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DEPARTMENT OF LABOR

Wage and Hour Division

29 CFR Parts 500, 780, 791, and 825

Docket No. WHD-2026-0067

RIN 1235-AA48

Joint Employer Status Under the Fair Labor Standards Act, Family and Medical Leave Act, and Migrant and Seasonal Agricultural Worker Protection Act

AGENCY: Wage and Hour Division, Department of Labor.

ACTION: Notice of proposed rulemaking.

SUMMARY: Since 2021, the Department has not provided any regulatory guidance addressing joint employer status under the Fair Labor Standards Act (FLSA or Act) for the benefit of workers, employers, or its enforcement personnel. In this rulemaking, the Department proposes to clarify how to determine joint employer status under the FLSA in Part 791 of Title 29, where its joint employer regulations were located prior to 2021. Additionally, the Department is also proposing to amend provisions in its regulations implementing the Family and Medical Leave Act (FMLA) and Migrant and Seasonal Agricultural Worker Protection Act (MSPA) to provide that joint employer status under those laws be determined using the Department's FLSA analysis, as the FMLA and MSPA both incorporate the FLSA's employment definitions. This rulemaking is intended to provide clarity and a measure of uniformity for employers and employees in an area of the law where components of legislative, executive, and judicial branches—at both the federal and state levels—have presented widely varying tests and standards. In addition, the proposed rule offers a nationwide standard for use by the Department's investigators and law enforcement personnel that would not only ensure the evenhanded application of the Act in matters that often cross state and circuit lines but also preserve core consistency with the wide variety of potentially relevant judicial frameworks. The

proposed rule intends to marshal the commonality between those approaches closest to the statute as construed by the courts and, in so doing, simplify the Department's enforcement of the law, reduce litigation, and provide a reliable and uniform analysis for workers and employers that ultimately applies and complements the core commonality between the various tests applied by the federal courts.

DATES: Interested persons are invited to submit written comments on this notice of proposed rulemaking (NPRM). Comments must be received on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

ADDRESSES: You may submit comments, identified by Regulatory Information Number (RIN) 1235-AA48, by either of the following methods:

- Electronic Comments: Submit comments through the Federal eRulemaking Portal at https://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, DC 20210.

Instructions: Response to this NPRM is voluntary. The Department requests that no business proprietary information, copyrighted information, or personally identifiable information be submitted in response to this NPRM. Commenters submitting file attachments on https://www.regulations.gov are advised that uploading text-recognized documents—*i.e.*, documents in a native file format or documents which have undergone optical character recognition (OCR)—enable staff at the Department to more easily search and retrieve specific content included in your comment for consideration.

Anyone who submits a comment (including duplicate comments) should understand and expect that the comment, including any personal information provided, will become a matter of public record and will be posted without change to https://www.regulations.gov. The Department posts comments gathered and submitted by a third-party organization as a group under a single

document ID number on https://www.regulations.gov. All comments must be received by 11:59 p.m. ET on [INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER], for consideration in this rulemaking; comments received after the comment period closes will not be considered.

The Department strongly recommends that commenters submit their comments electronically via https://www.regulations.gov to ensure timely receipt prior to the close of the comment period, as the Department continues to experience delays in the receipt of mail. Please 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 https://www.regulations.gov. In accordance with 5 U.S.C. 553(b)(4), a summary of this rule may also be found at https://www.regulations.gov.

FOR FURTHER INFORMATION CONTACT: Daniel Navarrete, Director, Division of Regulations, Legislation, and Interpretation, Wage and Hour Division (WHD), U.S. Department of Labor, Room S-3502, 200 Constitution Avenue, NW, Washington, DC 20210; telephone: (202) 693-0406 (this is not a toll-free number). Alternative formats are available upon request by calling 1-866-487-9243. If you are deaf, hard of hearing, or have a speech disability, please dial 7-1-1 to access telecommunications relay services.

Questions of interpretation or enforcement of the agency's existing regulations may be directed to the nearest WHD district office. Locate the nearest office by calling the 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 at https://www.dol.gov/agencies/whd/contact/local-offices for a nationwide listing of WHD district and area offices.

SUPPLEMENTARY INFORMATION:

I. Background

A. Relevant FLSA, FMLA, and MSPA Statutory Definitions

Enacted in 1938, the FLSA requires that, among other things, covered employers pay their nonexempt employees at least the federal minimum wage for every hour worked and overtime pay for every hour worked in excess of 40 in a workweek, and it mandates that employers keep certain records regarding their employees.[1] Section 3(d) of the Act defines "employer" to "include[] any person acting directly or indirectly in the interest of an employer in relation to an employee."[2] Section 3(e) generally defines "employee" to mean "any individual employed by an employer"[3] and identifies certain specific groups of workers who are not "employees" for purposes of the FLSA.[4] Finally, section 3(g) defines "employ" to "include[] to suffer or permit to work."[5]

Congress enacted MSPA in 1983 to protect migrant and seasonal agricultural workers by establishing employment standards related to wages, housing, transportation, disclosures, and recordkeeping.[6] Agricultural employers, agricultural associations, and farm labor contractors (as those terms are defined in MSPA) must comply with such applicable standards in their employment of migrant and seasonal agricultural workers.[7] MSPA also requires farm labor contractors to register with the Department and obtain a certificate of registration.[8] It is a violation of MSPA to threaten, discharge, or in any manner discriminate against any migrant or seasonal agricultural worker because such worker, with just cause, files a complaint, institutes a

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[1] *See* 29 U.S.C. 206(a) (minimum wage requirement), 207(a) (overtime pay requirement), 211(c) (recordkeeping requirements).
[2] 29 U.S.C. 203(d).
[3] 29 U.S.C. 203(e)(1).
[4] 29 U.S.C. 203(e)(2)–(5).
[5] 29 U.S.C. 203(g).
[6] *See generally* 29 U.S.C. 1801, *et seq*.
[7] *See* 29 U.S.C. 1821–1823, 1831–32, 1841–1844.
[8] *See* 29 U.S.C. 1811–1815.

proceeding, testifies or is about to testify in a proceeding, or exercises any right under MSPA.[9] MSPA adopts the FLSA's definition of "employ."[10]

The FMLA was enacted in 1993. It entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons while continuing group health insurance coverage under the same terms and conditions as if the employee had not taken leave.[11] Eligible employees who take such leave must generally be restored to the same or an equivalent position when they return to work after FMLA leave.[12] An employer cannot interfere with, restrain, or deny an employee's exercise of or attempt to exercise any rights under the FMLA.[13] The FMLA adopts the FLSA's definitions of "employ" and "employee."[14]

B. Early Guidance and Regulations Regarding FLSA Joint Employment

A year after the FLSA's enactment, WHD issued Interpretative Bulletin Number 13 in July 1939 addressing, among other topics, whether two or more companies could be jointly and severally liable for a single employee's hours worked under the FLSA.[15] The Bulletin acknowledged the possibility of what we consider today as joint employer liability and offered an illustration 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."[16] 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

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[9] 29 U.S.C. 1855(a).
[10] 29 U.S.C. 1802(5) ("The term 'employ' has the meaning given such term under [the FLSA, 29 U.S.C. 203(g)].").
[11] *See* 29 U.S.C. 2611–2614.
[12] *See* 29 U.S.C. 2614(a)(1)–(2).
[13] *See* 29 U.S.C. 2615.
[14] 29 U.S.C. 2611(3) (providing that the terms "employ" and "employee" for purposes of the FMLA have the same meanings given such terms in 29 U.S.C. 203(e) and (g)). The FMLA has its own definitions for whether an employee is "eligible" for FMLA leave and whether his or her employer is covered by the FMLA. *See* 29 U.S.C. 2611(2), (4).
[15] Interpretative Bulletin No. 13, "Hours Worked: Determination of Hours for Which Employees are Entitled to Compensation Under the Fair Labor Standards Act of 1938," ¶¶ 16–17. Shortly thereafter, WHD revised other portions of the Bulletin that are not pertinent here.
[16] *Id.* ¶ 16.

be considered as a joint employer for purposes of the [FLSA]."[17] This scenario—where an employee is jointly employed by two or more employers that simultaneously benefit from the employee's work—is understood today as vertical joint employment.[18]

The Bulletin provided a second example of an employee who works 40 hours for company A and 15 hours for company B during the same workweek.[19] The Bulletin explained that if the two companies 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 FLSA 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 FLSA for that workweek.[21] This scenario—where an employee works separate hours for two (or more) employers in the same workweek that are sufficiently associated with each other with respect to the employment of the employee—is understood today as horizontal joint employment.[22]

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 employees or if one company controls, is controlled by, or is under common control with, directly or indirectly, the other company."[23]

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[17] *Id*.
[18] *See, e.g.*, *Clifton v. Famous Bourbon Mgmt. Grp., Inc.*, 762 F. Supp. 3d 480, 496 n.125 (E.D. La. 2025).
[19] Interpretative Bulletin No. 13, ¶ 17.
[20] *Id*.
[21] *Id*.
[22] *See supra* fn.18.
[23] *See* 29 CFR Part 791 (1958 or 1959); *see also* Interpretative Bulletin No. 13, ¶ 17.

In 1958, the Department published regulations that expounded on the concepts WHD had set forth in Interpretative Bulletin No. 13.[24] Those regulations explained that there is joint employment under the FLSA and that the determination "depends upon all the facts in the particular case."[25] They further explained that two or more employers that "are acting entirely independently of each other and are completely disassociated" with respect to the employee's employment are not joint employers, but joint employment exists if "employment by one employer is not completely disassociated from employment by the other employer(s)."[26] The regulations also advised that, "[w]here the employee performs work which simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek," the employers are joint employers in situations such as: (1) where there is an arrangement between the employers to share the employee's services, as, for example, to interchange employees; (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.[27]

In 1961, the Department amended a footnote in those regulations to clarify that a joint employer is also jointly liable for overtime pay.[28] Nearly 60 years passed before the Department amended and updated Part 791 in 2020. However, in 1973, the Department did promulgate regulations addressing joint employment in certain agricultural contexts that remain in effect today.[29] Specifically, subsection 780.305(c) provides that "[a] farmer whose crops are harvested

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[24] Joint Employment Relationship under Fair Labor Standards Act of 1938, 23 FR 5905 (Aug. 5, 1958) (promulgating 29 CFR part 791).
[25] 29 CFR 791.2(a) (1958).
[26] *Id.*
[27] 29 CFR 791.2(b) (1958) (footnotes omitted).
[28] Miscellaneous Amendments, 26 FR 7730, 7732 (Aug. 18, 1961).
[29] Clarification of Employment Status of Certain Agricultural Labor, 38 FR 27520–21 (Oct. 4, 1973) (adding 29 CFR 780.305(c) and revising 29 CFR 780.331(d)).

by an independent contractor is considered to be a joint employer with the contractor who supplies the harvest hands if the farmer has the power to direct, control or supervise the work, or to determine the pay rates or method of payment for the harvest hands" (citing 29 CFR 780.331). Also, subsection 780.331(d) provides that "[w]hether or not a labor contractor or crew leader is found to be a bona fide independent contractor, his employees are considered jointly employed by him and the farmer who is using their labor if the farmer has the power to direct, control or supervise the work, or to determine the pay rates or method of payment" (citing cases).

C. Regulations Regarding FMLA and MSPA Joint Employment

1. FMLA Regulations

The Department's FMLA regulations define various terms under the FMLA, and consistent with the FMLA's adoption of the FLSA's statutory definitions, define "employ" to mean "to suffer or permit to work" and "employee" to generally mean "any individual employed by an employer."[30] The regulations also address joint employment under the FMLA, providing: "Where two or more businesses exercise some control over the work or working conditions of the employee, the businesses may be joint employers under FMLA. Joint employers may be separate and distinct entities with separate owners, managers, and facilities."[31] The regulations then restate, almost verbatim, the three joint employment situations identified in the 1958 regulation.[32] The FMLA regulations add: "A determination of whether or not a joint employment relationship exists is not determined by the application of any single criterion, but rather the entire relationship is to be viewed in its totality."[33]

Where joint employment exists, the FMLA regulations clarify that employees who are jointly employed by two or more employers must be counted by all joint employers in

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[30] 29 CFR 825.102.
[31] 29 CFR 825.106(a).
[32] *Id.*; *see supra* n. 24.
[33] 29 CFR 825.106(b)(1).

determining employer coverage and employee eligibility under the FMLA.[34] However, only an employee's "primary employer" is responsible for giving required notices to the employee, providing FMLA leave, and maintaining health benefits.[35] Job restoration is the primary responsibility of the primary employer, while a secondary employer would be responsible for accepting an employee returning from FMLA leave in certain circumstances.[36]

Finally, the regulations provide FMLA-specific guidance for the joint employer status of "temporary placement agencies" and "Professional Employer Organizations (PEOs)," which are described as companies that "[contract] with client employers to perform administrative functions such as payroll, benefits, regulatory paperwork, and updating employment policies."[37] When joint employment exists in a scenario involving a temporary placement agency, "the placement agency most commonly would be the primary employer."[38] By contrast, where a PEO is a joint employer, "the client employer most commonly would be the primary employer."[39]

The Department's initial FMLA regulations (promulgated in an Interim Final Rule in 1993 and which the Department applied through 1995) had set forth the following factors to determine joint employment: (1) the nature and degree of control of the workers; (2) the degree of supervision, direct or indirect, of the work; (3) the power to determine the pay rates or the methods of payment of the workers; (4) the right, directly or indirectly, to hire, fire, or modify the employment conditions of the workers; and (5) preparation of the payroll and payment of wages.[40]

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[34] *See* 29 CFR 29 CFR 825.106(d). Among other coverage requirements, "eligible employees" covered by the FMLA must work at a location where their employer has at least 50 employees within a 75-mile radius. *See* 29 U.S.C. 2611(2)(B)(ii).
[35] *See* 29 CFR 825.106(c).
[36] *See* 29 CFR 825.106(e); *see also* The Family and Medical Leave Act of 1993, Final Rule, 60 FR 2180–01, 2183 (Jan. 6, 1995).
[37] 29 CFR 825.106(b)(2).
[38] 29 CFR 825.106(c).
[39] *Id*.
[40] The Family and Medical Leave Act of 1993, Interim Final Rule, 58 FR 31794, 31814 (§ 825.106(a)(1)–(5)) (June 4, 1993).

2. MSPA Regulations

Shortly after Congress enacted MSPA in 1983, the Department issued regulations that included factors for determining joint employer status under the statute. They were: (A) the nature and degree of control of the workers; (B) the degree of supervision, direct or indirect, of the work; (C) the power to determine the pay rates or the methods of payment of the workers; (D) the right, directly or indirectly, to hire, fire, or modify the employment conditions of the workers; and (E) preparation of payroll and the payment of wages.[41] WHD and the Department applied these factors between 1983 and 1997.

In 1997, the Department's revised its MSPA regulations that address joint employment, adopting the framework it applies today.[42] These regulations provide that "the definition of the term *employ* includes the *joint employment* principles applicable under the Fair Labor Standards Act,"[43] and that "[*j*]*oint employment* under the Fair Labor Standards Act is joint employment under the MSPA."[44] Where joint employment exists, each joint employer must ensure that the employee receives all employment-related rights granted by MSPA, such as accurate and timely disclosure of the terms and conditions of employment, written payroll records, and payment of wages when due.[45] These employer responsibilities need only be carried out by one joint employer, but the failure to provide an employee with any of these required protections will result in joint liability for all joint employers.[46]

To determine if joint employment exists, the MSPA regulations borrow from the 1958 regulation, explaining: "A determination of whether the employment is to be considered joint

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[41] Migrant and Seasonal Agricultural Worker Protection Regulations, Final Rule, 48 FR 36736–01, 36745 (§ 500.20(h)(4)(ii)(A)–(E)) (Aug. 12, 1983).
[42] Migrant and Seasonal Agricultural Worker Protection Act, Final Rule, 62 FR 11734 (Mar. 12, 1997).
[43] 29 CFR 500.20(h)(5).
[44] 29 CFR 500.20(h)(5)(i).
[45] *See* WHD Fact Sheet #35: Joint Employment and Independent Contractors Under the Migrant and Seasonal Agricultural Worker Protection Act, https://www.dol.gov/agencies/whd/fact-sheets/35-mspa-joint-employment.
[46] *Id*.

employment depends upon all the facts in the particular case. If the facts establish that two or more persons are completely disassociated with respect to the employment of a particular employee, a joint employment situation does not exist."[47]

The MSPA regulations further explain that the common scenario for joint employment under MSPA involves whether agricultural workers employed by a farm labor contractor are jointly employed by the agricultural employer/association.[48] When making such a determination, "the ultimate question to be determined is the economic reality—whether the worker is so economically dependent upon the agricultural employer/association as to be considered its employee."[49] For use "in determining the ultimate question of economic dependency," the MSPA regulations provide seven non-exhaustive factors:

(A) Whether the agricultural employer/association has the power, either alone or through control of the farm labor contractor to direct, control, or supervise the worker(s) or the work performed (such control may be either direct or indirect, taking into account the nature of the work performed and a reasonable degree of contract performance oversight and coordination with third parties);

(B) Whether the agricultural employer/association has the power, either alone or in addition to another employer, directly or indirectly, to hire or fire, modify the employment conditions, or determine the pay rates or the methods of wage payment for the worker(s);

(C) The degree of permanency and duration of the relationship of the parties, in the context of the agricultural activity at issue;

(D) The extent to which the services rendered by the worker(s) are repetitive, rote tasks requiring skills which are acquired with relatively little training;

(E) Whether the activities performed by the worker(s) are an integral part of the overall business operation of the agricultural employer/association;

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[47] 29 CFR 500.20(h)(5).
[48] 29 CFR 500.20(h)(5)(i).
[49] 29 CFR 500.20(h)(5)(iii).

(F) Whether the work is performed on the agricultural employer/association's premises, rather than on premises owned or controlled by another business entity; and

(G) Whether the agricultural employer/association undertakes responsibilities in relation to the worker(s) which are commonly performed by employers, such as preparing and/or making payroll records, preparing and/or issuing pay checks, paying FICA taxes, providing workers' compensation insurance, providing field sanitation facilities, housing or transportation, or providing tools and equipment or materials required for the job (taking into account the amount of the investment).[50]

The MSPA regulations further provide that no one factor "will be dispositive of the ultimate question," and "[h]ow the factors are weighed depends upon all of the facts and circumstances."[51]

D. Federal Caselaw on Joint Employer Liability Under the FLSA

Federal courts generally identify two Supreme Court cases as relevant precedent for adjudicating FLSA joint employment disputes: *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947), and *Falk v. Brennan*, 414 U.S. 190 (1973).[52]

Rutherford Food examined whether a group of skilled meat boners working as a crew on the premises of a slaughterhouse were jointly employed by the slaughterhouse. Although the workers were recruited and paid by an "experienced boner" whose contract with the slaughterhouse stated that he had "complete control over the other boners" and that they "would be his employees," the Court nevertheless found that the workers were also employed by the

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[50] 29 CFR 500.20(h)(5)(iv).
[51] *Id*.
[52] WHD noted in its 2020 Joint Employer Rule that *Rutherford Food* "focus[ed] … on whether the workers were employees under the FLSA or independent contractors." 85 FR 2827; *see also Salinas v. Commercial Interiors, Inc*., 848 F.3d 125, 135 (4th Cir. 2017) (explaining that, "[a]lthough *Rutherford Food* recognized joint employment[,] … the case principally addressed whether the meat boners were employees or independent contractors"). A number of courts, however, cite to *Rutherford Food* as an FLSA joint employment case. *See Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 70 (2d Cir. 2003); *Torres-Lopez v. May*, 111 F.3d 633, 640 (9th Cir. 1997); *Layton v. DHL Exp. (USA), Inc*., 686 F.3d 1172, 1180 (11th Cir. 2012).

slaughterhouse, noting that "determination of [an employment] relationship does not depend on such isolated factors [as the existence of a contractual agreement or industry custom], but rather upon the circumstances of the whole activity."[53] The Court found relevant, among other facts, that "responsibility under the boning contracts without material changes passed from one boner to another," "[t]he premises and equipment of [the slaughterhouse] were used for the work," "[t]he group had no business organization that could or did shift as a unit from one slaughterhouse to another," and "[t]he managing official of the plant kept close touch on the operation."[54]

Falk addressed whether an apartment management company was an FLSA joint employer of the employees of the apartment buildings that it managed.[55] 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 29 U.S.C. 203(d), and could therefore be jointly liable with the building owners for any wages due to the employees under the FLSA.[56]

In 1983, the Ninth Circuit issued a seminal joint employer decision, *Bonnette v. California Health & Welfare Agency*.[57] In *Bonnette*, seniors and individuals with disabilities receiving state welfare assistance (the recipients) employed home care workers as part of a state welfare program.[58] Taking an approach similar to *Falk*, the court addressed whether California and several of its counties (the counties) were joint employers of the workers, and in making that determination, 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

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[53] *Rutherford Food*, 331 U.S. at 724–25, 730.
[54] *Id*. at 730.
[55] 414 U.S. at 195.
[56] *Id*.
[57] 704 F.2d 1465, *abrogated on other grounds* by *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). Although the Ninth Circuit later adopted a thirteen-factor test in *Torres-Lopez v. May*, 111 F.3d 633, 639–41 (9th Cir. 1997), many courts have treated *Bonnette* as the baseline for their own joint employer tests.
[58] 704 F.2d at 1467–68.

employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records."[59] 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 depends on the circumstances of the whole activity.[60] 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" too, jointly and severally liable with the recipients to the home care workers.[61]

E. WHD Subregulatory Guidance prior to 2020

WHD has addressed joint employment in several subregulatory documents—including opinion letters,[62] administrator interpretations,[63] as well as other guidance.

F. 2020 Joint Employer Rule

In January 2020, the Department published a final rule titled "Joint Employer Status Under the Fair Labor Standards Act," which took effect March 16, 2020 (2020 Rule).[64] The 2020 Rule explained that the 1958 version of Part 791 was "useful" when determining horizontal joint

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[59] *Id.* at 1469–70.
[60] *Id.* at 1470.
[61] *Id*.
[62] *See, e.g*., WHD Opinion Ltr. FLSA2005-15, 2005 WL 2086804 (Apr. 11, 2005) (addressing joint employment in a health care system comprised of hospitals, nursing homes, and parent holding company); WHD Opinion Ltr., 1999 WL 1788146 (Aug. 24, 1999) (advising that private duty nurses were jointly employed by a hospital and individual patients); WHD Opinion Ltr., 1998 WL 852621 (Jan. 27, 1998) (addressing the joint employment of grocery vendor employees stocking grocery shelves); WHD Opinion Ltr. FLSA-1089, 1989 WL 1632931 (Aug. 9, 1989) (advising that workers participating in an enclave program would be jointly employed by a participating business and a supervising workshop).
[63] *See* Administrator's Interpretation No. 2016-1, *available at* 2016 WL 284582 (Jan. 20, 2016) (asserting that the scope of joint employment under the FLSA is "as broad as possible") (withdrawn effective June 7, 2017); Administrator's Interpretation No. 2014-2, *available at* 2014 WL 2816951 (June 19, 2014) (addressing joint employment in home care) (withdrawn on March 10, 2020).
[64] Joint Employer Status Under the Fair Labor Standards Act, Final Rule, 85 FR 2820 (Jan. 16, 2020). The Department had published a notice of proposed rulemaking requesting comments on a proposed rule. Joint Employer Status Under the Fair Labor Standards Act, NPRM, 84 FR 14043 (Apr. 9, 2019). The final rule adopted "the analyses set forth in the NPRM largely as proposed." 85 FR 2820.

employment but "was not helpful and did not provide an adequate explanation" when determining vertical joint employment.[65] The 2020 Rule revised Part 791 so that: section 791.1 contained an introductory statement; section 791.2 contained the substance of the 2020 Rule's analyses for both vertical joint employment (which it referred to as "the first joint employer scenario") and horizontal joint employment (which it referred to as "the second joint employer scenario"); and section 791.3 contained a severability provision.[66] The 2020 Rule sought "to promote certainty for employers and employees, reduce litigation, promote greater uniformity among court decisions, and encourage innovation in the economy."[67]

1. 2020 Rule's Vertical Joint Employment Standard

For vertical joint employment, the 2020 Rule stated that "[t]he other person [that is benefitting from the employee's labor] 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," and then cited FLSA section 3(d)'s definition of "employer."[68] The 2020 Rule asserted that section 3(d) was the sole statutory provision for determining "joint employer status" under the FLSA—not sections 3(e) or 3(g).[69] The 2020 Rule further provided that the definitions of "employee" and "employ" in sections 3(e) and 3(g) "determine whether an individual worker is an employee under the [FLSA]."[70] Citing section 3(d)'s definition of "employer" as including "any person acting directly or indirectly in the interest of an employer in relation to an employee," the 2020 Rule stated that "only this language from section 3(d) contemplates the possibility of a person in addition to the employer who is also an employer and therefore jointly liable for the employee's hours worked."[71] The 2020 Rule concluded that this language from section 3(d), "by its plain

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[65] *Id.* at 2825.
[66] 29 CFR 791.1, 791.2, and 791.3 (2020).
[67] 85 FR 2820.
[68] 29 CFR 791.2(a)(1) (2020) (citing 29 U.S.C. 203(d)).
[69] *See generally* 85 FR 2825–28.
[70] *Id.* at 2827.
[71] *Id.* (citing 29 U.S.C. 203(d)); *see also id.* ("This language from section 3(d) makes sense only if there is an employer and employee with an existing employment relationship and the issue is whether another person is an employer.").

terms, contemplates an employment relationship between an employer and an employee, as well as another person who may be an employer too—which exactly fits the [vertical] joint employer scenario under the [FLSA]."[72] The 2020 Rule relied on the Supreme Court's decision in *Falk* and the Ninth Circuit's decision in *Bonnette* to "support focusing on section 3(d) as determining joint employer status."[73]

The 2020 Rule explained that "four factors are relevant to the determination" of whether the other employer is a joint employer in the vertical joint employment situation.[74] Those four factors were whether the other employer: (1) hires or fires the employee; (2) supervises and controls the employee's work schedule or conditions of employment to a substantial degree; (3) determines the employee's rate and method of payment; and (4) maintains the employee's employment records.[75] The 2020 Rule further explained that "these four factors—which weigh the economic reality of the potential joint employer's control, direct or indirect, over the employee—are not only the most relevant factors to the joint employer analysis, but also afford stakeholders greatly needed clarity and uniformity."[76]

The 2020 Rule's four-factor test "derived from" *Bonnette*,[77] with a few modifications. First, the 2020 Rule described the first factor as whether the other employer "[h]ires or fires the employee" instead of whether it had "the power" to hire and fire.[78] The 2020 Rule stated generally that the "potential joint employer must actually exercise … one or more of these indicia of control to be jointly liable under the [FLSA]," and that "[t]he potential joint employer's ability, power, or reserved right to act in relation to the employee may be relevant for determining joint employer status, but such ability, power, or right alone does not demonstrate

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[72] *Id.*
[73] *Id.*
[74] 29 CFR 791.2(a)(1) (2020).
[75] 29 CFR 791.2(a)(1)(i)–(iv) (2020).
[76] 85 FR 2830.
[77] *Id*.
[78] *Compare* 29 CFR 791.2(a)(1)(i) (2020) *with Bonnette*, 704 F.2d at 1469–70.

joint employer status without some actual exercise of control."[79] Second, the 2020 Rule modified the *Bonnette* factor requiring consideration of whether the potential joint employer supervises and controls work schedules or conditions of employment by adding the phrase "to a substantial degree." Although *Bonnette* did not include this phrase in its articulation of this factor, *Bonnette* did find that, on the facts before it, the potential joint employers "exercised considerable control" in that area.[80] Third, the 2020 Rule stated that "[s]atisfaction of the maintenance of employment records factor alone will not lead to a finding of joint employer status" (*Bonnette* did not address this).[81] Finally, the 2020 Rule stated that "[a]dditional factors may be relevant for determining joint employer status in this scenario, but only if they are indicia of whether the potential joint employer exercises significant control over the terms and conditions of the employee's work."[82] *Bonnette* indicated that "[t]he ultimate determination must be based 'upon the circumstances of the whole activity.'"[83]

The 2020 Rule also excluded consideration of the employee's economic dependence on the potential joint employer, explaining that "[e]conomic dependence is relevant when applying section 3(g) and determining whether a worker is an employee under the [FLSA]; however, determining whether a worker who is an employee under the [FLSA] has a joint employer for his or her work is a different analysis that is based on section 3(d)."[84] The 2020 Rule further explained that, "[b]ecause evaluating control of the employment relationship by the potential joint employer over the employee is the purpose of the Department's four-factor balancing test, it is sensible to limit the consideration of additional factors to those that indicate control."[85]

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[79] 29 CFR 791.2(a)(3)(i) (2020).
[80] *Compare* 29 CFR 791.2(a)(1)(ii) (2020) *with Bonnette*, 704 F.2d at 1469–70.
[81] *Compare* 29 CFR 791.2(a)(2) (2020) *with Bonnette*, 704 F.2d at 1469–70.
[82] 29 CFR 791.2(b) (2020).
[83] 704 F.2d at 1470 (quoting *Rutherford Food*, 331 U.S. at 730).
[84] 29 CFR 791.2(c) (2020) ("[T]o determine joint employer status, no factors should be used to assess economic dependence."); 85 FR 2821.
[85] 85 FR 2836.

Finally, the 2020 Rule provided that a person's business model (such as a franchise model), certain business practices (such as allowing an employer to operate a store on the person's premises or participating in an association health or retirement plan), certain business agreements (such as requiring an employer in a business contract to comply with specific legal obligations or to meet certain standards to protect the health or safety of its employees), and requiring quality control standards to ensure the consistent quality of the work product, brand, or business reputation do not make joint employer status more or less likely under the FLSA.[86]

2. 2020 Rule's Horizontal Joint Employment Standard

To determine horizontal joint employment, the 2020 Rule adopted the longstanding standard articulated in the prior version of section 791.2 promulgated in the 1958 regulation with "non-substantive revisions."[87] The 2020 Rule stated that, when considering horizontal joint employment, "if the employers are acting independently of each other and are disassociated with respect to the employment of the employee," they are not joint employers.[88] It further stated that, "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 [FLSA]."[89] It identified the same three general examples of horizontal joint employment provided in the 1958 version of section 791.2.[90]

3. 2020 Rule's Additional Provisions

The 2020 Rule adopted additional provisions applicable to both vertical and horizontal joint employment. Section 791.2(f) addressed the consequences of joint employment and provided that "[f]or 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

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[86] 29 CFR 791.2(d)(ii)–(v) (2020).
[87] 85 FR at 2823; *see also id.* at 2844–45.
[88] 29 CFR 791.2(e)(1)–(2) (2020).
[89] 29 CFR 791.2(e)(2) (2020).
[90] *Compare* 29 CFR 791.2(e)(2)(i)–(iii) (2020) *with* 29 CFR 791.2(b)(1)–(3) (1958).

compliance" with the Act.[91] Section 791.2(g) provided 11 "illustrative examples" of how the 2020 Rule applied to specific factual situations implicating vertical and horizontal joint employment.[92]

In the 2020 Rule, the Department did not amend its FMLA or MSPA joint employer regulations, explaining that "[t]his final rule provides the standards for determining joint employer status under the FLSA."[93] The Department added that it would "continue to use the standards in its MSPA joint employer regulation … to determine joint employer status under MSPA," and would "continue to use the standards in its FMLA joint employer regulations … to determine joint employer status under the FMLA."[94]

G. Legal Challenge to 2020 Rule and District Court Decision

In February 2020, 17 States and the District of Columbia (the States) filed a lawsuit in the United States District Court for the Southern District of New York against the Department asserting that the 2020 Rule violated the Administrative Procedure Act (APA).[95] The district court permitted the International Franchise Association, the Chamber of Commerce of the United States of America, the National Retail Federation, the Associated Builders and Contractors, and the American Hotel and Lodging Association (the Intervenors) to intervene as defendants in the case.[96] The parties filed cross-motions for summary judgment, which the district court decided on September 8, 2020.[97]

The district court vacated the 2020 Rule's "standard for vertical joint employer liability." The district court concluded that the 2020 Rule violated the APA because it found that the rule

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[91] 29 CFR 791.2(f) (2020).
[92] 29 CFR 791.2(g) (2020).
[93] 85 FR 2828 n.55.
[94] *Id*. (citing 29 CFR §§ 500.20(h)(5); 825.106).
[95] *New York v. Scalia*, No. 1:20-cv-01689 (S.D.N.Y. filed Feb. 26, 2020). The APA requires courts to hold unlawful and set aside agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A).
[96] *New York v. Scalia*, 2020 WL 3498755, at *5 (S.D.N.Y. June 29, 2020).
[97] *New York v. Scalia,* 490 F. Supp. 3d 748 (S.D.N.Y. 2020).

conflicted with the FLSA.[98] The district court identified three conflicts: the 2020 Rule's reliance on the FLSA's definition of "employer" in section 3(d) as the sole textual basis for joint employment; its adoption of a control-based test for determining vertical joint employment; and its prohibition against considering additional factors beyond control, such as economic dependence.[99] In addition, the district court held that the 2020 Rule was "arbitrary and capricious" for three reasons: the 2020 Rule did not adequately explain why it departed from the Department's prior interpretations; the 2020 Rule did not consider the conflict between it and the Department's MSPA joint employment regulations; and the 2020 Rule did not adequately consider its cost to workers.[100]

The district court concluded that the 2020 Rule's "novel interpretation for vertical joint employer liability" was unlawful under the APA and vacated all of § 791.2 except for § 791.2(e).[101] The court determined that, because the 2020 Rule's "non-substantive revisions to horizontal joint employer liability are severable," § 791.2(e) "remains in effect."[102]

In November 2020, the Department and the Intervenors appealed the district court's decision to the Second Circuit Court of Appeals.[103] The resolution of the appeal is discussed below.

H. Rescission of the 2020 Rule

On July 30, 2021, the Department published a final rule (Rescission Rule) rescinding the 2020 Rule.[104] In the Rescission Rule, the Department explained that the 2020 Rule's reliance on section 3(d) alone among the FLSA's provisions for its vertical joint employment analysis was

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[98] *Id.* at 774.
[99] *Id.* at 774–92.
[100] *Id.* at 792–95.
[101] *Id.* at 795.
[102] *Id.* at 795–96.
[103] *See New York v. Walsh*, No. 20-3806 (2d Cir. 2021) (appeal docketed on November 6, 2020).
[104] Rescission of Joint Employer Status Under the Fair Labor Standards Act Rule, Final Rule, 86 FR 40939 (July 30, 2021). On March 12, 2021, the Department had published a notice of proposed rulemaking proposing to rescind the 2020 Rule. *See* Rescission of Joint Employer Status Under the Fair Labor Standards Act Rule, NPRM, 86 FR 14038 (Mar. 12, 2021).

not supported by the FLSA's text or Congressional intent, particularly as the Department had never previously excluded FLSA sections 3(e) and (g) from the joint employment analysis and had instead applied an analysis that included the definitions of "employ" or "employee" when determining joint employment.[105] The Department further explained that the vertical joint employment analysis in the 2020 Rule, and particularly its reliance on section 3(d) alone as the statutory basis for joint employment, did not encompass all scenarios in which joint employment could arise because two employers may "suffer or permit" an employee to work and thus be joint employers under section 3(g) without one employer working "in the interest of an employer" under section 3(d)."[106] The Department also explained that, by focusing on the potential joint employer's actually-exercised control over the employee, the 2020 Rule's vertical joint employment analysis was contrary to the FLSA and longstanding case law.[107] The Department additionally stated that the 2020 Rule "did not sufficiently take into account prior WHD guidance," including its MSPA joint employment regulation.[108] Noting that "[t]he MSPA regulation provides that '[j]oint employment under the Fair Labor Standards Act is joint employment under the MSPA' and sets forth a multi-factor analysis for determining vertical joint employment that is different than the [2020] Rule's analysis," the Department determined that the 2020 Rule nonetheless "did not address or account for any differences between its new regulatory standard and MSPA's existing regulatory standard or any effects that it may have on joint employment under MSPA."[109]

For horizontal joint employment, the 2020 Rule had adopted the standard in the 1958 version of 29 CFR 791.2 with non-substantive revisions. The Rescission Rule explained that the 2020 Rule's "horizontal joint employment standard focused on the degree of the employers' association with respect to the employment of the employee, reflected the Department's

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[105] *See* 86 FR 40942–49.
[106] *Id.* at 40944–46.
[107] *Id.* at 40946–47.
[108] *Id.* at 40947–49.
[109] *Id.* at 40948 (quoting 29 CFR 500.20(h)(5)(i)) (internal footnotes omitted).

historical approach to the issue, and was consistent with the relevant case law." The Department considered retaining the 2020 Rule's horizontal joint employment analysis because of its consistency with prior guidance but rescinded the entire 2020 Rule because the 2020 Rule had "intertwined [its] horizontal joint employment provisions with [its] vertical joint employment provisions in 29 CFR 791.2." The Department reiterated that rescission was not intended to be a reconsideration of its longstanding horizontal joint employment analysis and that the "focus of a horizontal joint employment analysis will continue to be the degree of association between the potential joint employers, as it was in the [2020] Rule and the prior version of part 791."[110]

The Rescission Rule removed and reserved Part 791 in its entirety effective October 5, 2021.[111]

I. Resolution of the Appeal

The Department filed an opening brief with the Second Circuit in support of the 2020 Rule on January 15, 2021.[112] The Intervenors filed their opening brief on the same day.[113] On March 31, 2021, following the change in administration, the Department filed a motion seeking to hold the appeal in abeyance in light of the proposal that it had published to rescind the 2020 Rule.[114] The Second Circuit denied the motion.[115] The States filed their response brief on April 16, 2021.[116] The Intervenors filed their reply brief on May 7, 2021.[117] On May 28, 2021, the Department filed a reply brief.[118] In its reply brief, the Department explained that the rulemaking proposing to rescind the 2020 Rule may moot the States' challenge to that rule, making any resolution of the appeal unnecessary.[119] The Department took no position on the merits of the

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[110] *Id.* at 40954.
[111] *Id.* at 40957; *see also* 86 FR 52412–13 (noting the effective date of the 2020 Rule's rescission).
[112] *New York v. Walsh*, No. 20-3806 (2d Cir. 2021) (No. 58).
[113] *Id.* (No. 59).
[114] *Id.* (No. 90).
[115] *Id.* (No. 97).
[116] *Id.* (No. 101).
[117] *Id.* (No. 118).
[118] *Id.* (No. 121).
[119] *Id.* (No. 121, at p. 11).

2020 Rule in its reply brief. The Department argued that if the Second Circuit resolves the appeal, it should reverse the district court's decision on the grounds that the States had no standing to challenge the 2020 Rule.[120]

On October 6, 2021, following the effective date of the Rescission Rule, the Department filed a motion with the Second Circuit seeking to dismiss the appeal because the Department's rescission of the 2020 Rule had eliminated the States' dispute with the Department and had rendered the case moot.[121] On October 29, 2021, the Second Circuit granted the motion to dismiss the appeal and vacated the district court's order and judgment.[122]

J. Recent Opinion Letter

On September 30, 2025, WHD issued Opinion Letter FLSA2025-5, addressing whether a restaurant and members club for whom an employee worked separate hours are horizontal joint employers based on the facts presented.[123] The opinion letter reiterated that horizontal joint employment "typically occurs when employers are sufficiently associated with respect to the employment of the particular employee(s)," including where there is an arrangement between the employers to share an employee's services or interchange employees.[124] The letter concluded that the restaurant and members club are horizontal joint employers because they "are sufficiently associated with each other with respect to [the employee's] employment."[125]

II. Need for Rulemaking

The Department believes that regulations addressing joint employment is necessary to promote clarity and uniformity in the Department's nationwide enforcement of federal wage and hour law. The Department further believes that the proposed analysis in this NPRM represents the best construction of the FLSA—and by extension the FMLA and MSPA—with respect to

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[120] *Id.* (No. 121, at p. 2–7).
[121] *Id.* (No. 128, at p. 5).
[122] *Id.* (No. 145).
[123] *See* https://www.dol.gov/sites/dolgov/files/WHD/opinion-letters/FLSA/FLSA-2025-05.pdf.
[124] *Id.* at 2.
[125] *Id.* at 2–3.

determining joint employer status under those statutes, follows the decisions of the Supreme Court, and is broadly consistent with the commonality among varying approaches to joint employment in the federal circuit courts.

As noted above, for many decades, the Department maintained interpretive guidance on joint employer status under the Act in Part 791. Since rescinding those regulations in 2021, despite suggesting that the rescission did not abandon "longstanding horizontal joint employment analysis,"[126] the Department has provided no guidance on the topic, apart from WHD Opinion Letter FLSA2025-5. The absence of any direction has created uncertainty for businesses, workers, and courts, particularly for "vertical" scenarios where multiple entities are simultaneously benefiting from the same work performed by one or more workers.[127] In fact, the Department has not been applying a uniform standard to assess vertical joint employment under the FLSA. Instead, in each enforcement action, the Department attempts to apply a vertical joint employment standard consistent with the judicial precedent that may apply in that case, which—as described in this NPRM—varies between federal courts.[128] At a minimum, by clearly articulating the Department's position and approach, this rulemaking would bring greater uniformity and consistency to the Department's enforcement actions by adopting a transparent nationwide analysis, which could have benefits for all interested parties.

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[126] 86 FR 40954.

[127] Although the 2021 Rescission Rule advised that the Department would continue applying its "longstanding horizontal joint employment analysis," 86 FR 40954, the Rescission Rule did not specify how the Department would investigate FLSA cases involving possible vertical joint employment. WHD Opinion Letter FLSA2025-5 addressed a scenario that constituted horizontal joint employment.

[128] Of course, the workers and employers encompassed in a particular WHD investigation under the FLSA often do not fall neatly within the geographic territories of the federal circuit courts. As a result, the appropriate judicial framework (and thus the standard that the Department would apply) may not be clear either as a factual or legal matter.

Promulgating regulations on joint employment should improve the Department's ability to enforce the FLSA, especially in cases involving egregious child labor violations.[129] Here, the Department believes that it should make clear to employers and employees its position regarding FLSA joint employment and provide publicly available direction that its enforcement personnel could apply in those cases. Making its position clear regarding the degree to which sometimes sprawling supply chains may be deemed joint operations in published regulations could make the resolution of such cases more likely. At the very least, it would ensure that there is a common understanding regarding the Department's position among workers, employers, and its own enforcement personnel.

Relatedly, a cohesive standard drawn from and consistent with commonality between federal circuits would benefit the courts that hear and decide joint employment issues in private FLSA lawsuits. According to the Fourth Circuit, efforts by federal appellate courts to address FLSA joint employment "have spawned numerous multifactor balancing tests, none of which has achieved consensus support" among the circuits that have addressed the issue.[130] Still other circuits have yet to adopt a definitive analysis. In this context, guidance from the Department may be of help to courts as they develop and refine their approaches to the issue. In addition, there are a number of federal courts that have continued to cite to various iterations of Part 791 even though it has not existed since October 5, 2021,[131] indicating a willingness by courts to

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[129] *See* Rebecca Rainey, *Perdue, Tyson Face 'Unique' Probe in Child Labor Crackdown*, Bloomberg Law (Oct. 10, 2023) (suggesting that the absence of any "official regulatory test on the books governing the [Department]'s approach to joint employment" could be a "potential hurdle" in its investigation of child labor violations involving meatpacking companies and their subcontractors and staffing agencies).

[130] *Salinas*, 848 F.3d at 135; *see also Harris v. Med. Transp. Inc*., 300 F. Supp. 3d 234, 241–43 (D.D.C. 2018) (summarizing "a dizzying world of multi-factor tests" from different circuits).

[131] *See*, *e.g.*, *Guevara v. Lafise Corp*., 127 F.4th 824, 831 (11th Cir. 2025) (citing 29 CFR 791.2(a)); *Galvez v. Invest Cloud*, No. 23 Civ. 11301 (KPF), 2026 WL 165737, at *4 (S.D.N.Y. Jan. 21, 2026) (citing 29 CFR 791.2(a)); *Ortiz v. Consolidated Edison Co.*, No. 1:22-CV-08957, 2025 WL 2717309, at *25 (S.D.N.Y. Sept. 24, 2025) (citing 29 CFR 791.2(a)); *Ennals v. Spencer Gifts Distrib. Ctr.*, No. 3:23-CV-00615-GMG, 2025 WL 2808951, at *2 (W.D.N.C. Sept. 30, 2025) (citing 29 CFR 791.2(a)); *Baquiax v. Abasushi Fusion Cuisine Inc.*, No. 16-cv-

consider regulations from the Department. Regulations from the Department that are current and in effect would assist courts that look to the Department's position on FLSA joint employment. That the proposed regulation would not bind or control the courts—only Department investigators—is unremarkable. Courts have always been the final word on the meaning and application of the law. But, as noted above, regulations and guidance serve other purposes, including public direction from the Department to its investigators regarding how to apply a legal standard. The value of interpretative rules has not been lost on the Supreme Court, which has noted that they "constitute a body of experience and informed judgement to which courts and litigants may properly resort for guidance," particularly because such interpretations are "based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case."[132]

The Department further believes that rulemaking is needed to ensure that the standard for joint employment under FMLA and MSPA is consistent with the FLSA joint employer standard. As noted earlier, both the FMLA and MSPA explicitly incorporate the FLSA's definition of employment, including the "suffer or permit" standard codified at section 3(g) of the FLSA. Yet, WHD's existing regulations under the FMLA and MSPA articulate different joint employer standards that vary in their level of detail.[133] The Department believes that aligning the FMLA

2997, 2023 WL 2647450, at *5 (S.D.N.Y. Mar. 27, 2023) (citing 29 CFR 791.2(a)); *Ludlow v. Flowers Foods, Inc.*, No. 18-CV-1190, 2023 WL 2534618, at *3 (S.D. Cal. Mar. 15, 2023) (citing 29 CFR 791.2); *Smith v. Bigtop Bingo, Inc.*, No. 3:21-CV-3083, 2023 WL 2889300, at *6 (N.D. Fla. Mar. 10, 2023) (citing 29 CFR 791.2); *Monroe v. Hayward Unified Sch. Dist.*, No. 22-CV-04489, 2023 WL 2480738, at *2–3 (N.D. Cal. Mar. 12, 2023) (citing the version of 29 CFR 791.2 that was promulgated in 1958 and recognizing that it had been amended in 2020, and citing the version of 29 CFR 791.2 that was promulgated by the 2020 Rule and recognizing that it has not been in effect since October 5, 2021); *Lambert v. Jariwala & Co.*, No. 18-CV-17295, 2023 WL 1883354, at *9 (D.N.J. Feb. 10, 2023) (citing 29 CFR 791.2).

[132] *Skidmore v. Swift & Co*., 323 U.S. 134, 139–40 (1944); *see also Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 402 (2024) ("In an agency case in particular, the court will go about its task with the agency's 'body of experience and informed judgment,' among other information, at its disposal.") (quoting *Skidmore*, 323 U.S. at 140).

[133] *Compare* 29 CFR 825.106(a) (FMLA) *with* 29 CFR 500.20(h)(5) (MSPA). The Seventh Circuit has noted that the current FMLA regulation, which closely resembles the Department's

and MSPA regulations with the FLSA standard in a restored part 791 would reduce compliance burdens for employers, promote greater awareness among workers of their rights, and ensure uniformity in WHD's enforcement of its wage and hour laws.

Additionally, the Department believes that unified joint employment guidance could yield important practical benefits. Promulgating a regulatory standard may assist businesses in determining any joint employer responsibility when organizing their relationships and contracts and deciding whether to adopt—or avoid—certain business models and business practices.[134] Workers, in turn, may be better equipped to understand when multiple entities may share responsibility for their wages and working conditions. The Department also expects, as discussed in section VI.E., that clear regulatory guidance, if applied by courts, may reduce litigation costs and may prevent some lawsuits from being brought at all.

Finally, this rulemaking is consistent with principles of good government. By engaging in notice-and-comment rulemaking to restore interpretive guidance on FLSA joint employer status in part 791, rather than imposing a new standard in a memorandum or bulletin, the Department ensures that its ultimate approach to the topic will have benefited from the input of interested outside stakeholders. Soliciting input from the public in the development of significant interpretive guidance may enhance the persuasive power of such guidance,[135] and is also consistent with good governance recommendations from the Administrative Conference of the

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1958 FLSA regulation, "does not … provide much guidance in determining the parameters of what constitutes a joint-employment relationship." *Moldenhauer v. Tazewell-Pekin Consol. Commc'ns Ctr.*, 536 F.3d 640, 644 (7th Cir. 2008).

[134] *See* 85 FR 2853 (discussing comments during the Department's 2019-20 rulemaking which "agreed that the additional clarity would promote business relationships").

[135] *See Loper Bright*, 603 U.S. at 388 (advising that the "weight" of agency interpretive guidance depends in part "upon the thoroughness evident in its consideration") (quoting *Skidmore*, 323 U.S. at 140); *see also U.S. v. Mead Corp.*, 533 U.S. 218, 228 (2001) (noting that, among other factors, "courts have looked to the degree of the agency's care" and "formality" in determining the measure of deference to afford agencies' interpretations of their statutes).

United States and the Office of Management and Budget (OMB).[136] The Department looks forward to receiving feedback on this proposed rule and will consider any relevant "written data, views, or arguments" submitted by commenters during the notice-and-comment process. *See* 5 U.S.C. 553(c).

III. Discussion of Proposed Regulatory Provisions

For all the reasons discussed above, the Department proposes to issue regulations providing interpretive guidance to its enforcement personnel, and workers and employers in the regulated community, for determining joint employer status under the FLSA in Part 791, where it was located prior to 2021. The Department's proposed framework and analysis aligns with some aspects of the 2020 Rule, but includes several important modifications, as discussed in greater detail below.

The proposed regulatory text in part 791 includes:

- an introductory provision at § 791.100 explaining the purpose of part 791;
- a provision at § 791.105 describing general principles;
- a provision at § 791.110 describing two common scenarios of FLSA joint employment, i.e., vertical and horizontal joint employment, as well as the obligations of joint employers under the FLSA;
- a provision at § 791.115 providing the standard for determining vertical joint employment under the FLSA;
- a provision at § 791.120 providing the standard for determining horizontal joint employment under the FLSA;

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[136] *See* Admin. Conf. of the U.S., Recommendation 2019-1, *Agency Guidance Through Interpretive Rules*, at 7–8 (June 13, 2019) (advising agencies to consider offering an opportunity for public participation before or after the adoption or modification of an interpretive rule), https://www.acus.gov/sites/default/files/documents/Agency%20Guidance%20Through%20Interpretive%20Rules%20CLEAN%20FINAL%20POSTED.pdf; *see also* Final Bulletin for Agency Good Guidance Practices, OMB Bull. No. 07-02, at 9 (Jan. 18, 2007) (noting that "interpretive rules of general applicability or statements of general policy might be so consequential as to merit advance notice-and-comment"), https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/memoranda/2007/m07-07.pdf.

- a provision at § 791.125 addressing the relevance of certain business practices when determining joint employment under the FLSA; and
- a severability provision at § 791.130.

Additionally, the Department proposes to revise the regulations addressing joint employer status under MSPA and the FMLA to apply the analysis in part 791 when determining joint employer status under those statutes. Specifically, the Department proposes to revise 29 CFR 500.20(h)(5) in the MSPA regulations and 29 CFR 825.106(a) in the FMLA regulations to replace the analyses there with cross-references to Part 791, and to ensure that they are otherwise consistent with Part 791. Finally, the Department proposes to amend 29 CFR 780.305(c) and 29 CFR 780.331(d) so that those provisions, which address FLSA joint employment in certain agricultural settings, also cross-reference to the FLSA analysis in Part 791.

As noted above and for the reasons provided herein, the Department believes this proposed analysis represents the best construction of the FLSA—and by extension the FMLA and MSPA—with respect to determining joint employer status under those statutes, adheres to Supreme Court precedent, and is generally consistent with the commonality between the various tests applied by the federal courts of appeals.

A. Introductory Statement (Proposed § 791.100)

The Department proposes to readopt as § 791.100 (with minor, non-substantive revisions) the regulatory text from the 2020 Rule which provided an introductory statement at the beginning of the regulatory provisions.[137] The introductory statement would advise that: part 791 contains the Department's "general interpretations of the text governing joint employer status under the [FLSA]"; the WHD Administrator will use the interpretations "to guide the performance of his or her duties under the FLSA" and intends them "to be used by employers, employees, and courts to understand employers' obligations and employees' rights under the FLSA"; any prior inconsistent or conflicting "administrative rulings, interpretations, practices, or

[137] 29 CFR 791.1 (2020).

enforcement policies relating to joint employer status under the FLSA" are rescinded; and employers may rely on the interpretations to satisfy the good faith reliance defense in the Portal-to-Portal Act (29 U.S.C. 259), notwithstanding that after any such act or omission in the course of such reliance, any such interpretation is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

The Department believes that this introductory statement would provide clarity as to how WHD intends to use part 791 and how employers, businesses, workers, and courts should use part 791. The introductory statement would also address how part 791 relates to prior interpretations, providing further clarity to the public. And the introductory statement would explain how employers can rely on part 791 for purposes of the good faith reliance defense in the Portal-to-Portal Act.

The Department welcomes comments on all aspects of its proposed introductory statement.

B. General Principles (Proposed § 791.105)

In proposed § 791.105, the Department would introduce the basic concept of FLSA joint employment and explain some relevant general principles.

Proposed § 791.105(a) addresses, as a general matter, who or what constitutes an employer under the Act, explaining that an "employer or joint employer may be an individual, partnership, association, corporation, business trust, legal representative, public agency, or any organized group of persons, excluding any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such a labor organization." The broad conception of an employer is required by subsection 203(d) of the Act, which defines an "employer" under the FLSA as including "any person acting directly or indirectly in the interest of an employer in relation to an employee" (emphasis added) including a "public agency," but not including "any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization," as well as subsection 203(a),

which defines a "person" under the FLSA as "an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons." As the Department explained in the 2020 Rule, incorporating the FLSA's definition of "person" into the proposed regulatory text is appropriate to encompass the meaning of employer set forth in the statutory text. Indeed, just like an "employer" under the FLSA, "every kind of person contemplated by the [FLSA]" can be a joint employer under the FLSA assuming that the person otherwise satisfies the Department's joint employer standard.[138] Proposed § 791.105(a) is nearly identical to § 791.2(d)(1) of the 2020 Rule without the citation to 29 U.S.C. 203(a) and (d).

Proposed § 791.105(b) provides that "an employee may have multiple employers under the FLSA," recognizing the reality that many employees have more than one distinct employer. Yet this fact, by itself, does not implicate joint employment. Proposed § 791.105(b) confirms as much, explaining that, in "most cases, each employment will be distinct from the others, and each employer will be responsible on its own for complying with the FLSA with respect to the employee." Most employees with more than one employer work separate and distinct jobs for each. Indeed, in most cases an employee's work for one employer will have no impact on that employee's employment relationship with another employer, thus not raising joint employment implications. Proposed § 791.105(b) further explains that, in some circumstances, however, "two or more employers may employ the employee in a manner that makes them joint employers of the employee such that they are together responsible for complying with the FLSA with respect to the employee." Those circumstances—joint employment under the Act—are described later in the regulation.

Proposed § 791.105(c) explains that FLSA joint employment exists only among and between two or more employers that are separate entities—"[f]or there to be joint employment, each employer must exist as a separate entity." This is distinct from circumstances in which an employee is allegedly employed by two nominally separate entities, but in fact, the entities are

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[138] 85 FR 2839.

not separate and distinct, but rather one entity and employer. As a result, the employee is simply employed by a single employer responsible for FLSA compliance with respect to that employee. Proposed § 791.105(c) acknowledges these situations by providing that, in some cases, "it may be unnecessary to consider joint employment because the entities constituting the alleged employers are in fact a single entity and thus a single employer for purposes of FLSA compliance." The subsection continues with an example, noting that "if two entities are separately incorporated but effectively operate as a single entity, they may in fact be a single employer under the FLSA." It explains that "[n]either incorporating a separate entity nor manipulating corporate formalities may be used to divide a business' operation and avoid the FLSA's requirements," and that "[c]losely-related entities that are not in fact separate may be liable as a single employer under the FLSA without needing to consider joint employment."

When an employee is allegedly employed by multiple entities that may not truly be separate entities, evaluating whether the entities are one entity and thus a single employer under the FLSA should be considered before applying any joint employment analysis. *See* WHD Opinion Letter FLSA2025-5 (Sept. 30, 2005) (explaining that, as an alternative to considering joint employment, "[s]eparately incorporated entities may be considered a single employer … for purposes of compliance with the FLSA"). As noted above, joint employment exists only between two or more separate and distinct entities. Where multiple putative employers are actually or effectively a single entity, it is a single employer solely responsible for complying with the FLSA with respect to the work performed by the employee (including aggregating the employee's hours worked attributed to each entity to determine any overtime premium due under the FLSA), and a joint employment analysis is not appropriate.[139]

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[139] Proposed § 791.105(c) notes that "it may be unnecessary to consider joint employment" to the extent nominally separate "entities constituting the alleged employers are in fact a single entity and thus a single employer for purposes of FLSA compliance." Likewise, under a longstanding FMLA regulatory provision, "[s]eparate entities" may be "deemed to be parts of a single employer for purposes of FMLA if they meet the integrated employer test." *See* 29 CFR 825.104(c)(2) (detailing that test including its factors to consider). This proposal would not change 29 CFR 825.104(c)(2).

The Department welcomes comment on all aspects of proposed § 791.105.

C. Two Scenarios of FLSA Joint Employment (Proposed § 791.110)

Proposed § 791.110 addresses the related concepts of "vertical" and "horizontal" joint employment, using plain language to the extent possible, so these scenarios are generally understandable to a significant portion of small business owners and employees.[140] Proposed § 791.110 also addresses certain ramifications under the FLSA if two employers or entities are joint employers of one or more employees, notably explaining that they are jointly and severally liable for compliance with the FLSA with respect to employees jointly employed.

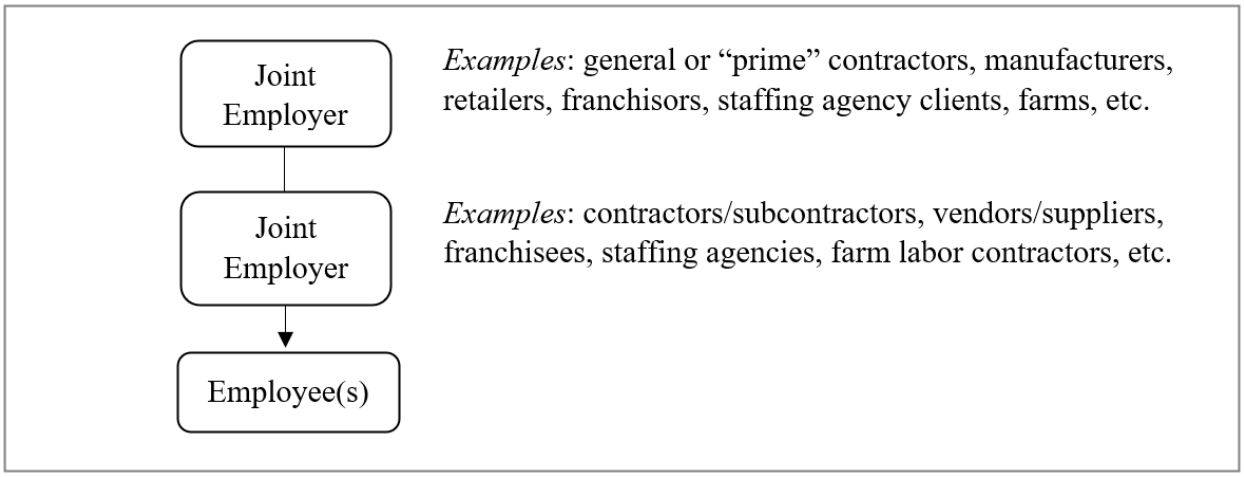
As described in proposed § 791.110(a), vertical joint employment generally describes an arrangement in which an employee "is jointly employed by two or more employers that simultaneously benefit from the employee's work." The subsection explains that, in a typical vertical joint employment situation, "the employee works one set of hours and there is no dispute that the employee has at least one employer for the work," and "the issue is whether another person that also benefits from the work is the employee's joint employer."[141] Continuing, the proposed provision adds that this "scenario is described as 'vertical' because it often centers around whether business partners which are higher or lower in a particular industry structure—such as contractors and subcontractors or staffing agencies and their clients—are joint employers of the employee."

Figure A: Vertical Joint Employment

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[140] The 2020 Rule did not use "vertical" and "horizontal," electing instead to use the labels "first joint employment scenario" (vertical) and "second joint employment scenario" (horizontal). 29 CFR 791.2(a) and (e) (2020). These phrases, albeit comprised of ostensibly simpler words, ultimately obfuscated and confounded relevant concepts. In the years since, courts, workers, businesses, and others have continued to use the "vertical" and "horizontal" terminology. Accordingly, the Department uses these more precise terms in this rulemaking.

[141] This is consistent with the 2020 Rule which described this scenario (labeling it the "first" scenario) as involving a worker who was unquestionably the employee of one employer and whose work for that employer simultaneously benefits another person, and the issue is whether that other person is also the employee's employer. 85 FR 2827.



Importantly, vertical joint employment can encompass work arrangements involving parties of varying sizes and resources, including agents or intermediaries who act on behalf of one or more employers. In the Department's experience in FLSA cases, vertical joint employment often involves a higher-tier entity, such as a staffing agency client or general contractor, that disputes whether it has an employment relationship with workers who are unquestionably employees of a lower-tier entity, such as a staffing agency or subcontractor, that has a business relationship with the higher-tier entity.[142] As the lower-tier entity is indisputably an employer in such circumstances, the vertical joint employment analysis focuses on the higher-tier entity's relationship with the employees of the lower-tier entity to determine whether the higher-tier entity has an employment relationship with said employees, that is, constitutes a joint employer of them. *See generally* Figure A above.

This makes sense in a vertical joint employment scenario because, in situations where employees perform work that simultaneously benefits two separate businesses, the only degree

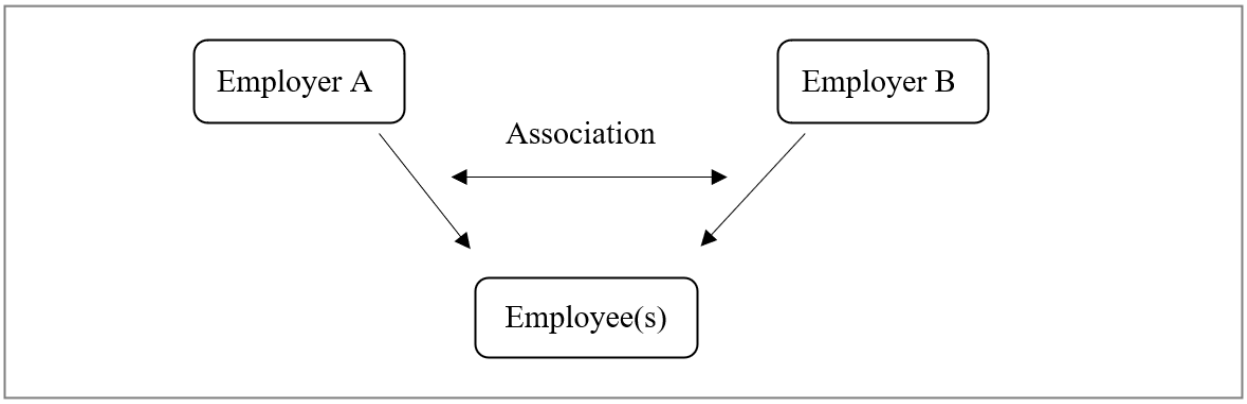
[142] Notwithstanding the Department's experience and the more ubiquitous situation above, sometimes the entity disputing its status as a vertical joint employer is the lower-tier entity—often a subcontractor, staffing agency, or similar business. *See, e.g.*, *Falk*, 414 U.S. at 192–95 (concluding that a company that "render[ed] management services for the owners of a number of apartment complexes" was a joint employer); *Hodgson v. Arnheim & Neely, Inc.*, 444 F.2d 609, 610–12 (3d Cir. 1971), *rev'd on other grounds*, 410 U.S. 512 (1973) (concluding that a similar real estate management company was a joint employer); *Baystate Alternative Staffing, Inc. v. Herman*, 163 F.3d 668, 674–76 (1st Cir. 1998) (affirming that a temporary staffing agency was a joint employer). However, more typically the entity at issue in a vertical joint employment case is the business client of a subcontractor or staffing agency.

of association between the business partners may be a contractual agreement between them whereby one provides services or labor or both to the other. In this vertical context, focusing on the association between the different businesses likely would not be probative, as such typical contractual business arrangements between companies do not themselves create joint employment liability under the FLSA. *Zheng*, 355 F.3d at 76 (explaining that the FLSA's employment definitions were "manifestly not intended to bring normal, strategically-oriented contracting schemes within the ambit of the [statute]"). However, when the putative joint employer's relationship with the employees is such that it functions as an employer of the employees, rather than a mere business partner of the other employer, the two entities are joint employers under the FLSA. *Id*.

As described in proposed § 791.110(b), horizontal joint employment generally involves situations in which an employee works separate hours for two or more joint employers in the same workweek, "and the employers are sufficiently associated with each other with respect to the employment of the employee such that they are joint employers." The proposed subsection explains that, in a typical horizontal joint employment situation, "it is undisputed that each employer employs the employee for some hours worked, and the issue is whether the employers are sufficiently associated with each other with respect to the employment of the employee."[143]

Figure B: Horizontal Joint Employment

[143] This is consistent with the 2020 Rule, in which the Department explained that focusing on the relationship between the two employers is the correct approach in this scenario given that the employee is indisputably employed by both employers and works separate jobs and hours for each employer. 85 FR 2845.



Consistent with caselaw, subsection 791.110(b) adds that, when there is horizontal joint employment, an employee's total hours worked across the workweek for each of the employers "must be aggregated for purposes of FLSA compliance, and each employer is jointly and severally liable for the employee's wages due under the FLSA, including any overtime premiums due based on the aggregated hours worked." *See, e.g., Chao v. A-One Med. Servs., Inc.*, 346 F.3d 908, 918 (9th Cir. 2003); *Wirtz v. Hebert*, 368 F.2d 139, 141 (5th Cir. 1966); *Mid-Continent Pipe Line Co. v. Hargrave*, 129 F.2d 655, 658–59 (10th Cir. 1942).

The analysis centers on the employers' relationship, which makes sense in the horizontal joint employment scenario because the employee is unquestionably employed by each employer, and the issue is the relationship between the employers. *See* Figure B above. In these circumstances, focusing on the employee would not be probative of the relationship between the employers; instead, analyzing the association (or lack thereof) between the employers is indicative of whether they jointly employ the employee and, therefore, must aggregate the hours worked by the employee for each of them.

Proposed § 791.110(c) provides that, for "each workweek that a person is a joint employer of an employee, that joint employer is jointly and severally liable with any other joint employers for compliance with all of the applicable provisions of the FLSA … for all of the hours worked by the employee in that workweek." As the Department explained in its proposal that became the 2020 Rule, joint and several liability means that "all joint employers are each fully responsible for the entire amount of minimum wages and overtime pay due to the employee

in the workweek," and that "[i]f one of them is unable or unwilling to pay, the others are responsible for the full amount owed."[144] Proposed § 791.110(c) further provides that, "[i]n discharging this joint obligation in a particular workweek, each joint employer may take credit toward minimum wage and overtime pay requirements for all payments made to the employee by any other joint employer." In the 2020 Rule, the Department explained that this "merely restates the longstanding principle of joint and several liability under the [FLSA]," and that it received no comments regarding this guidance.[145] Proposed § 791.110(c) would be the same as § 791.2(f) of the 2020 Rule with minor, non-substantive revisions.

The Department welcomes feedback on all aspects of proposed 791.110.

D. Determining Vertical Joint Employment (Proposed § 791.115)

Proposed § 791.115 provides the Department's standard for determining vertical joint employment. As explained below, the proposed standard generally resembles the standard previously provided on vertical joint employment from the 2020 Rule, though with several important changes.

1. Four Factors to Apply (Proposed § 791.115(a))

Vertical joint employment may occur where an employee is employed by an employer for work, and another person—or entity—simultaneously benefits from that work as, or in the manner of, an employer. Proposed § 791.115(a) provides four factors to determine whether the other person is the employee's joint employer in that vertical joint employment scenario. Those four factors are whether the other person or entity: (1) hires or fires the employee; (2) supervises and controls the employee's work schedule or conditions of employment to a substantial degree; (3) determines the employee's rate and method of payment; and (4) maintains the employee's employment records.

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[144] 84 FR 14045 n.11.
[145] 85 FR 2845.

In the typical vertical joint employment scenario, the worker is undoubtedly an employee under the FLSA, has an employer, and works one set of hours for that employer. The issue is whether another person or entity who also benefits from the employee's work also benefits from that work as, or in the manner of, an employer. If so, the other person or entity is the employee's employer too and, therefore, is jointly and severally liable to compensate the employee for all hours worked. The 2020 Rule illustrated vertical joint employment with examples, including "where the employer is a subcontractor or staffing agency, and the other person is a general contractor or staffing agency client."[146]

The four factors identified in proposed § 791.115(a) weigh the economic reality of the potential joint employer's control, direct or indirect, over the employee and would provide needed clarity and uniformity to the determination.[147] These factors capture the precise types of indicators that the Supreme Court found to be dispositive of joint employer status in *Falk*. There, the management company hired, supervised, and paid the employees at issue, who were clearly employees of the building owners.[148] Citing the "expansiveness" of the FLSA's definition of "employer" in section 3(d) as well as its definition of "employee" in section 3(e), the Court concluded that the management company's "substantial control of the terms and conditions of the work of these employees" made it a joint employer of the employees.[149] Substantial control is the standard set by the Court in *Falk*. The Court has not revisited its decision in *Falk*, nor has it revised the vertical joint employment standard it announced in that case, or otherwise addressed joint employment under the Act. The factors proposed by the Department align with the standard that the Supreme Court determined to be dispositive in *Falk*.

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[146] 85 FR 2828.
[147] *See id.* at 2830.
[148] 414 U.S. at 193 ("These employees work under the supervision of [the management company] and are paid from the rentals received at the apartment complexes where they are employed."), n.4 (noting that the management company was responsible for "hiring and supervising all employees required for the operation and maintenance of the buildings and grounds").
[149] *Id.* at 195.

Not only do the proposed factors epitomize the substantial control standard in *Falk*, they also derive from, and align with, *Bonnette*, the seminal appellate court decision addressing FLSA joint employment. Citing *Falk*, the Ninth Circuit in *Bonnette* explained that "[t]wo or more employers may jointly employ someone for purposes of the FLSA" and that "[a]ll joint employers are individually responsible for compliance with the FLSA."[150] The Ninth Circuit further explained that "[t]he ultimate determination must be based 'upon the circumstances of the whole activity.'"[151] The Ninth Circuit identified as determinative whether the potential 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.[152] It added that, "[i]n varying combinations, these factors have been considered by other courts for the same purpose."[153] The Ninth Circuit applied those four factors and concluded that the counties were joint employers because they "exercised considerable control over the nature and structure of the employment relationship" and "also had complete economic control over the relationship."[154]

In addition, the factors proposed by the Department also are consistent with its earliest interpretations of vertical joint employment. For example, in 1973 the Department published regulations addressing vertical joint employment under the FLSA in the context of farmers and labor contractors or crew leaders who supply harvest hands and other laborers to the farmers.[155] Assuming the labor contractor or crew leader is an independent contractor of the farmer and employs the laborers, those regulations provide that the farmer is a joint employer "if the farmer has the power to direct, control or supervise the work, or to determine the pay rates or method of payment" for the laborers.[156] And in both 1983 and 1993, when the Department published its

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[150] 704 F.2d at 1469 (citing 414 U.S. at 195).
[151] *Id.* at 1470 (citing *Rutherford Food*, 331 U.S. at 730).
[152] *Id.* at 1470.
[153] *Id.* (citing cases).
[154] *Id.* at 1470.
[155] 38 FR 27520–21 (Oct. 4, 1973) (adding 29 CFR 780.305(c) and revising 29 CFR 780.331(d)).
[156] *See* 29 CFR 780.305(c), 780.331(d).

first regulations providing factors for determining vertical joint employment under MSPA and the FMLA contemporaneous with each statute's enactment, the Department identified factors addressing control, supervision, determining pay rates and methods of payment, hiring and firing, and payroll records[157]—just like the factors that the Department is proposing in this NPRM.

Notably, the Department's proposed multi-factor balancing test is like the tests applied by many courts, which, like the Department's test, derive from *Bonnette*. For example, the First Circuit applied the *Bonnette* factors in *Baystate Alternative Staffing*,[158] and the Fifth Circuit applied the *Bonnette* factors in *Gray v. Powers*.[159] Similarly, the Third Circuit has explained that "a determination of joint employment 'must be based on a consideration of the total employment situation and the economic realities of the work relationship,'"[160] and that "significant control" is the standard for determining joint employment.[161] Relying on *Bonnette*, the Third Circuit articulated four factors that "are not materially different" from the *Bonnette* factors.[162]

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[157] 48 FR 36745 (§ 500.20(h)(4)(ii)(A)–(E)) (MSPA); 58 FR 31814 (§ 825.106(a)(1)–(5)) (FMLA).

[158] 163 F.3d at 675.

[159] 673 F.3d 352, 355–57 (5th Cir. 2012). Although *Gray* involved whether an individual owner of the employer corporation 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." *Id.* at 355 (emphasis added) (quotation marks and citation omitted). As the 2020 Rule noted (85 FR 2831 n.57), two older Fifth Circuit decisions applied a different test to determine whether an entity was a joint employer under the FLSA, 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, 669–70 (5th Cir. 1968). Similar to *Bonnette*, those older decisions considered how much control the potential joint employer exerts over the employee and whether it has the power to fire, hire, or modify the employment conditions of the employee.

[160] *In re Enterprise Rent-A-Car Wage & Hour Emp't Practices Litig.*, 683 F.3d 462, 469 (3d Cir. 2012) (quoting *Bonnette*, 704 F.2d at 1470); *see also Burrell v. Staff*, 60 F.4th 25, 43–48 (3d Cir. 2023); *Talarico v. Pub. Partnerships, LLC*, 837 F. App'x 81, 84–86 (3d Cir. 2020); *Fischer v. Fed. Express Corp.*, 509 F. Supp. 3d 275, 290 (E.D. Pa. 2020), *aff'd* 42 F.4th 366 (3d Cir. 2022); *Thompson v. Real Estate Mortg. Network*, 748 F.3d 142, 149 (3d Cir. 2014).

[161] *Enterprise Rent-A-Car*, 683 F.3d at 468 ("Ultimate control is not necessarily required to find an employer-employee relationship under the FLSA, and even indirect control may be sufficient. In other words, the alleged employer must exercise significant control.") (internal quotation marks omitted).

[162] *Id.* at 468–470.

Although the Sixth, Seventh, and Eighth Circuits have not issued definitive FLSA joint employment decisions, they have issued decisions suggesting that *Bonnette* is the basis for determining joint employment. The Sixth Circuit applied the *Bonnette* factors to determine whether the plaintiff, whose employer was a governmental entity that was immune from the suit, was also employed by another entity.[163] The Sixth Circuit added that the other entity was not the plaintiff's joint employer under the 2020 Rule, which "focuses on the same factors."[164] Some district courts within the Sixth Circuit have cited that decision to apply the *Bonnette* factors in joint employment cases.[165] The Seventh Circuit, in an FMLA decision in which it relied heavily on FLSA principles, indicated that joint employment depends on the amount of control exercised over the employee and that the *Bonnette* factors are relevant, although not exclusive, when assessing control.[166] District courts within the Seventh Circuit generally apply the *Bonnette* factors in FLSA joint employment cases.[167] The Eighth Circuit has suggested that joint employment under the FLSA is determined by analyzing economic realities factors such as the

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[163] *See Rhea v. W. Tennessee Violent Crime & Drug Task Force*, 825 F. App'x 272, 275–77 (6th Cir. 2020) (concluding that the other entity was not the plaintiff's employer because it "did not have control over the key 'economic' aspects of [his] employment").

[164] *Id.* at 277 n.4.

[165] *See Hamm v. Acadia Healthcare Co.*, No. 3:21-CV-00550, 2022 WL 3129033, at *5 (M.D. Tenn. Aug. 4, 2022) (citing *Rhea*, 825 F. App'x at 275–77); *Gowey v. True Grip & Lighting, Inc.*, 520 F. Supp. 3d 1013, 1022–24 (E.D. Tenn. 2021) (same); *see also Smith v. Guidant Glob. Inc.*, No. 19-CV-12318, 2019 WL 6728359, at *3 (E.D. Mich. Dec. 11, 2019) (applying the *Bonnette* factors). Some other district courts within the Sixth Circuit have applied variations of the *Bonnette* factors. *See Holmer v. Alcove Ventures, LLC*, No. 1:23-CV-747, 2024 WL 4350906, at *10 (N.D. Ohio Sept. 30, 2024) (applying a three-factor test considering (1) authority to hire, fire and discipline; (2) control over employees' pay and insurance; and (3) supervision); *Carson v. Ever-Seal, Inc.*, No. 3:22-CV-00205, 2024 WL 2060130, at *5 (M.D. Tenn. May 7, 2024) (applying *Bonnette*-like factors plus additional factors including whether the employee is an integral part of the putative employer's operation).

[166] *Moldenhauer*, 536 F.3d at 643–45. In a decision the prior year though, the Seventh Circuit affirmed a finding of joint employment in an FLSA/MSPA case, finding that the facts of the case squarely fit those in *Rutherford Food* and ruling that *Rutherford Food* "requires judgment in the workers' favor under the FLSA." *Reyes v. Remington Hybrid Seed Co.*, 495 F.3d 403, 408–09 (7th Cir. 2007) ("Everything the Court said about boning [in *Rutherford Food*] is true about detasseling and rogueing at Remington.").

[167] *See*, *e.g.*, *Egan v. A.W. Cos.*, No. 23 C 1148, 2024 WL 4382083, at *5 (N.D. Ill. Oct. 3, 2024) (citing *Moldenhauer*); *Patzfahl v. FSM ZA, LLC*, No. 20-C-1202, 2021 WL 4912883, at *2–3 (E.D. Wis. Oct. 21, 2021) (same); *Piazza v. New Albertsons, LP*, No. 20-CV-03187, 2021 WL 365771, at *3 (N.D. Ill. Feb. 3, 2021) (same).

potential joint employer's "right to control the nature and quality of the work," its "right to hire or fire," and "the source of compensation for the work."[168] District courts within the Eighth Circuit generally apply the *Bonnette* factors.[169]

The Department recognizes that some circuits apply a wider range of factors, but the *Bonnette* factors nonetheless provide the foundation for a number of those analyses. For example, the Ninth Circuit applies the *Bonnette* factors it adopted plus eight additional factors.[170] The Second Circuit first applies the *Bonnette* factors to determine if the potential joint employer has "formal control" over the workers such that it is a joint employer; if not, the Second Circuit then looks at six additional factors based on *Rutherford Food* to determine if the potential joint employer has "functional control" over the workers such that it is a joint employer.[171] The Eleventh Circuit applies an eight-factor analysis, the first five of which are similar to the *Bonnette* factors.[172] Finally, the Fourth Circuit has rejected the *Bonnette* factors in favor of a novel test.[173]

Thus, although there is variance in the analyses applied by federal courts, the *Bonnette* factors are by far the closest thing to a common denominator applied by courts when determining

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[168] *Ash v. Anderson Merchandisers, LLC*, 799 F.3d 957, 961 (8th Cir. 2015).
[169] *See*, *e.g.*, *Winesburg v. Stephanie Morris Nissan, LLC*, No. 2:22-CV-04157-MDH, 2023 WL 3901483, at *2 (W.D. Mo. June 8, 2023); *Padilla v. Caliper Bldg. Sys., LLC*, No. 20-CV-00658, 2020 WL 5629837, at *3 (D. Minn. Sept. 21, 2020); *Hampton v. Maxwell Trailers & Pick-Up Accessories, Inc.*, No. 2:18CV110 HEA, 2019 WL 3766639, at *4 (E.D. Mo. Aug. 9, 2019).
[170] *Torres-Lopez*, 111 F.3d at 639–40; *see also Moreau v. Air France*, 356 F.3d 942, 950–52 (9th Cir. 2004) (FMLA case).
[171] *See Barfield v. New York City Health & Hosps. Corp.*, 537 F.3d 132 (2d Cir. 2008); *Zheng v. Liberty Apparel Co.*, 355 F.3d 61 (2d Cir. 2003).
[172] *See Layton*, 686 F.3d at 1175–77; *see also Aimable v. Long & Scott Farms*, 20 F.3d 434, 443–44 (11th Cir. 1994).
[173] *Salinas*, 848 F.3d at 137 (stating that *Bonnette*'s "reliance on common-law agency principles does not square with Congress's intent that the FLSA's definition of 'employee' encompass a broader swath of workers than would constitute employees at common law"); *see also Hall v. DIRECTV, LLC*, 846 F.3d 757, 769 (4th Cir. 2017) ("[*Bonnette*'s] reliance on common-law agency principles ignores Congress's intent to ensure that the FLSA protects workers whose employment arrangements do not conform to the bounds of common-law agency relationships."). The D.C. Circuit recently relied heavily on the Fourth Circuit's decision in *Salinas* to develop a joint employment analysis in a case arising under the D.C. Wage Payment and Collection Law, which defines employment to be coextensive with the FLSA's definitions. *See Mills v. Anadolu Agency NA, Inc.*, 105 F.4th 388, 399 (D.C. Cir. 2024).

FLSA vertical joint employment. By synthesizing this caselaw, identifying common factors, and proposing a clear and straightforward analysis that incorporates the Supreme Court's decision in *Falk* and the core commonality drawn from that decision in the federal courts of appeals, the Department aims to address this variance and encourage greater consistency and uniformity for stakeholders. And although the Department's proposed four factors are not exhaustive,[174] the Department believes that an analysis with fewer factors is preferable to, for example, the two-step-and-10-total-factor, 12-factor, and 8-factor analyses applied by the Second, Ninth, and Eleventh Circuits, respectively. These analyses were developed and designed by and for courts, framed to be applied by learned judges to resolve complicated questions of law in the context of federal litigation. It is difficult for the Department to expect that even the most diligent and conscientious workers and employers, especially small businesses, would accurately and reliably apply these analyses and tests in real time.[175] For this reason, the Department proposes a framework that distills the central questions, critical factors, and relevant determinations from these tests into a structure that reliably produces the outcomes of the judicial tests, but that workers, and employers, and the Department's investigators may readily and reasonably apply. To this end, the Department believes that the greater the number of factors in a multi-factor test, the more complex and difficult the analysis, and the greater the likelihood of errant or inconsistent results in similar cases. By using factors that generally—but by no means exclusively—focus on the potential joint employer's control over the common terms and conditions of employment,[176] the Department believes that its proposed test will assist

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[174] *See* section III.D.5., *infra*.

[175] A worker or employer would have to identify the governing appellate decision—including subsequent decisions—of the relevant federal court of appeals. Once the proper cases have been identified, the worker or employer would have to properly understand and apply each factor often to nascent and developing business arrangements—without the benefit of months of years of subsequent discovery. Even assuming 8 or 12 factors were properly applied, the worker or employer must weigh them against each other to reach the correct legal conclusion.

[176] The First Circuit observed that two of the four *Bonnette* factors—examining whether the potential joint employer determines the employee's rate or method of pay or maintains the

stakeholders, guide its investigators, and help courts in determining FLSA joint employer status with greater ease and consistency. The Department suggests that the results will include greater certainty both to employers and workers as to who is and is not a joint employer under the FLSA before (or, indeed, without) any litigation.

As noted above, the Department's proposed four factors are, in fact, the *Bonnette* factors with some modifications. The Department's first factor asks whether the potential joint employer hires or fires employees, whereas the first *Bonnette* factor is whether the potential joint employer has the "power" to hire and fire the employee. This modification is consistent with courts' focus in practice on whether a potential joint employer actually has hired or fired workers,[177] as well as their general focus on "economic reality" when assessing employment relationships under the FLSA.[178] However, as explained below in the discussion of proposed § 791.115(c), the potential joint employer's reserved control nevertheless may be considered with respect to any of the factors (although the potential joint employer's actual exercise of control is more relevant), so the potential joint employer's "power" to hire and fire may be considered even though the Department's proposed first factor does not contain the word "power."

The Department's second factor questions whether the potential joint employer supervises and controls the employee's work schedule or conditions of employment to a

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employee's employment records—"address … the economic aspects of the working relationship." *Baystate*, 163 F.3d at 676. In this respect, the four-factor *Bonnette* test is consistent with the Supreme Court's focus on "economic reality" in cases construing the FLSA's employment definitions. *See Orozco*, 757 F.3d at 448 (describing the Fifth Circuit's four-factor test derived from *Bonnette* as "the economic reality test"); *Enterprise Rent-a-Car*, 683 F.3d at 469 (advising that the Third Circuit's four-factor test considers "the economic realities of the work relationship") (quoting *Bonnette*, 704 F.2d at 1470–7l).

[177] *Compare, e.g., Baystate*, 163 F.3d at 675 (concluding that a staffing agency was a joint employer in part because it was "solely responsible for hiring the temporary workers") *with Aimable*, 20 F.3d at 442 (concluding that a farm did not jointly employ migrant farmworkers in part because the farm "never mandated that a particular individual be hired or fired") *and Orozco*, 757 F.3d at 449 (concluding that a franchisor was not a joint employer in part because the record "[did] not prove that [he] hired or fired employees").

[178] *See Tony and Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 301 (1985) ("The test of employment under the [FLSA] is one of 'economic reality[.]'") (quoting *Goldberg v. Whitaker House Coop., Inc*., 366 U.S. 28, 33 (1961)).

substantial degree, whereas the second *Bonnette* factors does not contain "to a substantial degree." Because the facts underlying such supervision and control in a typical case do not generally yield binary outcomes (*i.e.*, total supervision/control or a complete lack of supervision/control), the "to a substantial degree" language simply reflects that there is some degree of such supervision/control in the middle (*i.e.*, that is more than occasional and is in fact substantial) that tips this factor from not indicating joint employment to indicating joint employment. This language is consistent with the Supreme Court's holding in *Falk* that "substantial control of the terms and conditions of the work" of the employees was the touchstone for joint employer status.[179]

Proposed § 791.115(a) also provides guidance on applying the factors: "No single factor is dispositive in determining joint employer status under the FLSA, as the determination will depend on all of the facts in a particular case." This proposed provision would be similar to guidance provided in the 2020 Rule[180] and consistent with *Bonnette*, which explained that determining joint employment "does not depend on 'isolated factors but rather upon the circumstances of the whole activity.'"[181]

The Department welcomes comments on all aspects of its proposed four factors.

Finally, the 2020 Rule, in explaining the vertical joint employment analysis that it adopted, stated that FLSA section 3(d)'s definition of employer "is the statutory basis for determining joint employer status under the FLSA."[182] The 2020 Rule further stated that FLSA section 3(e)'s definition of "employee" and section 3(g)'s definition of "employ" "determine whether an individual worker is an employee under the [FLSA]" and do not provide a basis for

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[179] 414 U.S. at 195; *see also Enterprise Rent-A-Car*, 683 F.3d at 468 (explaining that a joint employer "must exercise 'significant control'" (citation omitted)).
[180] 29 CFR 791.2(a)(3)(i) (2020) ("No single factor is dispositive in determining joint employer status under the Act. Whether a person is a joint employer under the [FLSA] will depend on how all the facts in a particular case relate to these factors … ")); *see also* 85 FR 2833 (explaining that "all four factors need not necessarily be satisfied in order for an entity to be deemed a joint employer" and that, "consistent with case law, the four factors represent a balancing test").
[181] 704 F.2d at 1469 (quoting *Rutherford Food*, 331 U.S. at 730).
[182] 85 FR 2827–28.

determining joint employment.[183] Accordingly, the 2020 Rule's regulatory text cited 29 U.S.C. 203(d) and provided that, in the vertical joint employer scenario, "[t]he 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."[184]

But here the Department is not proposing that regulatory text from the 2020 Rule or that section 3(d) is the exclusive statutory basis for determining joint employment under the FLSA to the exclusion of sections 3(e) and 3(g). Section 3(d)'s definition of "employer" as including "any person acting directly or indirectly in the interest of an employer in relation to an employee" is of course relevant when considering joint employment under the FLSA. The Department recognizes, however, that section 3(e)'s definition of "employee" and section 3(g)'s definition of "employ" as including "to suffer or permit to work" are relevant too.

In the 2020 Rule, the Department explained that, "[a]s the Supreme Court has ruled, the [FLSA's] definition of 'employ' was a rejection of the common law standard for determining who is an employee under the FLSA in favor of a broader scope of coverage."[185] Having considered the issue further, the Department notes that courts have found section 3(g) to also address joint employment. For example, the Eleventh Circuit has stated that "[t]he 'suffer or permit to work' standard derives from state child-labor laws designed to reach businesses that used middlemen to illegally hire and supervise children."[186] In *Rutherford Food*, the Supreme Court held that the meat boners employed by several intermediaries were, based on the facts of that case, employees of the slaughter-house that benefitted from their work.[187] In so doing, the Court cited sections 3(d), 3(e), and 3(g) as having "some bearing,"[188] and added that the

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[183] *Id*.
[184] 29 CFR 791.2(a)(1) (2020) (emphasis added).
[185] 85 FR 2827 (citing *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992); *Walling v. Portland Terminal Co.*, 330 U.S. 148, 150–51 (1947)).
[186] *Antenor v. D & S Farms*, 88 F.3d 925, 929 n. 5 (11th Cir. 1996) (citing *Rutherford Food*, 331 U.S. at 728 n.7; *People ex rel. Price* v. *Sheffield Farms-Slawson-Decker Co.,* 225 N.Y. 25, 29–31 (1918)).
[187] 331 U.S. at 729–30.
[188] *Id.* at 728 & n.6.

"definition of 'employ' is broad" and "evidently derives from the child labor statutes."[189] Similarly, the Court in *Darden* described section 3(e) as "evidently deriv[ing] from the child labor statutes" and noted that the FLSA "defines the verb 'employ' expansively."[190] Characterizing these cases, the district court in *Scalia* stated that "they [a]ll agreed that the 'middlemen' who directly employed children were their employers" and that "[t]he only question was whether businesses that 'used' middlemen were also (joint) employers."[191]

For all these reasons, the Department recognizes that the FLSA's employment definitions must be viewed together; none should be excluded when considering potential joint employment. The Department welcomes comments on this proposed approach.

2. Meaning of "Employment Records" (Proposed § 791.115(b))

Proposed § 791.115(b) is substantively similar to an analogous provision in the 2020 Rule.[192] The proposal defines "employment records"—a term used in the fourth proposed factor—to mean records, such as payroll records, that reflect, relate to, or otherwise record information pertaining to the hiring or firing, supervision and control of the work schedules or conditions of employment, or determining the rate and method of payment of the employee. The proposal provides that records maintained by the potential joint employer related to the employer's compliance with the contractual agreements identified in § 791.125 do not make joint employer status more or less likely under the FLSA and are not considered employment records. For example, if a company has a contractual agreement with a business partner requiring certain quality control standards and the company documents the efforts by the partner's employees to fulfill those standards, those records would not be indicative of whether the company is a joint employer of the partner's employees.

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[189] *Id.* at 728 & n.7 (citing the Department's brief in that case).
[190] *Darden*, 503 U.S. at 326 (citing *Rutherford Food*, 331 U.S. at 728).
[191] 490 F. Supp. 3d at 779.
[192] 29 CFR 791.2(a)(2) (2020).

The proposal further provides that the potential joint employer's satisfaction of the maintenance of employment records factor alone will not demonstrate joint employment. The Department believed, and continues to be believe, that the maintenance of employment records factor may be probative of joint employment and rejected requests to delete the factor from the analysis when promulgating the 2020 Rule.[193] The Department did note, however, that "courts have not found joint employer status when maintenance of employment records is the only evidence to support such a finding."[194] The Department thus clarified that, although the maintenance of employment records is a relevant factor, satisfaction of the fourth factor alone cannot lead to a finding of joint employer status.[195] The Department is not aware of any reason or legal basis to support changing that approach. Where an employer maintains the employee's employment records, but no other factors indicate that the employer is a joint employer, the employment records factor alone will not result in joint employment.

The Department welcomes comments on all aspects of its proposed maintenance of employment records factor.

3. Relevance of Reserved Control (Proposed § 791.115(c))

Proposed § 791.115(c) states that the potential joint employer's ability, power, or reserved right to act in relation to the employee is relevant for determining joint employer status, but the potential joint employer's actual exercise of control is more relevant than such ability, power, or right. It further states, as an example, that a potential joint employer's contractual authority to supervise, discipline, or fire employees is less relevant if in practice the potential joint employer never exercises such authority. The subsection also clarifies that, although contractual authority is generally relevant, a potential joint employer's ability, power, or reserved right to act in connection with any of the contractual provisions or business practices identified in § 791.125 is not relevant. This clarification is necessary to ensure that this proposal's general

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[193] 85 FR 2832.
[194] *Id.* (citing cases).
[195] *Id*.

consideration of contractual authority does not override the position explained in § 791.125 that authority with respect to certain contractual provisions is not relevant to determining joint employer status under the FLSA.

The Department recognizes that the potential joint employer's ability, power, or reserved right to act in relation to the employee is relevant for determining joint employer status. Consistent with the "ultimate determination [being] based 'upon the circumstances of the whole activity,'"[196] actual practices and contractual rights must both be considered. Courts view the power to control the employee or the work as an aspect of the joint employment determination.[197]

The 2020 Rule similarly recognized the relevance of the potential employer's reserved right to control, but stated that the "potential joint employer must actually exercise—directly or indirectly—one or more of the[] indicia of control" to be a joint employer under the FLSA.[198] The 2020 Rule further stated that "[t]he potential joint employer's ability, power, or reserved right to act in relation to the employee may be relevant for determining joint employer status, but such ability, power, or right alone does not demonstrate joint employer status without some actual exercise of control."[199] The 2020 Rule added that "[s]tandard contractual language reserving a right to act, for example, is alone insufficient for demonstrating joint employer status."[200]

However, the Department is not again proposing that regulatory text, nor does it maintain that actual exercise of control is necessary to find joint employment under the FLSA. Having further considered the matter, the Department believes that the more nuanced position it is

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[196] *Bonnette*, 704 F.2d at 1470 (quoting *Rutherford Food*, 331 U.S. at 730).
[197] *See*, *e.g.*, *Bonnette*, 704 F.2d at 1470 (considering whether the potential joint employer has "the *power* to hire and fire" employees) (emphasis added); *Enterprise Rent-A-Car*, 683 F.3d at 468 (considering authority to control employee and their work); *Baystate*, 163 F.3d at 675–76 (citing a potential joint employer's power to decline to send a worker back to a job site as relevant to the joint employment determination).
[198] 29 CFR 791.2(a)(3)(i) (2020) (citing 29 U.S.C. 203(d)).
[199] 29 CFR 791.2(a)(3)(i) (2020).
[200] *Id*.

proposing here—not requiring actual exercise of control for there to be joint employment, but recognizing that exercised control is more relevant than reserved control which is rarely or never exercised—is more consistent with the FLSA and longstanding caselaw, which focuses both on the "degree" of control[201] and on "the 'economic *reality*' of the situation."[202] For example, in *Bonnette*, the court focused on the actual exercise of control where there was a factual dispute over reserved right of control, stating that "[r]egardless of whether the [counties] are viewed as having the power to hire and fire … [they] *exercised* considerable control over the nature and structure of the employment relationship." 704 F.2d at 1470 (emphasis added). Similarly, in *Salinas v. Commercial Interiors*, the Fourth Circuit determined that a general contractor was a vertical joint employer in part because, in addition to its other control, it "could—*and did*" impose requirements on how the workers performed the work. 848 F.3d at 146 (emphasis added); *cf. Bartels v. Birmingham*, 332 U.S. 126, 128–32 (1947) (applying an "economic reality" test under the original Social Security Act and declining to find that a dance hall jointly employed a group of musicians (along with their band leader), despite an unexercised contract clause that gave the dance hall "complete control" over the musicians).

Moreover, the Department's position in the 2020 Rule that actual exercise of control is necessary to find joint employment under the FLSA stemmed in large part from its position that section 3(d)'s definition of "employer" was the sole statutory basis for joint employment.[203] In this proposal, however, the Department agrees (as explained above) that section 3(g)'s definition

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[201] *Layton*, 686 F.3d at 1178–79; *Torres-Lopez*, 111 F.3d at 642–43; *see also Zheng*, 355 F.3d at 72 (examining the "degree" of supervision).

[202] *Moreau*, 343 F.3d at 1188 (emphasis added); *see also Mitchell v. John R. Cowley & Bro., Inc.*, 292 F.2d 105, 112 (5th Cir. 1961) (emphasizing "the actual circumstances of employment" in determining whether joint employment exists).

[203] *See* 29 CFR 791.2(a)(3)(i) (2020) (citing 29 U.S.C. 203(d)); *see also* 84 FR 14044 ("Requiring the actual exercise of power ensures 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.'") (quoting 29 U.S.C. 203(d)). In addition, the Seventh Circuit has advised in an FMLA case that, for joint employment to exist, "each alleged employer must exercise control over the working conditions of the employee, although the ultimate determination will vary depending on the specific facts of each case." *Moldenhauer*, 536 F.3d at 644 (citing *Remington Hybrid Seed*, 495 F.3d at 408).

of "employ" is also relevant to determining joint employment, and considering both actual control and reserved right to control is consistent with defining "employ" as including "to suffer or permit to work."[204] Section 3(g) indicates that joint employment may exist where the potential joint employer has substantial power to direct an employee's work, even if it does not actively direct the work.[205]

Taking into consideration this caselaw and all the FLSA's employment definitions, the Department believes that proposed § 791.115(c) will provide greater clarity on the respective roles that actual practice and contractual provisions play in determining the economic reality of potential joint employment.

The Department welcomes comments on all aspects of proposed § 791.115(c).

4. Indirect Control (Proposed § 791.115(d))

Proposed § 791.115(d) recognizes that indirect control may be considered when applying the four factors identified in proposed § 791.115(a). The former provides that indirect control is exercised by the potential joint employer through mandatory directions to another employer that controls the employee but adds that the other employer's voluntary decision to grant the potential joint employer's request, recommendation, or suggestion does not constitute indirect control that can demonstrate joint employer status. In addition, proposed § 791.115(d) also clarifies that acts which incidentally impact the employee also do not indicate joint employer status. The 2020 Rule contained the same provision.[206]

A potential joint employer may exercise indirect control by directing an intermediary employer to hire or fire an employee, set an employee's schedule, or determine an employee's

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[204] 29 U.S.C. 203(g).

[205] *See Sec'y of Lab., U.S. Dep't of Lab. v. Lauritzen*, 835 F.2d 1529, 1543 (7th Cir. 1987) (Easterbrook, J., concurring) (explaining that the "suffer or permit" phrasing potentially "sweeps in" any work "done for the employer's benefit or with the employer's acquiescence"). The Eleventh Circuit has noted that courts have found employment relationships "under a multitude of circumstances where the alleged employer exercised little or no [actual] control or supervision over the putative employees." *Antenor*, 88 F.3d at 933 n.10.

[206] 29 CFR 791.2(a)(3)(ii) (2020).

pay, or otherwise effectuating these actions through the intermediary employer. Thus, indirect control is control that flows from the potential joint employer through the intermediary employer to the employee. If the potential joint employer directs the intermediary employer's exercise of control over the employee, indirect control of the employee exists. But agreeing to a mere request or recommendation, alone, is not enough for indirect control, although it can be indicative in rare circumstances.

The Third Circuit articulated this distinction in *Enterprise Rent-A-Car*, holding that such recommendations are not relevant to joint employer status. In that case, the parent company lacked the necessary direct control or authority over a subsidiary's assistant managers for joint employer status.[207] The plaintiffs sought to demonstrate joint employer status on the basis of indirect control by arguing that the parent company "functionally held many of these [authority] roles by way of the guidelines and manuals it promulgated to its subsidiaries."[208] But the Third Circuit found "no evidence that [the parent company's] actions at any time amounted to mandatory directions rather than mere recommendations."[209] Therefore, "[i]nasmuch as the adoption of [the parent company's] suggested policies and practices was entirely discretionary on the part of the subsidiaries, [the parent company] had no more authority over the conditions of the assistant managers' employment than would a third-party consultant who made suggestions for improvements to the subsidiaries' business practices."[210]

The Department continues to believe, as it did when promulgating the 2020 Rule,[211] that the Third Circuit's description of indirect control is correct and sensible. If a parent company lacks authority to require a subsidiary to adopt certain employment practices, it cannot indirectly require the subsidiary's employees to adopt such practices. In sum, a potential joint employer exercises indirect control over an intermediary employer's employee by issuing "mandatory

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[207] 683 F.3d at 471.
[208] *Id*.
[209] *Id.* at 470.
[210] *Id*.
[211] 85 FR 2834–35.

directions" to the intermediary employer. On the other hand, a potential joint employer's request, recommendation, or suggestion for an employment action, even if granted, is rarely evidence of indirect control because the intermediary employer has discretion to grant or refuse the request. In rare circumstances, such as when an intermediary employer repeatedly follows without question a potential joint employer's requests regarding employees, it may be inferred that the intermediary employer lacks discretion to refuse those requests, and therefore, indirect control exists. Proposed § 791.115(d) captures this distinction, and the illustrative examples in proposed § 791.115(g)(2) and (3) provide additional guidance.

Additionally, proposed § 791.115(d) clarifies that acts which incidentally impact the employees of another employer do not indicate joint employer status. General decisions by a business may impact other businesses with whom that business contracts or partners (and their employees), and the Department in the 2020 Rule sought to clarify that incidental impacts on their employees from these decisions do not indicate that the business is a joint employer.[212] For instance, a shipping facility that cuts back on its staffing needs during a slow period may incidentally impact the work schedules of its staffing agency's employees, but that general business decision would fall short of control over the employees' work schedules that would indicate joint employer status.[213] Similarly, the Eleventh Circuit in *Layton* found that certain business decisions made by a shipping and logistics company which incidentally impacted the workdays of drivers employed by a third party contractor, such as establishing the time that packages were available for pick-up each morning or relaying "erratic pick-up orders" that required drivers to work longer hours, were insufficient to indicate joint employment. 686 F.3d at 1178. While acknowledging that such business decisions "may have incidentally impacted Drivers' working conditions," the court concluded that such decisions did not establish joint employment where the company "did not involve itself with the specifics of how those goals

[212] *Id.* at 2835–36.
[213] *Id.* at 2835 n.72.

would be reached" or otherwise "exert control as an employer would have." *Id*. The Department believes that proposed § 791.115(d) would bring helpful clarity to businesses as they make decisions that could potentially affect their business partners.

The Department welcomes comments on all aspects of proposed § 791.115(d).

5. Consideration of Additional Factors (Proposed § 791.115(e))

Proposed § 791.115(e) explains that additional factors beyond the four factors identified in proposed § 791.115(a) may be relevant for determining vertical joint employment. Proposed § 791.115(e) provides that, for example, additional indicia of whether the potential joint employer exercises significant control over the terms and conditions of the employee's work in addition to the four factors may be relevant. Proposed § 791.115(e) further provides that indicia of whether the employee is economically dependent on the potential joint employer for work may also be relevant. Proposed § 791.115(e) provides two examples of additional factors that may be considered. First, if the employee has a continuous or repeated relationship with the potential joint employer in that the potential joint employer continuously or repeatedly benefits from the employee's work whether or not the other employers involved change, that may indicate joint employment. Second, if the employee works at a location or facility that is owned or controlled by the potential joint employer that benefits from the employee's work, that may indicate joint employment. Of course, if there is no continued or repeated relationship and the employee does not work at a location or facility that is owned or controlled by the potential joint employer, those facts would indicate no joint employment if they are considered. Proposed § 791.115(e) cautions, however, that any additional factors are generally less relevant than the four factors identified in proposed § 791.115(a), which typically carry greater weight in the analysis than any additional factors. Proposed § 791.115(e) adds that if the four factors identified in proposed § 791.115(a) unanimously indicate joint employment or no joint employment, there is a substantial likelihood that the indicated outcome is correct, and additional factors are highly unlikely, either individually or collectively, to outweigh the combined probative value of those

four factors. This provides application clarity to workers, employers, and the Department's investigators alike—either demonstrating joint employer status or its absence—that is very likely to broadly align with the wide variety of tests, standards, and analyses applied by the federal circuit courts.

It is well-settled that factors in multi-factor tests for determining FLSA joint employment are not exhaustive and that additional factors may be considered where material and appropriate.[214] The 2020 Rule allowed for the consideration of additional factors, "but only if they are indicia of whether the potential joint employer exercises significant control over the terms and conditions of the employee's work."[215] The Department is not proposing to adopt this provision from the 2020 Rule. Although limiting the consideration of additional factors to those that relate to control is supported by the Third Circuit,[216] the Department, having considered the issue further for purposes of this proposal, recognizes that courts, including *Bonnette*, generally do not place such limits on the consideration of additional factors.[217] The Department further recognizes that the district court in *Scalia* ruled that the 2020 Rule's provision regarding the consideration of additional factors, in its view, "unlawfully limits the factors the Department will

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[214] *See*, *e.g.*, 85 FR 2836 ("Courts that apply multi-factor balancing tests leave open the possibility of considering other factors.") (citing cases); *Bonnette*, 704 F.2d at 1470 ("The ultimate determination must be based 'upon the circumstances of the whole activity.'") (quoting *Rutherford Food*, 331 U.S. at 730); *Zheng*, 355 F.3d at 71–72 (explaining that a joint employment "determination is to be based on 'the circumstances of the whole activity,'" and informing the district court that, on remand, it is "free to consider any other factors it deems relevant to its assessment of the economic realities") (quoting *Rutherford Food*, 331 U.S. at 730); *Torres-Lopez*, 111 F.3d at 639 ("A court should consider all those factors which are relevant to the particular situation in evaluating the economic reality of an alleged joint employment relationship under the FLSA.") (brackets and internal quotation marks omitted) (citing *Bonnette*, 704 F.2d at 1470).

[215] 29 CFR 791.2(b) (2020). The 2020 Rule stated that, "[b]ecause evaluating control of the employment relationship by the potential joint employer over the employee is the purpose of the Department's four-factor balancing test, it is sensible to limit the consideration of additional factors to those that indicate control." 85 FR 2836.

[216] *Enterprise Rent-A-Car*, 683 F.3d at 469–470 (stating that its enumerated "factors *do not constitute an exhaustive list* of all potentially relevant facts" and that "other indicia of 'significant control'" beyond the enumerated factors may be relevant to determining joint employer status under the FLSA) (emphasis in original).

[217] *See supra* fn. 214.

consider in the joint employer inquiry."[218] Accordingly, this proposal does not limit the consideration of additional factors beyond the four factors identified in § 791.115(a) to those that relate to control, but recognizes that such factors are likely to be relevant where the four factors point to different conclusions.

Moreover, the Department is not proposing to exclude from the analysis any factors solely because they may assess or relate to economic dependence on an employer for work. The 2020 Rule excluded consideration of factors relating to the employee's economic dependence on the potential joint employer.[219] The Department's exclusion of economic dependence factors from the analysis in the 2020 Rule was predicated on its effort to bring analytical clarity by distinguishing between the analysis for determining a worker's status as an employee or not under the FLSA and the analysis for determining whether a worker who has already been determined to be an employee of an employer has a joint employer. The 2020 Rule advised that the analysis to determine a worker's status as an employee or not is based on sections 3(e) and 3(g) and assesses economic dependence, and that the analysis for determining joint employment is based on section 3(d) and does not assess economic dependence.[220] However, as explained above, the Department in this proposal recognizes that these FLSA definitions should be viewed together and that none of them should be excluded when considering joint employment. Moreover, the Department, having considered the issue further, recognizes that some courts consider economic dependence on an employer for work when determining joint employment under the FLSA,[221] and the Department notes that the district court in *Scalia* ruled that the 2020

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[218] 490 F. Supp. 3d at 790.
[219] 29 CFR 791.2(c) (2020) ("[T]o determine joint employer status, no factors should be used to assess economic dependence.").
[220] 85 FR 2838; *see also id.* at 2821 (explaining that "[e]conomic dependence is relevant when applying section 3(g) and determining whether a worker is an employee under the [FLSA]," but "determining whether a worker who is an employee under the [FLSA] has a joint employer for his or her work is a different analysis that is based on section 3(d)").
[221] *See Layton*, 686 F.3d at 1177–78 (citing *Antenor*, 88 F.3d at 932–33); *Baystate*, 163 F.3d at 675. *But see Salinas*, 848 F.3d at 138 (criticizing courts that rely on an economic

Rule's provision excluding consideration of economic dependence, in its view, "contradict[ed] caselaw and the Department's [prior] views."[222]

Thus, factors assessing economic dependence on a putative joint employer for work may be considered as additional factors where material and appropriate. However, the Department proposes to clarify that economic dependence on work is not the "ultimate question" or "ultimate test" of the joint employer analysis, as stated by the Department's current MSPA regulation and some courts.[223] Economic dependence on the employer for work is the ultimate inquiry when determining whether a particular worker is an employee or an independent contractor,[224] but it has less relevance in determining whether multiple businesses jointly employ the same economically dependent workers.[225] As the Second Circuit explained, economic dependence factors, particularly "the workers' investment in the business, and the degree of skill and independent initiative" are "used primarily to distinguish independent contractors from employees," and "they do not bear directly on whether workers who are already employed by a primary employer are also employed by a second employer. Instead, they help courts determine if particular workers are independent of *all* employers."[226]

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realities/economic dependence approach to determine joint employment because that approach "reflects a failure to distinguish the joint employment inquiry from the separate, employee-independent contractor inquiry," and adding that *Rutherford Food* does not support "the use of economic dependence to guide the entire joint employment analysis").

[222] 490 F. Supp. 3d at 790–91.

[223] *See* 29 CFR 500.20(h)(5)(iii); *Torres-Lopez*, 111 F.3d at 648; *see also Antenor*, 88 F.3d at 932–33 (asserting that economic dependence is the "ultimate notion" and "dominant factor" in FLSA joint employer cases).

[224] *See* Employee or Independent Contractor Status Under the Fair Labor Standards Act, Family and Medical Leave Act, and Migrant and Seasonal Agricultural Worker Protection Act, 91 FR 9932, 9973 (proposed § 795.105(b)) (Feb. 27, 2026). Notably, when the Eleventh Circuit identified economic dependence as the "ultimate notion" and "dominant factor" in FLSA joint employment cases in *Antenor*, 88 F.3d at 932–33, the court quoted directly from *Usery v. Pilgrim Equipment Co., Inc.*, 527 F.2d 1308, 1311 (5th Cir. 1975), a case addressing whether a worker was an employee or independent contractor and that did not involving joint employment.

[225] *See Salinas*, 848 F.3d at 137–39 (criticizing courts which "incorrectly frame the joint employment inquiry as a question of an employee's 'economic dependence' on a putative joint employer").

[226] *Zheng*, 355 F.3d at 67.

For example, particular workers may perform unskilled work with little or no personal investment and little or no opportunity for profit or loss; such facts might establish that the workers are economically dependent employees, but they are of no value in determining whether such workers are jointly employed by a particular entity. While there are some factors germane to economic dependence which are "not limited to the employee/independent contractor distinction,"[227] factors which are so limited should not be considered in the joint employer analysis, as explained *infra* in section III.D.6. of this NPRM.

More fundamentally, as the Seventh Circuit (Easterbrook, J.) observed in *Remington Hybrid Seed*, economic dependence is "scarcely … helpful" in assessing joint employer disputes on its own, as some degree of economic dependency on the clients or business partners of an employer is "true of all labor."[228] For example, any employee of a subcontractor or franchisee could be characterized as economically dependent in some sense on the general contractor or franchisor affiliated with his or her subcontractor/franchisee employer, but neither courts nor the Department have applied the FLSA to extend joint employer status to all general contractors and franchisors. *See Zheng*, 355 F.3d at 76 (explaining that judicial precedent interpreting joint employer status under the FLSA is "manifestly not intended to bring normal, strategically-oriented contracting schemes within the ambit of the [FLSA]"); *see also infra* section III.F.1. Although the Department is not proposing categorically to reject the relevance of economic dependence on the potential joint employer for work as it did in the 2020 Rule, additional factors indicative of economic dependence are less relevant than the four factors identified in proposed § 791.115(a), often may not be material to the analysis or question, and need not be considered in every case.

The Department posits that providing in the proposed regulatory text two examples of additional factors that may be considered—whether the employee has a continuous or repeated

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[227] *Aimable*, 20 F.3d at 444.
[228] 495 F.3d at 407.

relationship with the potential joint employer and whether the employee works at a location or facility that is owned or controlled by the potential joint employer—would both be useful guidance and enjoys broad support across several circuit courts.[229] As with the four factors proposed for consideration in every case, these additional factors can operate in either direction, *i.e.*, indicating the presence or absence of a vertical joint employment relationship, depending on the facts. *Compare Salinas*, 848 F.3d at 147 (finding joint employment in part because workers for the subcontractor at issue "worked almost exclusively on Commercial jobsites"), *with Moreau*, 356 F.3d at 948 (finding no joint employment in part because the subcontractor at issue "did not service Air France exclusively, and its employees would rotate from plane to plane and carrier to carrier so as to fill up an entire workday").[230]

Finally, as explained above, while additional factors may be considered where material and appropriate under the circumstances, in the Department's experience, additional factors often will not be either material to the question of joint employment or need to be considered. This is because the four factors identified in § 791.115(a) frequently clearly indicate a particular outcome, any relevant additional facts may and will be considered under one or more of those four factors, or both. Therefore, it is important to note that, unlike some tests that, in practice, allow for a determination to be made based on strong showing of a few of many factors, the four factors identified in § 791.115(a) must be considered in every case, and consideration of

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[229] For example, the Second Circuit considers, among other factors, whether the employee uses the potential joint employer's premises and equipment for the work and whether the employee works exclusively or predominantly for the potential joint employer. *See Barfield*, 537 F.3d at 143 (citing *Zheng*, 355 F.3d at 72). The Eleventh Circuit considers whether the potential joint employer owns "the facilities where the work occurred." *Layton*, 686 F.3d at 1176–77. *See also Rutherford Food*, 331 U.S. at 730 (noting that the employees worked continuously for the slaughterhouse (they did not "shift as a unit from one slaughter-house to another) and used the slaughterhouse's "premises and equipment" for the work); *but see Layton*, 686 F.3d at 1176 (rejecting consideration of the "permanency and exclusivity of employment").

[230] The Department notes that the 2020 Rule included a provision advising that a potential joint employer's "allowing [an] employer to operate a business on its premises (including 'store within a store' arrangements)" did not make joint employer status more or less likely under the FLSA. 29 CFR 791.2(d)(5) (2020). As discussed below in section III.F., the Department is not proposing to readopt that provision in this NPRM.

additional factors will depend on the circumstances of the case. *See Enterprise Rent-A-Car*, 683 F.3d at 469 (advising that the four *Bonnette* factors "reflect the facts that will generally be most relevant in a joint employment context" and "generally serve as the starting point" for a vertical joint employment analysis). For these reasons, proposed § 791.115(e) provides that the four factors identified in § 791.115(a) generally are more relevant and carry greater weight in the analysis than any additional factors. And even where additional factors may appear generally relevant to a particular situation, they are highly unlikely to outweigh the combined probative value of those four factors when they unanimously point to one reliable outcome measured against the wide variety of judicial tests. These provisions would provide useful guidance on how to apply the factors and help to ensure that any consideration of additional factors does not overtake consideration of the four factors.

The Department welcomes comments on all aspects of proposed § 791.115(e) and the consideration of additional factors.

6. Factors That Are Not Relevant (Proposed § 791.115(f))

Proposed § 791.115(f) provides that, notwithstanding any foregoing provisions of the proposed regulatory text, the following factors are primarily probative of a worker's status as an employee or independent contractor and have no relevance in determining joint employer status: (1) whether the employee is in a job that requires special skill, initiative, judgment, or foresight; (2) whether the employee has the opportunity for profit or loss based on his or her managerial skill; and (3) whether the employee invests in equipment or materials required for work or the employment of helpers.

Although the Department is not proposing to exclude economic dependence on an employer for work from determining joint employer status, the Department believes that certain factors are indisputably probative of economic dependence in the context of determining whether a worker is an employee or independent contractor—not whether an employee has more than one employer operating jointly *vis à vis* him or her. The Department is not aware of any basis for

stating that, as a matter of reality, skilled workers are more or less likely than unskilled workers to have a joint employer. Moreover, concepts like opportunity for profit or loss, investments, and initiative strike at the core of the analysis for determining employee or independent contractor status under the FLSA.[231] Indeed, in a joint employment case, the First Circuit in *Baystate* rejected factors that some courts applied "for the purpose of determining whether a worker is an 'employee' or an "independent contractor,'" such as the employee's skill and initiative, opportunity for profit or loss, and investments.[232] The First Circuit explained that the "usefulness of [these factors] is significantly limited in this case, however, because the employee/independent contractor choice is no longer before us."[233] Similarly, the Eleventh Circuit agreed in *Layton* that the employee's opportunity for profit and loss and the degree of skill required to perform the job were not relevant when determining joint employment.[234] The court explained that such "factors only distinguished whether one was an employee or an independent contractor."[235] Discussing its prior decision in *Aimable*, the court further explained that "[b]ecause it had been determined [in that case] that the farm workers were employees of the contractor, there was no need to evaluate whether hallmarks of an independent-contractor relationship existed."[236] Although the Ninth Circuit, for example, considers in its joint employment analysis the three factors identified in proposed § 791.115(f),[237] in line with the First and Eleventh Circuits, the Department believes that they should not be considered for the reasons explained above.

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[231] *See* 91 FR 9973–74 (proposed § 795.105(d)(1)(ii)) (describing the worker's opportunity for profit or loss based on his or her exercise of initiative (such as managerial skill or business acumen or judgment) or management of his or her investments or capital expenditures as a core factor in the independent contractor analysis).
[232] 163 F.3d at 675 n.9.
[233] *Id*.
[234] 686 F.3d at 1176 (citing *Aimable*, 20 F.3d at 443–44). As noted in fn. 229 above, *Layton* also rejected as irrelevant consideration of the "permanency and exclusivity of employment."
[235] 686 F.3d at 1176 (citing *Aimable*, 20 F.3d at 443–44).
[236] *Id*.
[237] *Torres-Lopez*, 111 F.3d at 639–640.

The 2020 Rule provided that the three factors identified in proposed § 791.115(f) were not relevant to determining joint employer status because they relate to economic dependence on a putative joint employer for work, which the 2020 Rule generally excluded from consideration.[238] Although this NPRM likewise considers the three factors to be irrelevant, it does so for different reasons, as explained above. The 2020 Rule also provided that whether the employee "is in a specialty job" was irrelevant because that factor assessed economic dependence; the question is whether the individual is employed by one or more employers.[239] To be clear, however, the Department is not including that language from the 2020 Rule in this NPRM. As explained above, the Department's proposed analysis does not exclude consideration of economic dependence on an employer for work. In addition, the Department recognizes that a number of courts consider whether the employee performs a specialty job in their joint employment analyses.[240]

Finally, the Department is not proposing to identify as an irrelevant factor the *number* of contractual relationships, other than with the employer, that the potential joint employer has entered into to receive similar services. The 2020 Rule included such a provision, explaining that the factor assesses economic dependence and is not relevant, like all factors assessing economic

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[238] 29 CFR 791.2(c)(1)–(3) (2020); *see also* 85 FR 2837–38.
[239] 29 CFR 791.2(c)(1) (2020); *see also* 85 FR 2837–38.
[240] *See*, *e.g.*, *Layton*, 686 F.3d at 1176 (considering, among other factors, whether the employees perform "a specialty job integral to the business"); *Remington Hybrid Seed*, 495 F.3d at 408 (concluding that a corn grower jointly employed workers hired to provide detasseling and rogueing services in part because "detasseling is a specialty job in an agricultural operation"); *Zheng*, 355 F.3d at 72–74 (considering "the extent to which [workers] performed a discrete line-job that was integral to [the joint employer's] process of production," informed by "industry custom and historical practice"); *Torres-Lopez*, 111 F.3d at 639–40 (considering, among other factors, "whether the work was a 'specialty job on the production line'") (quoting *Rutherford Food*, 331 U.S. at 730). The district court in *Scalia* noted that the 2020 Rule rejected "considering 'whether the employee is in a specialty job' in the joint employer inquiry," but stated that the rejection contradicted Supreme Court precedent because *Rutherford Food* "held that it *was* relevant that the workers 'did a specialty job on the production line.'" 490 F. Supp. 3d at 791 (citing 331 U.S. at 730) (emphasis in original). The Department additionally notes that consideration of whether the work is "integral" is a departure from the Supreme Court's consideration in *Rutherford Food* of whether work was "part of the integrated unit of production." 331 U.S. at 729; *see* also 91 FR 9956 (discussing this consideration in the context of determining employee or independent contractor status under the FLSA).

dependence.[241] As explained above, however, the Department is not proposing in this NPRM to exclude consideration of any factor simply because it assesses economic dependence for work, even though the number of contractual relationships is less likely to be probative of joint employment. The Department welcomes comments on whether consideration of the number of contractual relationships, other than with the employer, that the potential joint employer has entered into to receive similar services should be expressly excluded or included or not addressed in any final rule.

The Department welcomes comments on all aspects of proposed § 791.115(f).

7. Examples (Proposed § 791.115(g))

Proposed § 791.115(g) includes five examples illustrating and applying the Department's proposed analysis for vertical joint employment, generally tracking the factual scenarios addressed in the examples in § 791.2(g)(3) through (7) of the 2020 Rule.[242] Each proposed example provides a hypothetical factual situation, explains how the vertical joint employment standard applies, and concludes whether the persons or entities are joint employers. The Department's conclusions following each example are, like all illustrative examples, limited to substantially similar factual situations.

The Department welcomes comments on all aspects of the proposed examples.

E. Determining Horizontal Joint Employment (Proposed § 791.120)

The Department proposes to readopt as § 791.120 most of the regulatory text regarding horizontal joint employment from the 2020 Rule. Specifically, the Department proposes to readopt the regulatory text from § 791.2(e)(2) of the 2020 Rule (except for the last sentence) as § 791.120(a), the last sentence of the regulatory text from § 791.2(e)(2) of the 2020 Rule as § 791.120(b), and the examples regarding horizontal joint employment from § 791.2(g)(1) and (2) of the 2020 Rule as § 791.120(c). The Department is not proposing to readopt the regulatory

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[241] 29 CFR § 791.2(c)(4) (2020); *see also* 85 FR 2821.
[242] *See* 29 CFR 791.2(g)(3)–(7) (2020).

text from § 791.2(e)(1) of the 2020 Rule because that provision merely explained what horizontal joint employment is and would be repetitive of proposed § 791.110(b). The Department is proposing non-substantive changes to the regulatory text that it adopted in the 2020 Rule, such as changing references to the "Act" to the "FLSA" and changing references to "second" joint employer scenario and "this" scenario to "horizontal" joint employer scenario. As noted above, while the Department did not use terms such as "vertical" or "horizontal" joint employment in the 2020 Rule, it is in this proposal due both to their ubiquity and the clarity they provide.

Proposed § 791.120(a) describes the circumstances in which there may be horizontal joint employment, explaining how to determine if the employers are joint employers in this scenario and focusing on the association or lack thereof between the employers. The proposed regulatory text explains that, 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 FLSA. The proposed regulatory text further explains that, if the employers are sufficiently associated with respect to the employment of the employee, they are joint employers and must aggregate the hours worked by the employee for each of them for purposes of determining compliance with the FLSA. As in prior versions of part 791, the proposed regulatory text provides three situations where the employers will generally be sufficiently associated: (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 proposed regulatory text advises that such a determination depends on all of the facts and circumstances.

Proposed § 791.120(b) explains that business relationships between two employers that have little to do with their employment of specific workers, such as sharing a vendor or being

franchisees of the same franchisor, are not generally probative, and could not alone indicate a sufficient association between the employers to establish that they are joint employers.

Proposed § 791.120(c) provides two illustrative examples which imitate the factual scenarios previously adopted in § 791.2(g)(1) and (2) of the 2020 Rule.[243] Each example provides a hypothetical factual situation and discusses how the Department's standard for determining horizontal joint employment would apply and whether or not there is joint employment.

The standard for determining horizontal joint employment reflected in proposed § 791.120 is longstanding and well-settled. For example, the Department's pre-2020 version of 29 CFR part 791, which was adopted in 1958 and derived from the 1939 Interpretative Bulletin No. 13, explained that, when one employee performs separate work for two or more employers in the same workweek, the determination of a joint employment relationship turns on the association or lack thereof between the two potential joint employers.[244] The pre-2020 regulation elaborated on this guidance with three non-exhaustive situations where there would generally be sufficient association between the employers and thus horizontal joint employment.[245]

The 2020 Rule explained that the pre-2020 FLSA regulation provided "clear and useful" guidance in the horizontal joint employment scenario.[246] The 2020 Rule added that "focusing on the relationship between the two employers is the correct approach" in this scenario, and that the pre-2020 regulation's "focus on the relationship between the two employers has been useful to both the public and courts."[247] For these reasons, the 2020 Rule retained the analysis provided in

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[243] 29 CFR 791.2(g)(1)–(2) (2020).
[244] 29 CFR 791.2(a) (1958).
[245] 29 CFR 791.2(b) (1958).
[246] 85 FR 2851.
[247] *Id.* at 2845; *see also* 84 FR 14052 (citing *A-One Med. Servs.*, 346 F.3d at 917–18; *Murphy v. Heartshare Human Servs. of New York*, 254 F. Supp. 3d 392, 399–404 (E.D.N.Y. 2017); *Li v. A Perfect Day Franchise, Inc.*, 281 F.R.D. 373, 400–01 (N.D. Cal. 2012); *Chao v. Barbeque Ventures, LLC*, No. 8:06CV676, 2007 WL 5971772, at *6 (D. Neb. Dec. 12, 2007); WHD

the pre-2020 regulation (with non-substantive revisions) as its standard for determining horizontal joint employment.[248]

The Department's subsequent Rescission Rule agreed that the 2020 Rule's horizontal joint employment standard "reflected the Department's historical approach to the issue, and was consistent with the relevant case law."[249] The Rescission Rule rescinded the 2020 Rule in its entirety because it would have been "difficult and impractical" to leave the horizontal joint employer provision standing alone.[250] However, the Department emphasized that it was not reconsidering the substance of that standard and that the "focus of a horizontal joint employment analysis will continue to be the degree of association between the potential joint employers, as it was in the [2020] Rule and the prior version of part 791."[251]

In 2025, WHD again applied its historical approach to the horizontal joint employment scenario, analyzing in Opinion Letter FLSA2025-5 whether a restaurant and a members club for whom an employee worked separate hours are sufficiently associated with each other with respect to the employee such that they jointly employ the employee.[252] Noting that "[h]orizontal joint employment typically occurs when employers are sufficiently associated with respect to the employment of the particular employee(s)," WHD concluded that there were sufficient facts to demonstrate a horizontal joint-employer relationship between the restaurant and members club.

Opinion Ltr. FLSA 2005–17NA, 2005 WL 6219105 (June 14, 2005) (applying 1958 regulation 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); WHD Opinion Ltr., 1998 WL 1147714 (Jul. 13, 1998) (applying 1958 regulation 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 FLSA).

[248] 85 FR 2844–45. The district court decision that vacated the 2020 Rule's vertical joint employer standard severed the horizontal joint employer standard and did not vacate it. *Scalia,* 490 F. Supp. 3d at 795–96 (agreeing that the 2020 Rule "makes only 'non-substantive revisions' to existing law for horizontal joint employer liability") (quoting 85 FR 2844).

[249] 86 FR 40954.

[250] *Id*.

[251] *Id*.

[252] *See* https://www.dol.gov/sites/dolgov/files/WHD/opinion-letters/FLSA/FLSA-2025-05.pdf.

The Department is not aware of any basis for changing its longstanding approach to horizontal joint employment and accordingly proposes to readopt the standard from the 2020 Rule as explained above. The Department welcomes comments on all aspects of its proposed horizontal joint employment standard.

F. Relevance of Certain Business Practices (Proposed § 791.125)

Like other agencies enforcing labor or antidiscrimination laws, WHD looks beyond titles and labels to the particular facts and practices when administering the Act and other statutes for which it is responsible. As such, the Department proposes to clarify that certain general common business models and business practices, standing alone, do not categorically or in the abstract make joint employer status more or less likely under the FLSA, FMLA, or MSPA. Specifically, the Department proposes to largely readopt the guidance from the Department's 2020 Rule at § 791.2(d)(2)–(5), with one revision (described below) and one omission: the Department does not propose to readopt the guidance that "allowing [another] employer to operate on its premises (including 'store within store' arrangements)" does not make joint employer status more or less likely under the FLSA. Notably, the Department is proposing to locate guidance about the relevance of certain business models and business practices in a standalone section in part 791, which would make clear that such guidance is applicable in the contexts of both horizontal joint employment as well as vertical joint employment while also underscoring that such guidance would be independent and severable from other parts of the rule, including the analyses proposed to determine joint employer status in § 791.115 and § 791.120.

In the Department's view, general provisions relating to health, safety or legal compliance, quality control requirements, and common support practices do not establish or indicate the existence of joint employment. The mere existence of such business practices does not speak to whether a party is "acting directly or indirectly in the interest of [another] employer in relation to an employee," 29 U.S.C. 203(d), or "suffer[ing] or permit[ting]" work from the employees of another employer, 29 U.S.C. 203(g). Instead, as explained above, joint employer

status turns on "'the circumstances of the whole activity,'" with factors germane to the wages and working conditions of the employees at issue guiding the inquiry. *Bonnette*, 704 F.2d at 1469–70.

Moreover, promulgating such guidance in the Code of Federal Regulations would allow parties to maintain certain basic—often best—business practices with greater clarity and confidence that such responsible behavior will not transform them into a joint employer.[253] The Department notes that many of these identified business practices—such as basic anti-harassment policies, workplace safety measures, providing association health plans, sponsoring apprenticeship programs, etc.—are beneficial to all parties, including workers and consumers.

1. Franchising, Brand-and-Supply Agreements, and Similar Business Models

In § 791.125(a), the Department proposes to reaffirm that merely operating as a franchisor, entering into a brand and supply agreement, or using a similar business model does not, by itself, make joint employer status more or less likely. The Department notes that this proposed guidance is not a categorical statement that franchisors and similar businesses "can never qualify" as joint employers;[254] but it would make clear that merely operating as a franchisor or pursuing a similar business model has no categorical impact—positive or negative—in determining whether the business is a joint employer.

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[253] The Portal-to-Portal Act of 1947 provides parties with a defense against FLSA liability for any acts or omissions made in good faith reliance "on any written administrative regulation, order, ruling, approval, or interpretation" issued by the Administrator of the Wage and Hour Division. *See* 29 U.S.C. 259; *see also* 29 CFR 790.13–.19 (elaborating on the requirements for a "good faith reliance" defense under the Portal-to-Portal Act). This reliance defense is not available for alleged FMLA or MSPA violations. Separately, the Department's FMLA and MSPA regulations are legislative rules which carry the "'force and effect of law.'" *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 96 (2015). Congress has afforded the Department broad rulemaking authority under the FMLA and MSPA. *See* 29 U.S.C. 2654; 29 U.S.C. 1861.

[254] *Orozco v. Plackis*, 757 F.3d 445, 452 (5th Cir. 2014); *see also Olvera v. Bareburger Grp. LLC*, 73 F. Supp. 3d 201, 208 (S.D.N.Y. 2014) (denying a franchisor's motion to dismiss in an FLSA lawsuit where "plaintiffs … have not merely stated, in a conclusory fashion, that the franchisor defendants were joint employers … [but] have alleged several facts that, if true, would satisfy the 'economic reality' test for establishing employer status").

In a franchising relationship, one party—the franchisor—grants a license to other parties—franchisees—to use the franchisor's brand name and operational model in selling the franchisor's products or services. The franchisor typically "provides the franchisee with franchising leadership and support and exercises some controls to ensure the franchisee's adherence to brand guidelines," while each franchisee "is responsible for the day-to-day management of its independently owned business and benefits or risks loss based on [its] own performance and capabilities."[255] Similarly, in a brand and supply agreement, "one business agrees to sell another business' products under that business' brand name and comply with certain brand standards and signage requirements," though "without agreeing to limitations or requirements for other products or services offered."[256]

The Department recognizes that franchising and brand-and-supply agreements are common and legitimate business models, and that such arrangements do not in and of themselves result in joint employment under the FLSA. In particular, the Department emphasizes that its proposed vertical joint employment analysis is not intended to make franchisors or businesses in any similar business model more or less likely to be joint employers than other types of businesses; instead, it is intended to provide a general analysis—the application of which does not take into account franchising or any similar business model. Under the proposed rule, whether a franchisor or any similar business is a joint employer would depend on application of the factors proposed herein to the facts of the business' relationship with the employees. This is consistent with the approach that courts currently take in that they apply their varied economic realities analyses to the facts before them, almost always rejecting arguments that franchisors are joint employers unless there is sufficient supporting evidence above and beyond the franchise relationship that the franchisor is involved in the day-to-day management of the franchisee and

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[255] International Franchise Association, "What is a Franchise?", https://www.franchise.org/franchising-overview/what-is-a-franchise.
[256] 85 FR 2840.

its employees.[257] This guidance is also consistent with the Department's "longstanding position that certain business models—such as the franchise model—do not themselves indicate joint employer status under the FLSA."[258]

Reaffirming this guidance could prevent an overly broad application of the FLSA that would presumptively render franchisors and similar entities as joint employers simply by virtue of that characterization, regardless of the particulars of the relationship between them. At the same time, the Department recognized in the 2020 Rule that it would be inappropriate to state that there is no business model that could make joint employment more likely. *See* 85 FR 2841. Accordingly, the Department clarified in that rule that "the franchise business model, the brand and supply business model, and other *similar* business models" do not automatically "make joint employer status more likely, while still allowing for the possibility that business models could be devised that, unlike these models, would … make joint employer status more likely." *Id.* (emphasis added).

The Department welcomes comments on its readoption of this provision from the 2020 Rule, including feedback on other businesses models that commenters believe may or may not be indicative of joint employment.

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[257] *See Orozco*, 757 F.3d at 452 ("We do not suggest that franchisors can never qualify as the FLSA employer for a franchisee's employees; rather, we hold that [the employee] failed to produce legally sufficient evidence to satisfy the economic reality test and thus failed to prove that [the franchisor] was his employer under the FLSA."); *see also Chen v. Domino's Pizza, Inc*., No. 09-107 (JAP), 2009 WL 3379946 (D.N.J. Oct. 16, 2009) (holding that a "conclusory statement" does not establish that Domino's Pizza jointly employs the employees of its franchisees under the FLSA); *Singh v. 7-Eleven, Inc.*, No. C-05-04534 (RMW), 2007 WL 715488, at *3 (N.D. Cal. Mar. 8, 2007) (franchisor's brand standards and business model did not make it a joint employer); *Ochoa v. McDonalds Corp.*, 133 F. Supp. 3d 1228, 1235 (N.D. Cal. 2015) (same); *Gessele v. Jack in the Box, Inc.*, No. 3:14-CV-1092-BR, 2016 WL 7223324, at *11 (D. Or. Dec. 13, 2016) (holding that franchisor was not joint employer based on facts that the court found were similar to the facts in *Singh*); *In re Jimmy John's Overtime Litig.*, No. 14 C 5509, 2018 WL 3231273, at *20 (N.D. Ill. Jun. 14, 2018) ("Jimmy John's' control over the systems, operations, and dress code at franchise stores, as pervasive as it may seem, does not amount to joint employment.").

[258] 85 FR 2823. Moreover, the Department's enforcement practice has been that 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." 84 FR 14047.

2. Compliance with Legal Obligations or Health and Safety Standards

Similar to the 2020 Rule, the Department proposes in § 791.125(b) that contractual provisions addressing and requiring compliance with general legal obligations or health and safety standards—and the monitoring of such provisions—do not make joint employer status more or less likely. Examples of such provisions include mandating compliance with the FLSA and similar laws, requiring policies against unlawful harassment, requiring background checks, and requiring the establishment of workplace safety practices and protocols or the provision of training regarding matters such as health, safety, or legal compliance. Businesses regularly insist on such provisions with their business partners to reduce risk and ensure compliance with statutory or regulatory requirements.

Courts have held that this type of oversight reflects responsible contracting, not employer-like control. For example, in *Moreau*, the Ninth Circuit held that an airline was not a joint employer merely because it insisted that a ground-handling contractor comply with "various safety and security regulations, such as ensuring that food equipment was properly stowed or that the plane's load was adequately balanced," which the court found to be "qualitatively different" than the kind of control which might be indicative of joint employer status. 356 F.3d at 951. Speaking to the commonality of such practices, the court noted that "[a]ny airline … concerned about its passengers' safety would be remiss to simply delegate a task to another party and not double-check to verify that the task was done properly." *Id*. Similarly, in *Zhao v. Bebe Stores, Inc.*, the court dismissed the relevance of a retailer's attempts to monitor its garment supplier's "compliance with labor laws," such as its ability to access the supplier's payroll records, because there was "no authority" to suggest that such monitoring "can or should be used to find the existence of a joint employment arrangement." 247 F. Supp. 2d 1154, 1161 (C.D. Cal. 2003).

Many other courts have similarly dismissed the relevance of actions taken to ensure compliance with legal or safety requirements.[259]

Courts have recognized there are compelling policy reasons for discounting the relevance of contractual requirements relating generally to health, safety, and legal compliance. In *Zhao*, for example, the court noted that holding a retailer's attempts to ensure that its suppliers were complying with the law to be evidence of joint employer status "would be counterproductive and would create a disincentive for clothing designers and manufacturers to monitor contractor shops to ensure compliance with the FLSA." 247 F. Supp. 2d at 1161. The Department does not want any perceived possibility of joint employer liability to deter business from taking steps to ensure legal compliance and protect the health and safety of workers, customers, and other members of the public.

At the same time, not every contractual provision between businesses necessarily relates to "legal obligations"—that is, obligations imposed by government through law or regulation—and the Department wishes to avoid such an overly broad misinterpretation of its language in proposed § 791.125(b). Accordingly, the Department has made a small revision to the language that it previously adopted in the 2020 Rule by using the word "general" rather than "specific" in

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[259] *See, e.g., Godlewska v. HDA*, 916 F. Supp. 2d 246, 259–60 (E.D.N.Y. 2013), *aff'd sub nom. Godlewska v. Human Dev. Ass'n*, 561 F. App'x 108 (2d Cir. 2014) (contrasting "quality control[ ] … to ensure compliance with the law or protect clients' safety" with "control over the employee's 'day-to-day conditions of employment' [that] is relevant to the joint employment inquiry"); *Zampos v. W & E Commc'ns, Inc.*, 970 F. Supp. 2d 794, 803 (N.D. Ill. 2013) (requiring installation contractors to subject applicants to background checks and drug tests does not implicate "hiring and firing" factor because "this purported control, relating to the safety and security of Comcast customers, is qualitatively different from the control exercised by an employer"); *Johnson v. Serenity Transp., Inc*., No. 15-CV-02004-JSC, 2017 WL 1365112, at *10 (N.D. Cal. Apr. 14, 2017) ("Maintaining records for purposes of ensuring regulatory compliance or monitoring safety does not constitute maintenance of employment records to satisfy this *Bonnette* factor."); *cf. Senne v. Kansas City Royals Baseball Corp*., 591 F. Supp. 3d 453, 515 (N.D. Cal. 2022) (concluding that Major League Baseball jointly employed minor league baseball players because the facts established that Major League Baseball was "not merely a regulatory body").

the phrase "requiring the employer to comply with general legal obligations."[260] The Department welcomes feedback on proposed § 791.125(b).

3. Quality Control and Brand Reputation Standards

The Department proposes to readopt in § 791.125(c) regulatory text providing that requiring, monitoring, or enforcing another business' adherence to quality control standards—such as specifications relating to the size or scope of the work, quantity and quality standards, deadlines, morality clauses, or specifications regarding the use of standardized products, services, or advertising to maintain brand standards—do not make joint employer status more or less likely. Quality control measures are focused on the goods and services themselves by determining criteria for an acceptable work product or service and evaluating the end work product in light of those criteria, as opposed to actions directed toward the day-to-day management of the other business' employees. However, if a potential joint employer engages in day-to-day supervision of the other business, becoming involved with employees' firing or disciplinary actions, scheduling, or other conditions of employment, such actions would be relevant in assessing joint employer status.

Courts have drawn this distinction repeatedly. In *Zheng*, the Second Circuit acknowledged that the supervision of employees can be evidence of control indicative of a joint employment relationship, but emphasized that "supervision with respect to contractual warranties of quality and time of delivery has no bearing on the joint employment inquiry, as such supervision is perfectly consistent with a typical, legitimate subcontracting arrangement." 355 F.3d at 75. Similarly, in *Singh*, the court rejected the plaintiffs' arguments that requiring a franchisee location to be open 24 hours a day constituted "control of employee work schedules or conditions" under the *Bonnette* analysis, as the policy was "merely reflective of an inherent interrelation of operations between the two entities and 7-Eleven's goal of attaining conformity to

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[260] *Cf*. 29 CFR 791.2(d)(3) (2020) (addressing contractual provisions "requiring the employer to comply with *specific* legal obligations") (emphasis added).

certain operational standards and details." 2007 WL 715488, at *4–5. And in *Jacobson v. Comcast Corp*., the court concluded that quality control procedures intended to provide reliable service to cable customers such as "monitor[ing] the location of technicians," "specif[ying] the time at which [technicians] are supposed to arrive at appointments," and "regularly evaluat[ing] completed work to ensure that it meets standards," was "qualitatively different from the control exercised by employers over employees." 740 F. Supp. 2d 683, 691–92 (D. Md. 2010); *see also Mitchell v. Hertzke*, 234 F.2d 183, 190 (10th Cir. 1956) (concluding that "[contractual] powers … limited to determining the time and conditions of the planting, the conditions under which the beans were to be raised, and the time when they were to be harvested" was insufficient to establish that a vegetable canning company jointly employed the farm workers of its suppliers).[261]

As these cases illustrate, quality control measures are often integral to modern business. Without evidence showing that an entity's enforcement of such measures is affecting the working conditions of the employees who work for one or more other employers, they do not establish or indicate joint employer status. This proposed guidance would assist companies in understanding any possibility of joint employment when considering actions to safeguard their brand integrity.

4. Other Common Business Practices

The Department also proposes to readopt in § 791.125(d) regulatory text providing that certain common basic business practices—such as providing another employer with a sample employee handbook, offering an association health or retirement plan to another employer or participating in such a plan with the employer, or jointly participating in an apprenticeship program with another employer—does not make joint employer status more or less likely under

[261] *See also* 85 FR 2843 n.86 (citing cases).

the FLSA.[262] By providing these kinds of additional resources to employers, potential joint employers are giving employers access to a greater degree of business expertise, training resources, and benefit plans than they would be able to attain on their own—all of which benefit employees generally. Concerns about incurring joint employer liability should not deter businesses from providing such resources.

In sum, the Department continues to believe that the aforementioned programs and resources serve practical ends for businesses and workers, but do not themselves indicate control over employment. Of course, if a potential joint employer took actions such as enforcing the terms of a franchise handbook against a franchisee's employee, directing an employer's employee to participate in a joint apprenticeship program, or exercising control over an employer's employee who worked on its premises, those actions could indicate joint employer status.

5. Omission of the 2020 Rule's Guidance regarding a Business that Allows Another Employer to Operate on its Premises

The Department does not propose to include a provision advising that "allowing [another] employer to operate on its premises (including 'store within a store' arrangements)" does not make joint employer status more or less likely under the FLSA. Several courts have identified an entity's ownership of the premises where work is performed to be a relevant factor in assessing whether the entity is a joint employer. *See Moreau*, 356 F.3d at 947 (considering "whether the premises … of the employer are used for the work"); *Zheng*, 355 F.3d at 72 (same); *see also Salinas*, 848 F.3d at 141 (considering "[w]hether the work is performed on a premises owned or controlled by one or more of the putative joint employers, independently or in connection with one another"). As the Eleventh Circuit explained in *Layton*, an entity's ownership of the location

[262] 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 would 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").

where the work at issue is performed could be relevant in a joint employer case "because a landowner is thought to have some knowledge of and control over what happens on his land." 686 F.3d at 1180; *see also Zheng*, 355 F.3d at 72 ("[W]hether a putative joint employer's premises … are used by its putative joint employees … is relevant because the shared use of premises … may support the inference that a putative joint employer has functional control over the plaintiffs' work."); *Antenor*, 88 F.3d at 937 ("[A] business that owns or controls the worksite will likely be able to prevent labor law violations, even if it delegates hiring and supervisory responsibilities to labor contractors."). Conversely, when work is performed in locations that an alleged joint employer does not own, that fact can be relevant in determining that the entity is not a joint employer. *See, e.g.*, *Layton*, 686 F.3d at 1180 (finding the fact that drivers only "spent a small part of their days" in warehouses owned by the alleged joint employer "weighs against a finding of joint employment"); *Wirtz v. Dr. Pepper Bottling Co. of Atlanta*, 374 F.2d 5, 8 (5th Cir. 1967) (concluding that workers were not jointly employed by Dr. Pepper in part because the workers "were not employed at all on company premises and were not allowed to go there").

Although the Department recognizes that where the work is performed has been considered probative by some circuits and may be considered as an additional factor in some cases (*see* proposed § 791.115(e)), the Department is not proposing to include a factor related to the location where the work is performed for consideration in every case because many courts do not include a location-related factor in their joint employer analyses. Moreover, the location where work is performed may not be relevant in every case, such as cases involving workers in occupations that require work in remote locations or in the homes of third-party consumers. However, the Department believes that categorically excluding the relevance of a business "allowing [another] employer to operate on its premises" from the joint employer analysis would conflict with the judicial precedent described above.

The Department welcomes feedback from commenters on the business practices and actions that it has proposed as not relevant to the joint employer analysis, including suggestions

of any additional business practices or actions that should be addressed—particularly those that affect businesses in all industries, as the Department intends for the guidance in restored part 791 to be generally applicable.

6. Examples (Proposed § 791.125(e))

Proposed § 791.125(e) includes three illustrative examples applying the Department's proposed regulatory text regarding certain business models and business practices. The proposed examples imitate the illustrative examples previously adopted in § 791.2(g)(8) through (10) of the 2020 Rule,[263] but have been modified to make the examples, like proposed § 791.125 generally, independent and severable from the rest of the rule, including the analyses to determine vertical and horizontal joint employment in proposed §§ 791.115 and 791.120, respectively. As with the examples proposed for inclusion in §§ 791.115(g) and 791.120(c), the examples provided in proposed § 791.125(e) are limited to substantially similar factual situations. The Department welcomes comments on all aspects of these proposed examples.

G. Proposed Revisions to FMLA and MSPA Regulations

The Department is proposing to revise the regulations addressing joint employer status under the FMLA and MSPA to provide that the same FLSA analysis proposed for adoption in part 791 would also apply when determining joint employer status under the FMLA and MSPA.

Both MSPA and the FMLA statutorily incorporate FLSA definitions regarding the scope of employment. *See* 29 U.S.C. 1802(5) (providing that the term "employ" for the purposes of MSPA has the meaning given such term under section 3(g) of the FLSA); 29 U.S.C. 2611(3)

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[263] *See* 85 FR 2861. The Department has not proposed to readopt the example provided in § 791.2(g)(11) of the 2020 Rule because the Department is not proposing to readopt the 2020 Rule's guidance regarding the relevance of a business that allows another employer to operate on its premises. *See supra* section III.F.5.

(providing that the terms "employee" and "employ" for purposes of the FMLA have the same meanings given such terms in sections 3(e) and (g) of the FLSA).[264]

In addition, the Department's MSPA and FMLA regulations recognize that the scope of employment under those statutes is determined by the FLSA. For example, the MSPA regulations state that "employ," "employer", and "employee" are each given the meaning set forth in the FLSA. 29 CFR 500.20(h)(1)–(3) (citing 29 U.S.C. 203(d), (e), and (g)). The MSPA regulations also provide that "[t]he definition of the term employ includes the joint employment principles applicable under the Fair Labor Standards Act." 29 CFR 500.20(h)(5). Similarly, the FMLA regulations note that the definitions of "employ" and "employee" come from the FLSA. 29 CFR 825.102, 825.105(a).

Both MSPA and the FMLA thus support applying to those statutes the same analysis that the Department applies for determining joint employer status under the FLSA. In addition, applying one analysis across the three statutes will encourage consistent results and will provide a simpler approach for employers, businesses, and workers in determining their rights and obligations under the statutes. In the 2020 rulemaking, the Department received comments supporting a consistent approach to determining joint employer status across all federal labor laws, including, for example, the National Labor Relations Act (NLRA).[265] Although only Congress can achieve that,[266] where a uniform analysis is consistent with the statutes, as it would

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[264] *See also Garcia-Celestino v. Ruiz Harvesting, Inc.*, 843 F.3d 1276, 1287 (11th Cir. 2016) (noting that when Congress enacted MSPA, "it adopted the same sweeping statutory 'suffer or permit to work' definition of the term 'employ,' incorporating the FLSA definition by reference") (citing 29 U.S.C. 1802(5)); *Mendel v. City of Gibraltar*, 727 F.3d 565, 569 (6th Cir. 2013) ("To answer the question of whether [workers] fall within the scope of the FMLA's definition of an 'employee,' we must turn to the section of the FLSA that addresses this issue.") (citing 29 U.S.C. 2611(3)).

[265] *See* 85 FR 2828.

[266] Courts have explained that the FLSA's particular statutory definitions require an analysis for joint employment which is different and generally broader than the common law standard that applies under statutes like the NLRA. *See, e.g., Bonnette*, 704 F.2d at 1469 (stating that "the definition of 'employer' under the FLSA is not limited by the common law concept of 'employer'" and "is to be given an expansive interpretation"); *see also, e.g.*, *Falk*, 414 U.S. at

be with the FLSA, FMLA, and MSPA here, the Department believes that regulations adopting a uniform analysis would not only be beneficial, but also consistent with Congressional intent.

Failing to make conforming edits to the MSPA regulation when promulgating an FLSA joint employer regulation would risk confusing agricultural employers, agricultural associations, and farm labor contractors which might be subject to both the FLSA and MSPA, as well as the agricultural workers that such entities engage. Revising the MSPA regulation (29 CFR 500.20(h)(5)) to conform with the Department's FLSA regulation would avoid these concerns and provide uniformity between MSPA and the FLSA on this issue.

The FMLA regulation's guidance for determining whether an entity is a joint employer would be similarly unclear unless the Department makes conforming revisions. The regulation defines "Employee" in 29 CFR 825.102 as having the same meaning as that term has under the FLSA and notes that the "definition of employ for purposes of FMLA is taken from the [FLSA]," 29 CFR 825.105(a). However, the FMLA joint employer regulation that the Department proposes to revise sets forth nearly the same test as the FLSA joint employment regulation that was in effect from 1958 to 2020.[267] As such, the joint employment test in the FMLA regulation is inconsistent with the proposed FLSA analysis in this rulemaking.[268] The Department believes that proposing to replace content in 29 CFR 825.106(a) borrowed from an FLSA regulation that no longer exists with a cross-reference to the new guidance in part 791

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195 (noting the "expansiveness of the [FLSA's] definition of 'employer'"). Thus, in the absence of amendatory legislation, the Department cannot adopt for the FLSA the standard which the National Labor Relations Board applies to assess joint employment under the NLRA.

[267] Specifically, the FMLA regulation provides that "a joint employment relationship generally will be considered to exist in situations such as: (1) Where there is an arrangement between employers to share an employee's services or to interchange employees; (2) Where one employer acts directly or indirectly in the interest of the other employer in relation to the employee; or, (3) Where the employers are not completely disassociated with respect to the employee's employment and may be deemed to share control of the employee, directly or indirectly, because one employer controls, is controlled by, or is under common control with the other employer." *Compare* 29 CFR 825.106(a) *with* 29 CFR 791.2(b) (2019).

[268] *See infra* section V.F.2. (explaining why the Department is not proposing to readopt the pre-2020 FLSA regulation as a regulatory alternative).

would address this concern and provide useful guidance when making the determination under the FMLA.

In addition, many courts have not limited their FMLA joint employer analysis to the analysis set forth in 29 CFR 825.106(a). For instance, courts frequently apply the analysis from the Ninth Circuit's decision in *Moreau*, which considered a variety of factors drawn from FLSA and MSPA cases, including the *Bonnette* factors. 356 F.3d at 950–53; *see, e.g., Olson v. United States ex rel. Dep't of Energy*, 980 F.3d 1334, 1339 (9th Cir. 2020) (approving of district court's application of *Moreau* factors to joint employment analysis). Notably, the Seventh Circuit concluded that the FMLA regulation "does not … provide much guidance in determining the parameters of what constitutes a joint-employment relationship" and instead endorsed a holistic analysis examining whether "each alleged employer … exercise[s] control over the working conditions of the employee … depending on the specific facts of each case." *Moldenhauer*, 536 F.3d at 644; *see also Schubert v. Bethesda Health Grp., Inc.*, 319 F. Supp. 2d 963, 970–72 (E.D. Mo. 2004) (noting that "[t]he [FMLA] regulation does not provide much guidance to assist courts in defining the exact boundaries of a joint employment relationship" and applying a four-factor *Bonnette* test).

The divergent approaches taken by courts when evaluating joint employer status under the FMLA suggest that—like the Department's pre-2020 FLSA regulation from which it borrowed—the current FMLA regulation does not provide a sufficiently detailed analysis, at least with respect to cases of potential vertical joint employment. In any event, because courts regularly consider FLSA and MSPA cases in evaluating joint employment under the FMLA, modifying the FMLA joint employment regulation to be consistent with the FLSA regulation will provide additional clarity and consistency across the statutes.

In regard to MSPA, courts regularly cite the Department's MSPA regulation and apply the factors set forth at 29 CFR 500.20(h)(5) to make a joint employment determination under MSPA (either alone or in combination with other factors). *See, e.g., Charles v. Burton*, 169 F.3d

1322, 1328–29 (11th Cir. 1999); *Reyes-Trujillo v. Four Star Greenhouse, Inc.*, 513 F. Supp. 3d 761, 791–92 (E.D. Mich. 2021); *Perez v. Valley Garlic, Inc.*, No. 116CV01156AWIEPG, 2017 WL 772147, at *5 (E.D. Cal. Feb. 27, 2017). This application of the Department's MSPA regulation is certainly appropriate, as the regulation is a legislative rule issued pursuant to an express delegation of rulemaking authority that is binding on regulated entities.[269] However, certain provisions of the current MSPA joint employer regulations are inconsistent with the FLSA guidance proposed in this rulemaking, including, *inter alia*, its identification of economic dependence as the "ultimate question" of the joint employment analysis,[270] and its consideration of "[t]he extent to which the services rendered by the worker(s) are repetitive, rote tasks requiring skills which are acquired with relatively little training,"[271] To the extent the test for joint employment set forth in the current MSPA regulation differs in meaningful ways from the Department's proposed FLSA guidance, the current MSPA regulation should be updated as part of this rulemaking. As a general matter, the Department does not believe it would be advisable to have differing multi-factor tests for joint employer status under laws that share the same statutory definitions for employment.

In sum, the Department's proposed edits to the FMLA and MSPA regulations are motivated by the fact that the analysis for determining joint employer status should be the same under those statutes as it is under the FLSA, as well as the concerns identified herein with the

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[269] *See* 29 U.S.C. 1861. The Supreme Court has advised that legislative rules which carry the "force and effect of law" are those which: (1) "affect[ ] individual rights and obligations"; (2) are "rooted in a grant of [legislative] power by the Congress"; and (3) are "promulgat[ed] … [in] conform[ity] with any procedural requirements imposed by Congress." *Chrysler Corp. v. Brown*, 441 U.S. 281, 302–03 (1979) (internal quotation marks omitted). Similarly, the Department's FMLA regulation is a legislative rule issued pursuant to express rulemaking authority. *See* 29 U.S.C. 2654.

[270] *Compare* 29 CFR 500.20(h)(5)(iii) *with* section III.D.5. and proposed § 791.115(e) (explaining that economic dependence is not the "ultimate question" of the joint employer analysis, although certain factors indicative of economic dependence may be considered as additional factors).

[271] *Compare* 29 CFR 500.20(h)(5)(iv)(D) *with* section III.D.6. and proposed § 791.115(f) (proposing to exclude the performance of unskilled work as irrelevant to a joint employer analysis).

joint employer analyses in those regulations. Workers and businesses alike would benefit from the simplicity and certainty of having a single uniform standard for assessing joint employer status under all three laws, distilled from a thorough review of the caselaw which has developed under all three laws.

For the MSPA regulations, the Department is proposing to revise 29 CFR 500.20(h)(5) as follows: the Department will retain the first three sentences of § 500.20(h)(5), but it will delete the fourth and fifth sentences. This deletion is necessary because the "completely disassociated" language is drawn from the 1958 version of the FLSA joint employment regulation and is not fully consistent with the regulation proposed here. The Department also proposes adding a sentence at the end of this paragraph that states "The criteria set forth in §§ 791.110 through 791.125 of this chapter apply to any determination of whether a joint employment relationship exists under MSPA." This revision would incorporate into the MSPA regulations the analysis for determining joint employer status in part 791. Next, the Department proposes to retain all of § 500.20(h)(5)(i). This paragraph is consistent with the proposed FLSA regulation in this NPRM, while providing guidance specific to MSPA. The Department further proposes to retain the first two sentences of § 500.20(h)(5)(ii) and delete the remainder of subsection (ii). The portion of subsection (ii) that would be deleted emphasizes the test articulated in *Hodgson v. Griffin & Brand of McAllen, Inc*., 471 F.2d 235, 237–38 (5th Cir. 1973), which differs from the criteria set forth in this proposal, and thus this discussion would be removed to ensure consistency. The Department proposes removing all of § 500.20(h)(5)(iii). This paragraph references a worker's economic dependence on a particular entity as the "ultimate question" to be determined in the joint employment analysis, which is not consistent with the regulation proposed here. And the Department proposes removing all of § 500.20(h)(5)(iv) except for this sentence: "The analysis as to the existence of an employment relationship is not a strict liability or per se determination under which any agricultural employer/association would be found to be an employer merely by retaining or benefiting from the services of a farm labor contractor." These deletions are

necessary to ensure that the guidance in subparagraph (iv) does not conflict with the proposed FLSA regulation, while retaining the sentence that is consistent with the proposed FLSA regulation and which provides guidance specific to MSPA. Paragraph (iv) would be renumbered as (iii) given the removal of paragraph (iii). The Department welcomes comments on all aspects of its proposed revisions to § 500.20(h)(5).

For the FMLA regulations, the Department is proposing to revise 29 CFR 825.106(a) by retaining the first two sentences of that subsection, but deleting the remainder of the subsection, including paragraphs (1), (2), and (3). The Department then proposes adding a new third sentence to § 825.106(a): "The criteria set forth in §§ 791.110 through 791.125 of this chapter apply to any determination of whether a joint employment relationship exists." This revision would incorporate into the FMLA regulations the analysis for determining joint employer status in part 791.

The Department notes that 29 CFR 825.106(c) sets forth the concept of a primary and secondary employer, and assigns certain responsibilities to the primary employer, such as providing FMLA leave and maintenance of health benefits. The regulation provides that "[f]actors considered in determining which is the primary employer include authority/responsibility to hire and fire, assign/place the employee, make payroll, and provide employment benefits." 29 CFR 825.106(c). At this time, the Department does not propose any changes to 29 CFR 825.106(c), however, it invites comments on this provision. In particular, the Department is interested in whether commenters believe the current test for determining the primary employer is appropriate in light of proposed §§ 791.110 through 791.120 and what changes or alternatives, if any, commenters may suggest.

The Department is not proposing to make any changes to 29 CFR 825.104(c)(2), which provides that separate businesses or entities may be considered to be parts of a single employer for FMLA purposes if they satisfy the "integrated employer" test.[272]

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[272] *See supra* fn. 139.

The Department welcomes comments on all aspects of its proposed revisions to 29 CFR 825.106(a).

H. Proposed Revisions to 29 CFR Part 780

The Department is proposing to revise two references to joint employment in 29 CFR part 780, which provides guidance regarding the exemptions in the FLSA applicable to agriculture, processing of agricultural commodities, and related subjects. 29 CFR 780.305(c) addresses situations where a farmer may be a joint employer with a contractor who supplies "harvest hands," and 29 CFR 780.331(d) addresses situations where a farmer may be a joint employer with a "crew leader" who supplies employees. Both regulations provide factors for determining joint employment that substantially overlap with the factors in proposed § 791.115(a). Nonetheless, and to ensure that its regulatory guidance regarding FLSA joint employment is uniform, the Department is proposing to revise the two references in part 780 so that they cross-reference part 791.

Specifically, the Department proposes to replace the first sentence of 29 CFR 780.305(c) and the regulatory citation that follows with: "Whether a farmer whose crops are harvested by an independent contractor is considered to be a joint employer with the contractor who supplies the harvest hands shall be determined by applying the criteria set forth in §§ 791.110 through 791.125 of this chapter." And the Department proposes to replace the first sentence of 29 CFR 780.331(d) and the case citations that follow with: "Whether or not a labor contractor or crew leader is found to be a bona fide independent contractor, whether the employees of the labor contractor or crew leader are jointly employed by the farmer who is using their labor shall be determined by applying the criteria set forth in §§ 791.110 through 791.125 of this chapter."

The Department welcomes comments on all aspects of its proposed revisions to 29 CFR part 780.

I. Severability (Proposed § 791.130)

The Department proposes to readopt as § 791.130 the regulatory text from the 2020 Rule which provided that any provision of part 791 found to be invalid or unenforceable "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."[273] For example, as was the case in the 2020 Rule, the Department's proposed analysis here for assessing vertical joint employment would be independent and severable from its proposed analysis for assessing horizontal joint employment.[274] However, in reaction to concerns identified in the Department's withdrawal of the 2020 Rule, the Department has organized the proposed regulatory text in this NPRM to ensure that each provision would not be "difficult and impractical … to remain alone" in the event that other provisions are invalidated, enjoined, or otherwise not put into effect.[275]

The Department welcomes comments on all aspects of its proposed severability provision at § 791.130.

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 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 PRA. The Department welcomes comments on this determination.

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[273] 29 CFR 791.3 (2020).
[274] *See Scalia*, 490 F. Supp. 3d at 795–96.
[275] 86 FR 40954.

V. Preliminary Regulatory Impact Analysis (PRIA) Conducted In Accordance with Executive Order 12866, Regulatory Planning and Review, and Executive Order 13563, Improving Regulation and Regulatory Review, and Executive Order 14192, Unleashing Prosperity Through Deregulation

Under Executive Order 12866, OMB's Office of Information and Regulatory Affairs (OIRA) determines whether a regulatory action is significant and, therefore, subject to the requirements of the Executive Order and OMB review.[276] Section 3(f) of Executive Order 12866 defines a "significant regulatory action" as a regulatory action that is likely to result in a rule that may: (1) have an annual effect on the economy of $100 million or more, or adversely affect in a material way a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities (also referred to as economically significant); (2) create serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. OIRA has determined that this proposed rule is a significant regulatory action under section 3(f) of Executive Order 12866.

Executive Order 13563 directs agencies to, among other things, propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; that it is tailored to impose the least burden on society, consistent with obtaining the regulatory objectives; and that, in choosing among alternative regulatory approaches, the agency has selected those approaches that maximize net benefits. Executive Order 13563 recognizes that some costs and benefits are difficult to quantify and provides that, when appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.[277]

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[276] *See* Regulatory Planning and Review, 58 FR 51735, 51741 (Oct. 4, 1993).
[277] *See* Improving Regulation and Regulatory Review, 76 FR 3821 (Jan. 21, 2011).

Executive Order 14192, titled "Unleashing Prosperity Through Deregulation," was issued on January 31, 2025. This rule, if finalized as proposed, is expected to be an E.O. 14192 deregulatory action, as the Department estimates that the recurring cost savings attributable to the proposed rule—including reduced compliance costs and reduced litigation costs, as well as the avoided "opportunity costs of … previously foregone activities"[278]—would exceed one-time regulatory familiarization costs. The analysis below outlines the impacts that the Department anticipates may result from this proposed rule and was prepared pursuant to the above-mentioned executive orders.

A. Introduction

1. Background and Need for Rulemaking

An employee may have multiple employers. In most cases, each employment will be distinct from the others, and each employer will be responsible on its own for complying with the law with respect to the employee. In some cases, however, two or more employers may employ the employee in a manner that makes them joint employers of the employee such that they are together responsible for complying with the law with respect to the employee.

This rulemaking proposes to revise the analysis the Department would apply to determine joint employer status under Fair Labor Standards Act (FLSA), the Family and Medical Leave Act (FMLA), and the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), which are enforced by the Department's Wage and Hour Division (WHD). The FMLA and MSPA both incorporate the FLSA's statutory definitions of employment,[279] suggesting that the same analysis

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[278] OMB Memo M-25-20, "Guidance Implementing Section 3 of Executive Order 14192, Titled 'Unleashing Prosperity Through Deregulation'" at 11 (Mar. 26, 2025); *see also* OMB Circular A-4 at 37 (Sept. 17, 2003), https://www.whitehouse.gov/wp-content/uploads/2025/08/CircularA-4.pdf.

[279] *See* 29 U.S.C. 1802(5) (providing that the term "employ" for the purposes of MSPA has the meaning given such term under section 3(g) of the FLSA); 29 U.S.C. 2611(3) (providing that the terms "employee" and "employ" for purposes of the FMLA have the same meaning that such terms are given under the FLSA).

to determine whether joint employment exists under the FLSA should determine whether joint employment exists under the FMLA and MSPA.

Under the FLSA, joint employers are jointly and severally liable for any wages, damages, and penalties owed to the employee(s), and an employee's total hours worked each week for all joint employers is used to determine the employee's entitlement to overtime pay. Similarly, under MSPA, each joint employer must ensure that the employee receives all applicable employment-related rights granted by MSPA, such as accurate and timely disclosure of the terms and conditions of employment, written payroll records, and payment of wages when due.[280] Under the FMLA, employees who are jointly employed by two or more employers must be counted by all joint employers in determining employer coverage and employee eligibility under the FMLA,[281] though only an employee's "primary employer" is responsible for giving required notices to the employee, providing FMLA leave, and maintaining health benefits.[282] In most instances, job restoration is the primary responsibility of the primary employer; a secondary employer may also be responsible in certain circumstances for restoring the employee to the same or equivalent job upon return from FMLA leave.[283]

Joint employment generally arises in two contexts, commonly described as "vertical" or "horizontal." In "vertical" joint employment, an employee is jointly employed by two or more employers that simultaneously benefit from the employee's work. Typically, the employee works one set of hours and there is no dispute that the employee has at least one employer for the work; the issue is whether another person that also benefits from the work is the employee's joint employer. This scenario is described as "vertical" because it often centers around whether business partners which are higher or lower in a particular industry structure—such as

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[280] *See* WHD Fact Sheet #35: Joint Employment and Independent Contractors Under the Migrant and Seasonal Agricultural Worker Protection Act, https://www.dol.gov/agencies/whd/fact-sheets/35-mspa-joint-employment.
[281] *See* 29 CFR 825.106(d).
[282] *See* 29 CFR 825.106(c).
[283] *See* 29 CFR 825.106(e).

contractors and subcontractors or staffing agencies and their clients—are joint employers of the employee. By contrast, in "horizontal" joint employment, an employee works separate hours for two (or more) employers in the same workweek, and the employers are sufficiently associated with each other such that they are joint employers. Typically, it is undisputed that each employer employs the employee for some hours worked, and the issue is whether the employers are sufficiently associated with each other with respect to the employment of the employee.

As explained more fully in section II, the Department believes that rulemaking is necessary to restore clarity and consistency regarding joint employer status under the FLSA, FMLA, and MSPA. The Department has not maintained regulatory guidance addressing FLSA joint employment since July 2021, when it rescinded its earlier FLSA joint employer regulation. The absence of such guidance has created uncertainty for businesses, workers, and courts, particularly in "vertical" scenarios where multiple entities are simultaneously benefiting from the same work performed by one or more workers. In such FLSA cases, the Department has been applying a vertical joint employment standard consistent with the judicial precedent that may apply in that case, which varies throughout the Federal courts. Meanwhile, the Department's existing FMLA and MSPA regulations articulate joint employment standards that are different from each other and from the FLSA standard that the Department is proposing to adopt—an outcome at odds with the understanding that the standard for determining joint employer status should align under all three laws, which share the same statutory definitions of employment. Finally, the Department believes that regulated entities would benefit from regulatory guidance about certain business models and business practices that, standing alone, would not make joint employer status more or less likely under the FLSA, FMLA, or MSPA.

Accordingly, in this rulemaking, the Department is proposing to restore a regulation for determining joint employer status under the FLSA at 29 CFR part 791, where it was located prior to 2021. Additionally, the Department is proposing to revise the regulations addressing joint

employer status under the FMLA and MSPA so that the FLSA analysis in part 791 applies when determining joint employer status under those statutes.

2. Summary of the Analysis

This preliminary analysis addresses the potential benefits, costs, cost savings, and transfer effects that the Department expects would result if the proposed rule were adopted in a future final rule. Consistent with its approach in other rulemakings, the Department has prepared an estimate of regulatory familiarization costs, all of which would occur within the first year of the rule's implementation. Due to data limitations and inherent uncertainty over whether and how different parties such as businesses, workers, and courts might respond to this rulemaking, the Department's preliminary analysis of other potential effects attributable to the proposed rule (including potential benefits and cost savings) is qualitative. However, the Department believes that the unquantified benefits and cost savings of this rulemaking (including cost savings attributable to reduced compliance costs and reduced litigation costs) would significantly outweigh initial familiarization costs, particularly since benefits and cost savings would be perpetual.[284]

The Department estimates that a future final rule would result in initial undiscounted regulatory familiarization costs ranging between $425.17 million (a lower bound estimate) and $544.53 million (an upper bound estimate). Because the proposed rule would not impose any new requirements on regulated entities, the Department does not expect that this rulemaking would result in any other meaningful costs. Assuming for the sake of analysis that initial regulatory familiarization costs could be spread out over a 10-year period, the Department estimates that the proposed rule would have an annualized cost ranging from $42.52 million to $54.45 million at a discount rate of 7 percent in 2024 dollars.

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[284] *See* 84 FR 68767 (explaining in a 2019 final rule addressing the calculation of overtime pay that "[unquantified] cost savings will outweigh [quantified] regulatory familiarization costs … [because] the potential cost savings … will continue into the future, saving employers valuable time and resources").

As the Department has noted in its earlier rulemakings on this topic, the Department does not currently have data on the number of businesses that are or might be in joint employment relationships.[285] The Department requests comments, studies, and data on the prevalence of joint employment, how this proposed rule might affect the businesses and workers involved in such relationships, and how to quantify those impacts, if such quantification is possible. The Department also requests comments and data on any additional potential benefits, costs, cost savings, and transfer effects of this proposed rule.

Exhibit 1 - Estimated Monetized Costs of the Proposed Rule [2024 $millions]		
	Net Costs (Upper Bound)	Net Costs (Lower Bound)
Undiscounted 10-Year Total	$544.53	$425.17
10-Year Present Value with a discount rate of 3%	$560.86	$437.92
10-Year Present Value with a discount rate of 7%	$582.64	$454.93
10-Year Average	$54.45	$42.52
Annualized at a discount rate of 3%	$56.09	$43.79
Annualized at a discount rate of 7%	$58.26	$45.49

B. Potential Costs

1. Rule Familiarization

Adopting new regulations and revising existing regulations interpreting joint employer status would impose a one-time regulatory familiarization cost on private businesses and state and local government entities. To estimate these regulatory familiarization costs, the Department determined: (1) the number of potentially affected entities; (2) the average hourly compensation of the employees reviewing the regulation; and (3) the amount of time required to review the regulations.

[285] *See* 85 FR 2854; *see also* 86 FR 40955.

i. Number of Potentially Affected Entities

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 regulations. Larger businesses might review the regulations 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 these costs, 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 proposed rule was drafted are from the 2022 Statistics of U.S. Businesses (SUSB), which reports 6.5 million private firms and 8.3 million private establishments with paid employees.[286] Included in these estimates are many businesses such as restaurants (797,836 establishments), hotels (56,920 establishments), and construction companies (860,651 establishments), each within industry sectors that may be more affected by this proposed rule than others. Additionally, the Department estimates 90,888 state and local governments (2022 Census of Governments) might incur familiarization costs.[287]

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 the new and revised regulations include any provisions that may affect them or their employees.

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[286] Statistics of U.S. Businesses 2022, https://www.census.gov/programs-surveys/susb.html, 2022 SUSB Annual Data Tables by Establishment Industry.
[287] 2022 Census of Governments - Organization.

ii. Hourly Compensation Rates

The Department used the hourly compensation rate presented in Exhibit 2 to estimate the rule familiarization costs below in the Subject-by-Subject Analysis. BLS's OEWS data show that the mean hourly wage for a Compensation, Benefits, and Job Analysis Specialists (SOC code 13-1141) is $39.86.[288] The Department used a 46-percent benefits rate[289] and a 17-percent overhead rate:[290]

Exhibit 2 – Compensation Rates [2024 dollars]

Position	Base Hourly Wage Rate (a)	Loaded Wage Factor (b)	Overhead Cost (c)	Hourly Compensation Rate (a + b + c)
Compensation, Benefits, and Job Analysis Specialist	$39.86	$18.34 ($39.86 × 0.46)	$6.78 ($39.86 × 0.17)	$64.97

iii. Time to Review

The Department judges 1 hour per entity, on average, to be an appropriate review time for the proposed rule. The Department believes that an hour, on average, is appropriate, because while some firms and establishments primarily impacted by the proposed rule would spend longer than one hour to review a rule, numerous other establishments may rely on Departmental or third-party summaries of the rule or spend little or no time reviewing the rule. Moreover, the relevant statutory definitions have been in the FLSA since its enactment in 1938. The Department has recognized the concept of joint employer status under the FLSA since at least 1939, and the Department issued its first FLSA regulation interpreting joint employer status in

[288] BLS, Occupational Employment and Wage Statistics, SOC Code 13-1141, May 2024, https://data.bls.gov/oes/#/industry/000000.
[289] BLS, Employer Costs for Employee Compensation – September 2025, Employer Costs for Employee Compensation Summary - 2025 Q02 Results [Benefits rate based on compensation rates for civilian workers].
[290] Cody Rice, U.S. Environmental Protection Agency, "Wage Rates for Economic Analyses of the Toxics Release Inventory Program," June 10, 2002, https://www.regulations.gov/document/EPA-HQ-OPPT-2014-0650-0005.

1958 and its first such regulations under MSPA and the FMLA decades ago, both of which borrowed from the Department's then-existing FLSA regulation. 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. The Department invites feedback from commenters on this determination.

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

NAICS Sector	By Firm		By Establishment	
	Firms	Cost [a]	Establishments	Cost [a]
Agriculture, Forestry, Fishing and Hunting	22,599	1,468	23,332	1,516
Mining, Quarrying, and Oil/Gas Extraction	17,341	1,127	23,180	1,506
Utilities	6,772	440	20,425	1,327
Construction	782,487	50,838	800,651	52,018
Manufacturing	239,265	15,545	285,500	18,549
Wholesale Trade	277,932	18,057	388,706	25,254
Retail Trade	645,404	441,932	1,045,890	67,951
Transportation and Warehousing	237,527	15,432	294,354	19,124
Information	89,332	25,804	160,946	10,457
Finance and Insurance	244,536	15,888	480,546	31,221
Real Estate and Rental and Leasing	366,557	23,815	466,656	30,319
Professional, Scientific, and Technical Serv.	872,305	56,674	974,303	63,300
Management of Companies and Enterprises	25,413	1,651	51,218	3,328
Administrative and Support Services	376,192	23,077	450,481	27,408
Educational Services	103,287	6,711	114,806	7,459
Health Care and Social Assistance	693,801	45,076	976,418	63,438
Arts, Entertainment, and Recreation	148,290	9,634	162,960	10,588
Accommodation and Food Services	574,723	37,340	771,856	50,147
Other Services (except Public Admin.)	729,236	47,378	797,836	51,835
State and Local Governments	90,888	5,905	90,888	5,905
All Industries	6,543,887	415,524	8,380,952	539,158
Average annualized costs, 7 percent discount rate				
Over 10 years	$44,461		$57,690	
Average annualized costs, 3 percent discount rate				
Over 10 years	$42,799		$55,533	

[a] Each firm or establishment is expected to allocate 30 minutes of Compensation, Benefits, and Job Analysis Specialists' (SOC 13-1141) time for regulatory familiarization. The mean hourly rate for this occupation is $39.86 based on BLS's May 2024 Occupational Employment Statistics, and the wage load factor is 1.63 (0.46 for benefits and 0.17 for overhead). Therefore, the per-entity cost is $64.97.
Source for number of firms and establishments in each NAICS sector: Statistics of U.S. Businesses 2022, https://www.census.gov/programs-surveys/susb.html, 2022 SUSB Annual Data Tables by Establishment Industry; 2022 Census of Governments, 2022 Census of Governments, Organization Tables.

The Department estimates that the undiscounted lower bound of regulatory familiarization cost range would be $425.17 million, and the undiscounted upper bound would be $544.53 million. Additionally, the Department estimates that the Retail Trade industry would have the highest upper bound ($67.95 million), while the Professional, Scientific and Technical Services industry would have the highest lower bound ($56.67 million). The Department estimates that all regulatory familiarization costs would occur in Year 1.

Additionally, the Department estimates average annualized costs of this proposed rule over 10 years and in perpetuity. Over 10 years, this proposed rule would have an average annual cost of $45.49 million to $58.26 million, calculated at a 7 percent discount rate ($43.79 million to $56.09 million calculated at a 3 percent discount rate).

2. Other Potential Costs

The Department considered whether this proposed rule would generate additional compliance costs beyond one-time regulatory familiarization. For example, the Department assumes that some firms may choose to adjust their business practices in response to a clearer joint employer analysis (including guidance regarding specific business practices and models which do not make joint employer status more or less likely). Specifically, firms may be more willing to invest in partnerships that enhance operational efficiency, and making the necessary business adjustments to facilitate such partnerships would have costs. However, it is difficult to quantify these effects in monetary terms, as the Department currently lacks data on the number of businesses that might be affected by this rulemaking, the specific costs of transitioning to different business models and business practices, and the extent to which this rulemaking would drive adoption of new business models or business practices. The Department welcomes feedback from commenters that may assist in quantifying this expected effect, including relevant data, research, or anecdotal evidence.

C. Potential Benefits and Cost Savings

This proposed rule is intended to promote clarity and uniformity in the Department's application of joint employer standards in its enforcement under the FLSA, FMLA, MSPA. To the extent that the proposed rule achieves those goals, the Department anticipates that the proposed rule would have various benefits and cost savings, which are discussed qualitatively below.

1. Reduced compliance costs

The Department anticipates that the proposed rule would reduce the time and money spent by some organizations to determine whether they are joint employers—particularly businesses in potential vertical joint employment relationships such as farms, farm labor contractors, franchisors, franchisees, general contractors, subcontractors, staffing agencies, and staffing agency clients. For example, some entities may be paying outside law firms or in-house attorneys to research and interpret the law governing possible FLSA joint employer liability and advise whether particular business practices could increase that possibility. Relatedly, FLSA-covered businesses which are also subject to the FMLA and/or MSPA may be incurring compliance costs to ascertain whether and to what extent the standard for joint employment may differ between the FLSA, FMLA, and/or MSPA. By establishing a uniform joint employer standard for the Department to apply in its enforcement under all three statutes, this rulemaking could reduce such compliance costs.

The Department lacks data on the compliance costs that businesses presently incur to understand joint employer liability under the FLSA, FMLA, and MSPA, and is uncertain of the extent to which the proposed rule would reduce such costs. The Department invites feedback on this issue.

2. Reduced litigation costs

Added clarity may reduce litigation regarding joint employer status arising under the FLSA, FMLA, and MSPA, including litigation between multiple parties regarding the allocation

of liabilities and monetary damages. The proposed rule may also reduce the cost of such litigation, to the extent that the rulemaking promotes uniformity in the joint employer tests applied by courts or reduces disputes between litigants over the applicable criteria to determine joint employer status. Finally, entities which might better understand as a result of a clearer standard that they are joint employers might be more likely to avoid violations of the FLSA, FMLA, and MSPA, reducing the likelihood of disputes under those laws.

The Department welcomes feedback from commenters regarding how this effect might be quantified.

3. Increased prevalence of beneficial business practices

Though not specific to joint employer liability, there is a wide body of scholarship emphasizing that legal uncertainty can deter investment, innovation, and other beneficial economic activity.[291] Here, by clarifying the standard for determining joint employment under the FLSA, FMLA, and MSPA, the proposed rule would assist entities that might be hesitant to enter into certain relationships or engage in certain kinds of business practices out of concerns that they may be liable as a joint employer. For example, entities could rely on the guidance in proposed § 791.125 to more confidently engage in various beneficial business practices, such as: using or establishing an association health plan or association retirement plan with other businesses; providing a sample employee handbook, or other forms, to another business; jointly participating with another business in an apprenticeship program; or negotiating certain contractual provisions with other businesses, such as requiring workplace safety practices, anti-harassment policies, or other measures intended to encourage compliance with the law or to

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[291] *See* Avinash Dixit and Robert Pindyck, *Investment Under Uncertainty*, at 9 (1994), https://msuweb.montclair.edu/~lebelp/DixitPindyck1994.pdf ("Reduction or elimination of unnecessary uncertainty may be the best kind of public policy to stimulate investment."); *see also, e.g.*, Ryu, Dean, *The Pricing and Economic Impact of Legal Risk* (Sept. 25, 2024), https://ssrn.com/abstract=4967369 or http://dx.doi.org/10.2139/ssrn.4967369; Lee, Jiwon and Schoenherr, David and Starmans, Jan, *The Economics of Legal Uncertainty* (Jan. 14, 2026) https://ssrn.com/abstract=4276837; Marcus, Alfred A., *Policy Uncertainty and Technological Innovation* (1981), https://doi.org/10.5465/amr.1981.4285783.

promote other desired business practices. Notably, many of these business practices would be beneficial for workers and consumers as well as businesses.

Beyond the specific practices identified in proposed § 791.125, the Department expects that clarifying the standard for determining joint employment as a general matter would encourage innovation and economic growth, as businesses would be more willing to invest in partnerships that enhance operational efficiency. However, it is difficult to quantify these effects in monetary terms, as the Department currently lacks data on the number of businesses that might be affected by this rulemaking, the degree to which such businesses are presently foregoing certain business models or business practices due to the possibility of joint employer liability, the specific opportunity costs of such foregone business models and business practices, and the extent to which this rulemaking would reduce or eliminate these undesirable outcomes. The Department welcomes feedback from commenters that may assist in quantifying this expected effect, including relevant data, research, or anecdotal evidence.

4. Improved enforcement of wage and hour laws

The proposed rule would enhance the Department's ability to enforce compliance with the FLSA, FMLA, and MSPA by having a clear and uniform standard for determining joint employment. A clear, consistent standard to apply during enforcement allows investigators to utilize a uniform analysis across various cases, conserving the Department's enforcement resources and leading to more consistent outcomes. Also, having clearer regulatory guidance and improved enforcement capabilities would likely result in faster resolutions to disputes, which in turn could benefit employees in obtaining faster relief for wage theft or other employment violations.

5. Improved worker awareness of available rights and remedies

By reaffirming that the FLSA, FMLA, and MSPA contemplate the possibility of joint employment and providing a uniform standard to determine when it exists, the proposed rule would help workers to better understand their rights and available remedies. For example,

proposed § 791.110(b) clarifies that, when an employee works separate hours for two (or more) joint employers in the same workweek, the employee's total hours worked across the workweek for each of the employers must be aggregated for purposes of FLSA compliance. Guidance to this effect existed in the Department's regulations prior to 2021,[292] but because the Department rescinded the entirety of its FLSA joint employer regulation in 2021, some workers in a horizontal joint employment scenario (such as the one addressed in WHD Opinion Letter FLSA2025-5) might not be aware of their entitlement to overtime pay resulting from aggregated hours worked across employers. And even if such workers are aware that joint employment is a possibility, the absence of any regulatory guidance may deter or delay the worker from asserting their rights or filing a complaint with the Department—steps which may be cost prohibitive for workers without the time, resources, or knowledge to perform their own legal research.

Restoring regulatory language that affirms the concept of joint employment and its FLSA consequences would benefit such workers. Relatedly, by providing a clear and uniform standard to determine when joint employment exists under the FLSA, FMLA, and MSPA, the proposed rule would better position workers who are jointly employed to assert their rights and, if necessary, seek redress from all parties who are liable as their employers.

D. Potential Transfers

Transfer payments are monetary payments from one group to another that do not affect total resources available to society (or, if resources are affected, it is through incentive effects uncaptured without more extensive analysis).[293] Consistent with this definition, the Department has historically characterized expected wage effects (or "labor cost" effects) as transfer payments, whether from businesses to workers, or from workers to businesses, or between

[292] *See* 29 CFR 791.2(a) (2019).
[293] OMB Circular A-4 at 38.

subsets of affected workers.[294] In this rulemaking, the Department does not expect that there would be significant transfer effects as a consequence of the proposed rule, although some workers in vertically-tiered industries may, in some cases, have more or less difficulty collecting their owed wages. More generally, there is a correlation between the benefits and cost savings discussed above and the potential transfer effects discussed in this section.

As an initial matter, nothing in the proposed rule would reduce the wages owed to employees under the FLSA or MSPA. Although the presence or absence of joint employment can affect the amount of overtime pay due to employees who work separate sets of hours for multiple employers in the same workweek,[295] § 791.120 of the proposed rule reflects the Department's current and longstanding approach for determining joint employer status in this "horizontal" scenario.[296] Thus, if the proposed rule were adopted, there would be no change in the Department's aggregation of workers' hours to determine overtime hours worked.

With respect to "vertical" joint employment scenarios (where an employee's work simultaneously benefits two or more joint employers), the Department acknowledges that, in 2021, it expressed agreement with commenter concerns that its earlier 2020 Rule would have harmed workers by "ma[king] it more difficult to collect back wages owed" and "incentiviz[ing] companies to expand their use of temporary staffing agencies, contractors, and subcontractors rather than employing workers directly."[297] The Department believes that such concerns are

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[294] *See, e.g.*, 84 FR 51269–79 (estimating "transfers from employers to employees" attributable to increases in earnings thresholds required to exempt certain salaried workers from the FLSA's wage and hour requirements); 83 FR 48539–40 (Sept. 26, 2018) (estimating "potential transfers from employees to employers when employers no longer have to pay [a certain] minimum wage").

[295] In the horizontal 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 employment in this situation can result in some hours qualifying for an overtime premium. For example, if the employee works 40 hours for employer A in a workweek and 10 hours for employer B 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.

[296] *See supra* section III.E.

[297] 86 FR 40950, 40952; *see also Scalia*, 490 F. Supp. 3d at 793–95 (partially invalidating the 2020 Rule in part because it failed to "adequately consider [its] cost to workers").

largely inapplicable to this rulemaking, which would provide an analysis resulting in a broader scope of vertical joint employment than the 2020 Rule that is similar to the analysis applied by many courts.[298] The intended outcome of this rulemaking is to clarify the standard for determining joint employer status under the FLSA based on Supreme Court precedent, seminal appellate court caselaw, and the Department's early guidance.

However, the Department acknowledges that the analysis for vertical joint employment in proposed § 791.115 may not result in as broad a scope of vertical joint employment as the analysis applied by some courts or the analysis provided in the Department's current MSPA regulation at 29 CFR 500.20(h)(5).[299] For example, unlike the current MSPA regulation, the proposed analysis does not consider "[t]he extent to which the services rendered by the worker(s) are repetitive, rote tasks requiring skills which are acquired with relatively little training" as a relevant factor in determining whether a particular worker is jointly employed.[300] Thus, under the proposed analysis, the Department might be slightly less likely to find that farmworkers engaged in repetitive tasks are jointly employed for MSPA purposes as compared to a baseline scenario where the Department continues applying its current MSPA regulation, although they certainly could be jointly employed under the proposed analysis in light of the other considerations entailed. The Department notes that, despite some differences, the proposed rule's analysis for vertical joint employment considers many of the same factors as the current MSPA regulation[301] and expects that the two standards would reach the same outcome in most cases.

Because the proposed rule's analysis might narrow the scope of vertical joint employment for some workers (i.e., farmworkers subject to MSPA or workers in jurisdictions

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[298] See *infra*, section V.F.1. (evaluating the 2020 Rule as a regulatory alternative to the analysis proposed here).
[299] *See infra*, section V.F.3. (evaluating the current MSPA regulation as a regulatory alternative to the analysis proposed here).
[300] *Compare* 29 CFR 500.20(h)(5)(iv)(D) *with supra* section III.D.6. (explaining the identification of worker skill as an irrelevant factor for joint employment in proposed § 791.115(f)).
[301] *Compare, e.g.*, 29 CFR 500.20(h)(5)(iv)(A), (B) & (G) *with* proposed § 791.115(a).

where courts might apply a broader FLSA or FMLA analysis), it could reduce, in some cases, the number of persons who are responsible for ensuring that employee rights under those statutes are fulfilled, including the payment of owed wages. This, in turn, may, for example, reduce the amount of wages that some employees collect under the FLSA and MSPA if their employer is unwilling or unable to comply with the law, such as where an employer is or becomes insolvent. However, in light of the proposed analysis' similarity to the analysis applied by many courts,[302] the magnitude of this effect is unlikely to be significant.

A transfer flowing instead from employers to workers (though different employers and workers than the ones experiencing the just-noted effect associated with the concept of vertical joint employment) might also occur, to the extent that the proposed rule improves the Department's ability to bring enforcement actions or raises employee awareness about the possibility of joint employment, as discussed above.

The Department welcomes feedback on this preliminary analysis of potential transfer effects and invites data or evidence from commenters that might help the Department to quantify any wage transfers attributable to this rulemaking.

E. Regulatory Alternatives

When proposing a significant regulatory action, Executive Order 12866 requires agencies to conduct "[a]n assessment, including the underlying analysis, of costs and benefits of potentially effective and reasonably feasible alternatives to the planned regulation."[303] Here, in addition to "the alternative of not regulating,"[304] the Department considered three alternatives to the proposed rule, addressed below in ascending order of stringency (*i.e.*, from the narrowest to

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[302] *See supra*, section III.D.1. (explaining that "the Department's proposed multi-factor balancing test is like the tests applied by many courts" and "is by far the closest thing to a common denominator applied by courts when determining FLSA vertical joint employment").
[303] Exec. Order No. 12866 § 6(a)(3)(C)(iii), 58 FR 51741.
[304] Exec. Order No. 12866 § 1, 58 FR 51735. Section II of this NPRM explains why there is a compelling need for this rulemaking.

the broadest scope of joint employment)[305]: (1) readopting the joint employer analysis from the Department's 2020 Rule; (2) readopting the joint employer analysis from the Department's pre-2020 FLSA regulation; or (3) adopting a joint employer analysis identical to the guidance provided in Administrator's Interpretation No. 2016-1. Consistent with the approach taken in this rulemaking, the Department assumed for each of the alternatives that the same joint employer analysis adopted for FLSA purposes would also apply to determine joint employer status under the FMLA and MSPA, consistent with statutory language for all three laws.

The analysis of each regulatory alternative is qualitative due to the same uncertainties and data limitations which necessitate a largely qualitative preliminary analysis of the proposed rule. However, the Department welcomes feedback on these regulatory alternatives, including any evidence or data that might be helpful in quantifying potential effects, and invites suggestions for any other regulatory alternatives that commenters believe would be feasible and appropriate.

1. ***Readopting the Joint Employer Analysis from the Department's 2020 Rule***

Under this alternative, the Department would readopt the FLSA analysis from the Joint Employer Rule published in January 2020 and rescinded in July 2021 and also apply that analysis to determine joint employment under the FMLA and MSPA. There are many similarities between the 2020 Rule's joint employer analysis and the analysis proposed in this rulemaking, such as how the 2020 Rule distinguished between horizontal and vertical joint employment;[306] maintained the Department's longstanding analysis for horizontal joint employment;[307] clarified the distinction between joint employer status and independent contractor status;[308] and identified

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[305] OMB guidance advises that, where possible, agencies should analyze at least one "more stringent option" and one "less stringent option" to the proposed approach. OMB Circular A-4 at 16.

[306] *Compare* section III.C. *supra* and proposed § 791.110 *with* 85 FR 2825 (discussing "Two Joint Employer Scenarios").

[307] *Compare* section III.E. *supra* and proposed § 791.120 *with* 85 FR 2844–45 (discussing "non-substantive revisions" to the Department's pre-2020 guidance on horizontal joint employment).

[308] *Compare* section III.D.6. *supra* and proposed § 791.115(f) *with* 85 FR 2837 (discussing "factors for determining whether a worker is an employee or independent contractor … [which] are not relevant for determining whether additional persons are jointly liable under the [FLSA]").

certain business models and business practices which do not make joint employer status more or less likely.[309] However, there are also several important differences. For example, unlike the analysis proposed in this rulemaking, the 2020 Rule: (1) rejected the relevance of the term "employ" in section 3(g) of the FLSA;[310] (2) rejected the relevance of "economic dependence" and related factors;[311] (3) advised that an individual or entity "must actually exercise" one or more of the four enumerated factors to be a vertical joint employer;[312] and (4) advised that "allowing [an] employer to operate a business on [another company's] premises … does not make joint employer status more or less likely under the [FLSA]."[313]

The Department considers this alternative to be less stringent than the analysis in this proposed rule because the four differences described above (and others) would narrow the circumstances under which an entity could be found to be a vertical joint employer. Thus, applying this standard uniformly across the FLSA, FMLA, and MSPA may reduce compliance obligations and expected liability exposure for some businesses operating through subcontracting, staffing, or franchising arrangements, while also reducing the ability of some employees to collect wages owed to them under the FLSA or MSPA, to the extent that the employee's other employer (such as a staffing agency, subcontractor, or franchisee) is unable or unwilling to pay.[314]

The Department does not prefer this alternative. As noted earlier, the 2020 Rule was partially invalidated in September 2020 by the U.S. District Court for the Southern District of

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[309] *Compare* section III.F. *supra* and proposed § 791.125 *with* 85 FR 2839–44.
[310] The 2020 Rule advised that a "person [who] simultaneously benefits" from the work of another employer's employee is a joint employer "*only* if that person is acting directly or indirectly in the interest of the employer in relation to the employee," on the grounds "that section 3(d)—not sections 3(e) or 3(g)—is the statutory basis for determining joint employer status under the [FLSA]." 85 FR 2828 (emphasis added).
[311] *See* 29 CFR 791.2(c) (2020) (advising that "[w]hether [an] employee is economically dependent on the potential joint employer is not relevant for determining the potential joint employer's liability under the [FLSA]" and that "no factors should be used to assess economic dependence").
[312] 29 CFR 791.2(a)(3)(i) (2020).
[313] 29 CFR 791.2(d)(5) (2020).
[314] *See* 85 FR 2853; *see also* 86 FR 40952.

New York, which concluded that the rule provided a novel standard for vertical joint employment that was "impermissibly narrow" for the FLSA[315]—a conclusion the Department later endorsed when it rescinded the 2020 Rule in July 2021.[316] In light of this history, the Department has concerns that readopting the 2020 Rule and particularly its vertical joint employment analysis would carry greater legal risk than the analysis proposed in this rulemaking, undermining the Department's goal of adopting a uniform analysis for joint employment under the FLSA, FMLA, and MSPA that courts find persuasive. As explained in section III, the vertical joint employer analysis proposed in this rulemaking is more consistent with longstanding judicial precedent than the analysis that was adopted in the 2020 Rule, which the Department acknowledged at the time "clearly differs" from the judicial precedent in most federal circuits.[317] Accordingly, the Department expects that the analysis proposed in this rulemaking would be more likely to influence courts than the 2020 Rule,[318] which in turn would increase the likelihood that this rulemaking achieves the kinds of beneficial outcomes that motivated the 2020 Rule, such as promoting innovation and certainty in business relationships, reducing compliance costs for organizations operating in multiple jurisdictions, and reducing litigation over the allocation of FLSA-related liability and damages.[319]

2. Readopting the Joint Employer Analysis from the Department's Pre-2020 Regulation

Under this alternative, the Department would readopt the FLSA joint employer regulation that was in effect from 1958 until it was superseded by the 2020 Rule and amend the joint employer provisions in the Department's FMLA and MSPA regulations to align their standards. As discussed in section I.B. of this NPRM, the Department's pre-2020 FLSA regulation provided

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[315] *New York v. Scalia*, 490 F. Supp. 3d 748, 786 (S.D.N.Y. 2020).
[316] *See* 86 FR 40939.
[317] 85 FR 2824.
[318] *See* 86 FR 40950 ("[T]here has been no widespread adoption of the [2020] Rule's vertical joint employment analysis, and the [2020] Rule has not significantly affected judicial analysis of FLSA joint employment cases.").
[319] *See* 85 FR 2853–54 (discussing such outcomes).

general guidance advising that joint employment exists where employers are "not completely disassociated" with respect to the employment of a particular worker, "depend[ing] upon all the facts in the particular case."[320] The pre-2020 regulation was longstanding (having been introduced in 1958, imitating earlier interpretive guidance), but it did not articulate a detailed analysis for assessing vertical joint employment.[321] Accordingly, the Department's pre-2020 regulation was not influential in shaping FLSA judicial precedent deciding vertical joint employment cases. For example, the Supreme Court did not apply or even mention the Department's pre-2020 FLSA regulation when it found vertical joint employment in 1973 when deciding *Falk v. Brennan*, 414 U.S. 190 (1973), and federal appellate courts usually applied analyses other than the analysis in the pre-2020 regulation when deciding vertical joint employment cases. *See, e.g.*, *Reyes v. Remington Hybrid Seed Co., Inc.*, 495 F.3d 403 (7th Cir. 2007) (not mentioning the pre-2020 regulation); *Wirtz v. Lone Star Steel Co.*, 405 F.2d 668 (5th Cir. 1968) (same); *Aimable v. Long & Scott Farms*, 20 F.3d 434, 438 n.6 (11th Cir. 1994) (citing to the pre-2020 regulation in a footnote); *see also Wirtz v. Hebert*, 368 F.2d 139, 141 (5th Cir. 1966) (concluding it was "unnecessary to consider" the pre-2020 regulation where "[the FLSA] and case law is entirely sufficient, in view of the facts adduced, to sustain the position of the Secretary").

The Department views this alternative as intermediate in stringency, as restoring the pre-2020 regulation would permit a broader scope of joint employment than would have existed under the 2020 Rule. However, the Department maintains that the pre-2020 FLSA regulation provided "ambiguous" guidance that was not particularly helpful to workers, businesses, or the

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[320] 29 CFR 791.2(a) (2019).

[321] *See* AI No. 2016-1 at 3 (advising that "guidance provided in the FLSA joint employment regulation … is useful when analyzing potential *horizontal* joint employment cases" but advising readers to consult "the MSPA joint employment regulation … when analyzing potential vertical joint employment") (emphasis added).

courts when determining vertical joint employment.[322] In particular, the pre-2020 FLSA regulation did not identify any factors for determining vertical joint employment, in contrast to the various multi-factor tests developed by federal courts of appeals in the decades after the Department initially adopted the pre-2020 FLSA regulation (in 1958). For these reasons, the Department declined to restore the pre-2020 regulation when it rescinded the 2020 Rule in July 2021, and the Department does not view this option as a preferable regulatory alternative now.

3. ***Adopting a Joint Employer Analysis Identical to the Guidance Provided in Administrator's Interpretation No. 2016-1***

Under this alternative, the Department would adopt a joint employer standard identical to the one articulated in Administrator's Interpretation No. 2016-1 (the "Joint Employer AI") and apply it uniformly across the FLSA, FMLA, and MSPA. Like the analysis proposed in this rulemaking, the Joint Employer AI provided detailed guidance distinguishing between horizontal and vertical joint employment, explaining that "the focus of a horizontal joint employment analysis is the relationship between the two (or more) employers" while "the vertical joint employment analysis instead examines … the relationships between [workers and potential joint employers]," such as "the construction worker and the general contractor" or "the farmworker and the grower[.]"[323] However, there are several notable differences between the analysis for vertical joint employment proposed in this rulemaking and the analysis discussed in the Joint Employer AI.

For example, unlike this rulemaking, the Joint Employer AI criticized the four-factor *Bonnette* tests applied by "some courts" to assess vertical joint employment—which closely

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[322] 85 FR 2824; *cf. Moldenhauer v. Tazewell-Pekin Consol. Communications Center*, 536 F.3d 640, 644 (7th Cir. 2008) (interpreting similar regulatory text from the current FMLA regulation and concluding that it "does not … provide much guidance in determining the parameters of what constitutes a joint-employment relationship"); *Schubert v. Bethesda Health Group, Inc.*, 319 F. Supp. 2d 963, 970 (E.D. Mo. 2004)("The [FMLA] regulation does not provide much guidance to assist courts in defining the exact boundaries of a joint employment relationship[.]"); *Moreau v. Air France*, 356 F.3d 942, 946 (9th Cir. 2004) (noting that "the FMLA joint employer regulation mirrors the wording of the [pre-2020 FLSA regulation]" but otherwise ignoring both regulations in an FMLA joint employer case).

[323] Joint Employer AI at 5.

resembles the four-factor test described in proposed § 791.115(a)—as "unduly narrow" and "not consistent" with the FLSA, asserting that the four factors "address only or primarily the potential joint employer's control" over workers.[324] Instead, the Joint Employer AI instructed that vertical joint employment under the FLSA or MSPA should be assessed by applying the seven factors in the current MSPA regulation,[325] which—in addition to encompassing the considerations in the four *Bonnette* factors—also includes considerations such as: "[t]he degree of permanency and duration of the relationship of the parties"; "[t]he extent to which the services rendered by the worker(s) are repetitive, rote tasks requiring skills which are acquired with relatively little training"; "[w]hether the activities performed by the worker(s) are an integral part of the overall business operation of the [potential joint employer];" and "[w]hether the work is performed on the [potential joint employer's] premises."[326] In another difference from the approach proposed in this rulemaking, the Joint Employer AI advised that the "ultimate inquiry" of a vertical joint employment analysis is "whether the employee is economically dependent on the potential joint employer,"[327] emphasizing that "the scope of employment relationships and joint employment under the FLSA and MSPA is as broad as possible."[328] Finally, unlike the analysis proposed in this rulemaking, the Joint Employer AI did not identify any factors, business models, or business practices which do not make joint employer status more or less likely.

The Department considers this alternative more stringent than the proposed rule because its application would likely result in greater instances of vertical joint employer findings. Thus, adopting the analysis from the Joint Employer AI would increase compliance costs and litigation exposure for businesses which could be scrutinized as potential vertical joint employers, such as franchisors, general contractors, or staffing agency clients. However, this alternative could

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[324] *Id*. at 13–14 (citing *Baystate Alternative Staffing, Inc. v. Herman*, 163 F.3d 668, 675 (1st Cir. 1998), and *In re Enterprise Rent-A-Car Wage & Hour Emp't Practices Litig.*, 683 F.3d 462, 468–69 (3d Cir. 2012)).
[325] *Id*. at 11–12.
[326] 29 CFR 500.20(h)(5)(iv)(A)–(G).
[327] Joint Employer AI at 13.
[328] *Id*. at 3.

benefit workers by making it easier for them to recover unpaid wages from a joint employer if one employer is unable or unwilling to pay.

The Department does not prefer this alternative, for many of the reasons discussed at length in section III of this NPRM. For example and as explained above, economic dependence should not be the "ultimate inquiry" of the joint employer analysis, as the concept of economic dependence is typically more relevant in determining whether workers are employees in the first instance (as opposed to independent contractors), and some degree of economic dependency on the clients or business partners of an employer is "true of all labor."[329] Relatedly and as also explained above, "the extent to which the services rendered by the worker(s) are repetitive, rote tasks requiring skills which are acquired with relatively little training" is not material to the joint employer analysis, as this factor has nothing to do with the relationship between an employee and any potential joint employer.[330] By contrast, although the four-factor test proposed to determine vertical joint employment in this rulemaking is not exhaustive, it is by far the closest thing to a common denominator among the various multi-factor tests applied by different federal circuit courts and would be simpler to understand and apply than the seven-factor test endorsed by the Joint Employer AI. Finally, because the Joint Employer AI did not identify any factors, business models or business practices that do not make joint employer status more or less likely, adopting the Joint Employer AI would fail to provide the same degree of beneficial clarity and certainty that could result from this rulemaking, as discussed in greater detail in section V.B.1.

VI. Initial Regulatory Flexibility Analysis (IRFA)

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 agencies to prepare an initial regulatory flexibility analysis (IRFA) when they propose any rule that would have a significant economic impact on a substantial number of small

[329] *Remington Hybrid Seed*, 495 F.3d at 407; *see also supra* section III.D.5.
[330] *See supra* section III.D.6.

entities. *See* 5 U.S.C. 603, 605(b). Because this proposed rule could have a significant (beneficial) impact on a significant number of small entities, the Department has prepared this IRFA.

A. Reasons Why Action by the Agency is Being Considered

An employee may have multiple employers. In most cases, each employment will be distinct from the others, and each employer will be responsible on its own for complying with the law with respect to the employee. In some cases, however, two or more employers may employ the employee in a manner that makes them joint employers of the employee such that they are together responsible for complying with the law with respect to the employee. For example, under the Fair Labor Standards Act (FLSA), joint employers are jointly and severally liable for any wages, damages, and penalties owed to the employee(s), and an employee's total hours worked each week for all joint employers is used to determine the employee's entitlement to overtime pay. Similarly, under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), each joint employer must ensure that the employee receives all employment-related rights granted by MSPA, such as accurate and timely disclosure of the terms and conditions of employment, written payroll records, and payment of wages when due.[331] Under the Family and Medical Leave Act (FMLA), employees who are jointly employed by two or more employers must be counted by all joint employers in determining employer coverage and employee eligibility under the FMLA,[332] though only an employee's "primary employer" is responsible for giving required notices to the employee, providing FMLA leave, and maintaining health benefits.[333] Job restoration is the primary responsibility of the primary employer; a secondary

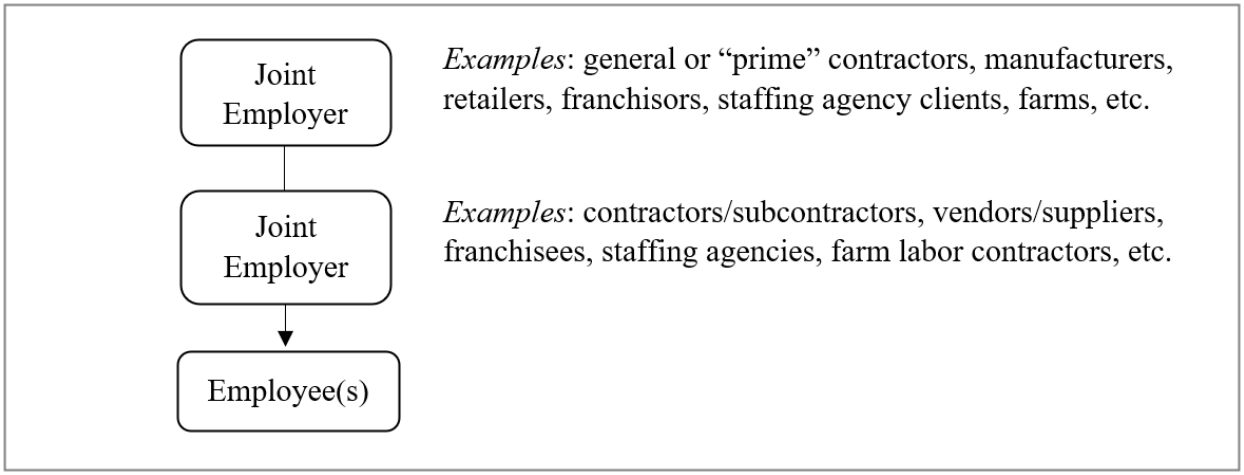
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[331] *See* WHD Fact Sheet #35: Joint Employment and Independent Contractors Under the Migrant and Seasonal Agricultural Worker Protection Act, https://www.dol.gov/agencies/whd/fact-sheets/35-mspa-joint-employment.
[332] *See* 29 CFR 825.106(d).
[333] *See* 29 CFR 825.106(c).

employer may also be responsible in certain circumstances for restoring the employee to the same or equivalent job upon return from FMLA leave.[334]

Joint employment generally arises in two contexts, commonly described as "vertical" or "horizontal." In "vertical" joint employment, an employee is jointly employed by two or more employers that simultaneously benefit from the employee's work. Typically, the employee works one set of hours and there is no dispute that the employee has at least one employer for the work; the issue is whether another person that also benefits from the work is the employee's joint employer. This scenario is described as "vertical" because it often centers around whether business partners which are higher or lower in a particular industry structure—such as contractors and subcontractors or staffing agencies and their clients—are joint employers of the employee.

Figure A: Vertical Joint Employment

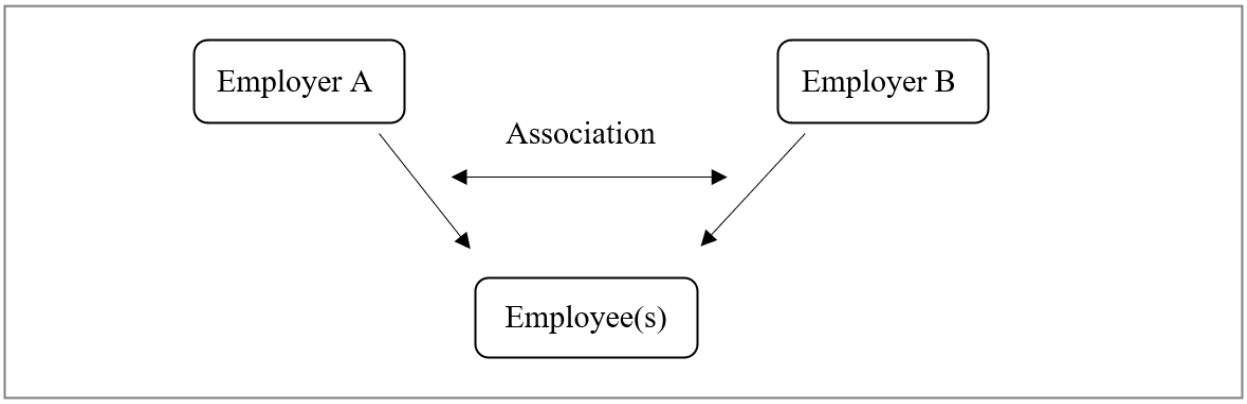


By contrast, in "horizontal" joint employment, an employee works separate hours for two (or more) employers in the same workweek, and the employers are sufficiently associated with each other such that they are joint employers. Typically, it is undisputed that each employer employs the employee for some hours worked, and the issue is whether the employers are sufficiently associated with each other with respect to the employment of the employee.

Figure B: Horizontal Joint Employment

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[334] *See* 29 CFR 825.106(e).



As explained more fully in section II, the Department believes that rulemaking is necessary to restore clarity and consistency regarding joint employer status under the FLSA, FMLA, and MSPA. The Department has not maintained regulatory guidance addressing FLSA joint employment since July 2021, when it rescinded its earlier FLSA joint employer regulation. The absence of such guidance has created uncertainty for businesses, workers, and courts, particularly in "vertical" scenarios where multiple entities are simultaneously benefiting from the same work performed by one or more workers. In such FLSA cases, the Department has been applying a vertical joint employment standard consistent with the judicial precedent that may apply in that case, which varies throughout the Federal courts. Meanwhile, the Department's existing FMLA and MSPA regulations articulate joint employment standards that are different from each other and from the FLSA standard that the Department is proposing to adopt—an outcome at odds with the understanding that the standard for determining joint employer status should align under all three laws, which share the same statutory definitions of employment. Finally, the Department believes that regulated entities would benefit from regulatory guidance about certain business models and business practices that, standing alone, would not make joint employer status more or less likely under the FLSA, FMLA, or MSPA.

Accordingly, in this rulemaking, the Department is proposing to restore a regulation for determining joint employer status under the FLSA at 29 CFR part 791, where it was located prior to 2021. Additionally, the Department is proposing to revise the regulations addressing joint employer status under the FMLA and MSPA so that the FLSA analysis in part 791 applies when

determining joint employer status under those statutes. Finally, the Department proposes to amend 29 CFR 780.305(c) and 29 CFR 780.331(d) so those provisions, which address FLSA joint employment in certain agricultural settings, also cross-reference to the proposed FLSA analysis in restored part 791.

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

The objectives of this rulemaking are to: (1) provide clear and helpful regulatory guidance regarding joint employment under the FLSA, FMLA, and MSPA, including the distinction between horizontal and vertical joint employment; (2) provide an analysis for assessing vertical joint employment that would enhance the Department's ability to consistently enforce the FLSA, FMLA, and MSPA, notwithstanding differences in the various tests applied by courts; (3) promote greater uniformity in the joint employer analysis applied by courts; (4) reduce compliance and litigation costs attributable to legal uncertainty about the current standard for joint employment; and (5) reduce the chill on organizations which may be hesitant to enter into certain relationships or engage in certain kinds of business practices because of uncertainty whether they would be joint employers of another employer's employees.

The Department's authority to interpret the FLSA comes with its authority to administer and enforce the FLSA. *See Herman* v. *Fabri-Centers of Am., Inc.,* 308 F.3d 580, 592–93 & n.8 (6th Cir. 2002) (noting that "[t]he Wage and Hour Division of the Department of Labor was created to administer the [FLSA]" while agreeing with the Department's interpretation of one of the FLSA's provisions); *Dufrene* v. *Browning-Ferris, Inc.,* 207 F.3d 264, 267 (5th Cir. 2000) ("By granting the Secretary of Labor the power to administer the FLSA, Congress implicitly granted him the power to interpret."); *Condo* v. *Sysco Corp.,* 1 F.3d 599, 603 (7th Cir. 1993) (same). Additionally, Congress has delegated the Department with broad rulemaking authority to interpret the FMLA and MSPA. *See* 29 U.S.C. 2654; 29 U.S.C. 1861.

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. In order to evaluate the proposed rule, the Department used the United States Census Bureau's 2022 SUSB Annual Data table to identify the number of private firms (6.5 million) and private establishments (8.3 million) that would potentially be affected by the proposed rule. Of those, SUSB data estimates that approximately 6.46 million firms and 6.95 million establishments had fewer than 500 employees.[335,336,337] 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, etc.) and receipt size (*e.g.,* less than $100,000, $100,000–$499,999, etc.). The general methodological approach was to classify all establishments or firms in categories below the 500 employee cutoff as a "small entity."

D. Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Proposed Rule

As explained more fully in section V.B.1 of this NPRM, affected entities would incur cost from rule familiarization. The Department assumes that a Compensation, Benefits, and Job Analysis Specialist (SOC Code 13-1141) (or a staff member in a similar position) would review any final rule.[338] According to the OEWS, these workers had a mean wage of $39.86 per hour.

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[335] The U.S. Census Bureau does not specifically define small business, but does break down its data into firms with 500 or more employees and those with fewer than 500 employees. *See* U.S Department of Commerce, Bureau of Census, 2022 Statistics of U.S. Businesses (SUSB) Annual Data Tables by Establishment Industry (Aug. 2025), https://www.census.gov/data/tables/2022/econ/susb/2022-susb-annual.html (from downloaded Excel Table entitled "U.S., 6-digit NAICS"). Consequently, the 500-employee threshold is commonly used to describe the universe of small employers.

[336] The 2022 data are the most recently available with revenue data.

[337] For this analysis, the Department excluded independent contractors who are not registered as small businesses, and who are generally not captured in the Economic Census, from the calculation of small establishments.

[338] A Compensation/Benefits Specialist ensures company compliance with Federal and state laws, including reporting requirements; evaluates job positions, determining classification, exempt or non-exempt status, and salary; plans, develops, evaluates, improves, and communicates methods and techniques for selecting, promoting, compensating, evaluating, and training workers. *See* BLS, *Occupational Employment and Wage Statistics Query System*, https://data.bls.gov/oes/#/industry/000000 (last updated May 2024).

The Department assumes that it would take on average 1 hour to review the substance of the rule if adopted as proposed. The Department expects that the standards applied by this proposed rule should be at least partially familiar with the specialists tasked to review it, and therefore believes that 1 hour, on average, is appropriate because while some establishments would spend more time to review a rule, many establishments may rely on Departmental or third party summaries of the rule or spend little or no time reviewing the rule. Assuming benefits are paid at a rate of 46 percent of the base wage, and overhead costs are 17 percent of the base wage, the reviewer's effective hourly rate is $64.97.

As discussed above in Section V.B.1, the Department calculated rule familiarization cost for 8.3 million establishments. Among those establishments, 6.37 million were identified as small businesses with under 500 employees. Annual payroll estimates for these small business establishments totaled $3,465 million which is approximately 39 percent of total payroll across all businesses regardless of size.

Table 2 presents the estimated number of small businesses, at the firm and establishment level, affected by the final rule.

Table 2: Regulatory Familiarization for Small Entities and Industry, Average by Firm and Establishment

NAICS Sector	By Firm			By Establishment		
	Firms	Cost Per Firm [a]	Cost per Sector ($1,000)	Establishments	Cost Per Firm [a]	Cost per Sector ($1,000)
Agriculture, Forestry, Fishing and Hunting	22,498	64.97	1,462	22,967	64.97	1,492
Mining, Quarrying, and Oil and Gas Extraction	17,003	64.97	1,105	18,813	64.97	1,222
Utilities	6,566	64.97	427	8,426	64.97	547
Construction	781,192	64.97	50,754	788,395	64.97	51,222
Manufacturing	235,088	64.97	15,274	788,395	64.97	16,251
Wholesale Trade	274,629	64.97	17,843	312,167	64.97	20,281
Retail Trade	643,115	64.97	41,783	718,945	64.97	46,710
Transportation and Warehousing	235,163	64.97	15,279	246,772	64.97	16,033

Information	87,987	64.97	5,717	160,946	64.97	6,528
Finance and Insurance	242,710	64.97	15,769	294,136	64.97	19,110
Real Estate and Rental and Leasing	365,322	64.97	23,735	397,563	64.97	25,830
Professional, Scientific, and Technical Services	868,529	64.97	56,428	902,276	64.97	58,621
Management of Companies and Enterprises	18,040	64.97	1,172	19,060	64.97	1,238
Administrative and Support Services	351,126	64.97	22,813	360,905	64.97	23,448
Educational Services	102,016	64.97	6,628	107,441	64.97	6,980
Health Care and Social Assistance	689,442	64.97	44,793	790,644	64.97	51,368
Arts, Entertainment, and Recreation	147,542	64.97	9,586	153,216	64.97	9,954
Accommodation and Food Services	572,464	64.97	37,193	633,139	64.97	41,135
Other Services (except Public Administration)	727,836	64.97	47,288	760,484	64.97	49,409
State and Local Governments	73,528	64.97	4,777	73,528	64.97	4,777
All Industries	6,461,796	64.97	419,823	6,955,333	64.97	451,888
Average Annualized costs, 7 percent discount rate						
Over 10 Years	44,921			48,352		
Average Annualized costs, 3 percent discount rate						
Over 10 Years	43,242			46,544		
Average Annualized costs per entity, 7 percent discount rate						
Over 10 years	8.64					
Average Annualized costs per entity, 3 percent discount rate						
Over 10 years	7.40					

[a] Each firm or establishment is expected to allocate 60 minutes of Compensation, Benefits, and Job Analysis Specialists' (SOC 13-1141) time for regulatory familiarization. The mean hourly rate for this occupation is $39.86 based on BLS's May 2024 Occupational Employment Statistics, and the wage load factor is 1.63 (0.46 for benefits and 0.17 for overhead). Therefore, the per-entity cost is $64.97.
Source for number of firms and establishments in each NAICS sector: Statistics of U.S. Businesses 2022, https://www.census.gov/programs-surveys/susb.html, 2022 SUSB Annual Data Tables by Establishment Industry; 2022 Census of Governments, https://www.census.gov/data/tables/2022/econ/gus/2022-governments.html.

The Department estimates that in Year 1, small businesses will incur a minimum cost of approximately $419 million in total regulatory familiarization costs, and a maximum of approximately $451 million. The estimated annual total cost to small entities of this rule over 10 years is $44.9 million to $48.4 million calculated at a 7 percent discount rate ($43.2 million to $46.5 million at a 3 percent discount rate).

The Department anticipates several benefits to small entities, including reduced compliance and litigation costs. Small businesses are expected to particularly benefit from this clarification, as the increased certainty and uniformity would allow them to make more informed business decisions without needing to invest as heavily in legal counsel to navigate complex joint employer determinations across multiple statutes. Clarifying joint employer criteria would be expected to encourage beneficial business practices and partnerships that businesses, including small entities, might otherwise forego due to uncertainty about potential liability. While the Department does not anticipate significant transfer effects, it acknowledges that the proposed standard may result in a slightly narrower scope of vertical joint employment compared to the current MSPA regulation or standards applied by some courts, potentially affecting wage recovery in limited cases involving, for example, insolvent employers, though this effect is expected to be small and potentially offset by improved enforcement capabilities. Accordingly, the Department does not expect that there would be meaningful costs attributable to this rulemaking apart from the cost of initial regulatory familiarization. The Department invites feedback on this determination.

Based on this analysis, the Department does not expect that small entities will incur large individual costs as a result of this rule, if finalized. A threshold of 1 percent of revenues has been used in prior rulemakings for the definition of significant economic impact. This threshold is also consistent with that sometimes used by other agencies within DOL.

Even though all entities will incur regulatory familiarization costs, these costs will be relatively small on a per-entity basis (an average of $64.47 per entity). Additionally, no such costs will be incurred after the first year following the promulgation of a final rule.

E. Alternatives to the Proposed Rule

The RFA requires agencies to discuss "any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant

economic impact of the proposed rule on small entities."[339] In addition to "the alternative of not regulating,"[340] the Department considered three alternatives to the proposed rule: (1) readopting the joint employer analysis from the Department's 2020 Rule; (2) readopting the joint employer analysis from the Department's pre-2020 FLSA regulation; or (3) adopting a joint employer analysis identical to the guidance provided in Administrator's Interpretation No. 2016-1. The specific advantages and disadvantages of these alternatives are addressed in greater detail in section V.F. of this NPRM, but the Department believes that its proposed analysis will best achieve the stated objectives of this rulemaking while minimizing potential costs and legal risk.

In addition to the alternatives discussed above, Section 603(c) of the RFA describes four categories of regulatory alternatives that might be appropriate for consideration in an IRFA analysis. Those categories of regulatory alternatives are addressed below.

1. ***Differing Compliance and Reporting Requirements for Small Entities***

The proposed rule would not impose new reporting, recordkeeping, or filing requirements on any entity, large or small.

2. ***Clarification, Consolidation, and Simplification of Compliance and Reporting Requirements for Small Entities***

This proposed rule would not impose any new reporting requirements, and the Department makes available a variety of resources to employers for understanding their obligations and achieving compliance.

3. ***Use of Performance Rather Than Design Standards***

This proposed rule would provide guidance regarding joint employer status under the FLSA, FMLA, and MSPA consistent with the statutory text of those laws and judicial precedent interpreting those laws. Using "performance standards" to assess joint employer status would be inconsistent with such authorities, which would undermine the Department's goal of adopting a

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[339] 5 U.S.C. 603(c).
[340] Exec. Order No. 12866 § 1, 58 FR 51735. Section II of this NPRM explains why there is a compelling need for this rulemaking.

uniform analysis for joint employer status under the FLSA, FMLA, and MSPA that courts find persuasive.

4. Exemption From Coverage of the Rule for Small Entities

The Department rejects this alternative because the proposed rule interprets statutory definitions of employment from the FLSA, and those definitions are uniformly applicable to all employers, regardless of their size. Moreover, the Department's goal in this rulemaking is to adopt an analysis for joint employment derived from judicial precedent that courts will find persuasive. Creating exceptions to the proposed analysis for small entities would contravene that objective.

The Department welcomes comments on this IRFA's analysis of regulatory alternatives.

F. Relevant Federal Rules Duplicating, Overlapping, or Conflicting with the Proposed Rule

Of the laws enforced by the Department's Wage and Hour Division, only the FMLA and MSPA share the FLSA's employment definitions. For statutes that do not incorporate the FLSA's definitions, WHD applies other standards to assess joint employment.[341]

VII. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532, requires agencies to prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing any federal mandate that may result in excess of $100 million (adjusted annually for inflation) in expenditures in any one year by state, local, and tribal governments in the aggregate, or by the private sector. This rulemaking is not expected exceed that threshold. *See* section V for an assessment of anticipated costs, transfers, and benefits.

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[341] *See, e.g.*, 20 CFR 655.103(b) (applying "the common law of agency" to assess joint employer status under the H-2A program).

VIII. 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.

IX. Executive Order 13175, Indian Tribal Governments

This proposed rule would not have tribal implications under Executive Order 13175 that would require a tribal summary impact statement. The 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.

List of Subjects

29 CFR Part 500

Administrative practice and procedure, Aliens, Employment, Housing, Insurance, Intergovernmental relations, Investigations, Licensing and registration, Migrant labor, Motor vehicle safety, Occupational safety and health, Penalties, Reporting and recordkeeping requirements, Wages, Whistleblowing.

29 CFR Part 780

Agriculture, Child Labor, Wages.

29 CFR Part 791

Employment, Wages.

29 CFR Part 825

Administrative practice and procedure, Airmen, Employee benefit plans, Health, Health insurance, Labor management relations, Maternal and child health, Penalties, Pensions, Reporting and recordkeeping requirements, Teachers.

For the reasons set out in the preamble, the Department of Labor proposes to amend 29 CFR chapter V as follows:

PART 500—MIGRANT AND SEASONAL AGRICULTURAL WORKER PROTECTION

1. The authority citation for part 500 continues to read as follows:

Authority: Pub. L. 97-470, 96 Stat. 2583 (29 U.S.C. 1801-1872); Secretary's Order No. 01-2014 (Dec. 19, 2014), 79 FR 77527 (Dec. 24, 2014); 28 U.S.C. 2461 Note (Federal Civil Penalties Inflation Adjustment Act of 1990); and Pub. L. 114-74, 129 Stat 584.

2. Amend § 500.20 by revising paragraph (h)(5) to read as follows:

(5) The definition of the term employ includes the joint employment principles applicable under the Fair Labor Standards Act. The term joint employment means a condition in which a single individual stands in the relation of an employee to two or more persons at the same time. A determination of whether the employment is to be considered joint employment depends upon all the facts in the particular case. The criteria set forth in §§ 791.110 through 791.125 of this chapter apply to any determination of whether a joint employment relationship exists under MSPA.

(i) If it is determined that a farm labor contractor is an independent contractor, it still must be determined whether or not the employees of the farm labor contractor are also jointly employed by the agricultural employer/association. Joint employment under the Fair Labor Standards Act is joint employment under the MSPA. Such joint employment relationships, which are common in agriculture, have been addressed both in the legislative history and by the courts.

(ii) The legislative history of the Act (H. Rep. No. 97–885, 97th Cong., 2d Sess., 1982) states that the legislative purpose in enacting MSPA was "to reverse the historical pattern of abuse and exploitation of migrant and seasonal farm workers . . .," which would only be accomplished by "advanc[ing] . . . a completely new approach" (Rept. at

3). Congress's incorporation of the FLSA term employ was undertaken with the deliberate intent of adopting the FLSA joint employer doctrine as the "central foundation" of MSPA and "the best means by which to insure that the purposes of this MSPA would be fulfilled" (Rept. at 6).

(iii) The analysis as to the existence of an employment relationship is not a strict liability or per se determination under which any agricultural employer/association would be found to be an employer merely by retaining or benefiting from the services of a farm labor contractor.

PART 780— EXEMPTIONS APPLICABLE TO AGRICULTURE, PROCESSING OF AGRICULTURAL COMMODITIES, AND RELATED SUBJECTS UNDER THE FAIR LABOR STANDARDS ACT

3. The authority citation for part 780 continues to read as follows:

Authority: Secs. 1–19, 52 Stat. 1060, as amended; 75 Stat. 65; 29 U.S.C. 201–219. Pub. L. 105–78, 111 Stat. 1467.

4. Amend § 780.305 by revising paragraph (c) to read as follows:

(c) Whether a farmer whose crops are harvested by an independent contractor is considered to be a joint employer with the contractor who supplies the harvest hands shall be determined by applying the criteria set forth in §§ 791.110 through 791.125 of this chapter. Each employer must include the contractor's employees in his man-day count in determining whether his own man-day test is met. Each employer will be considered responsible for compliance with the minimum wage and child labor requirements of the Act with respect to the employees who are jointly employed.

5. Amend § 780.331 by revising paragraph (d) to read as follows:

(d) Whether or not a labor contractor or crew leader is found to be a bona fide independent contractor, whether the employees of the labor contractor or crew leader are jointly employed by the farmer who is using their labor shall be determined by applying the criteria set forth in

§§ 791.110 through 791.125 of this chapter. In a joint employment situation, the man-days of agricultural labor rendered are counted toward the man-days of such labor of each employer. Each employer is considered equally responsible for compliance with the Act. With respect to the recordkeeping regulations in 29 CFR 516.33, the employer who actually pays the employees will be considered primarily responsible for maintaining and preserving the records of hours worked and employees' earnings specified in paragraph (c) of § 516.33 of this chapter.

6. Add part 791 to subchapter B to read as follows:

PART 791—DETERMINING JOINT EMPLOYER STATUS UNDER THE FAIR LABOR STANDARDS ACT

Sec.

791.100 Introductory statement.

791.105 General Principles.

791.110 Two Scenarios of FLSA Joint Employment.

791.115 Determining Vertical Joint Employment.

791.120 Determining Horizontal Joint Employment.

791.125 Relevance of Certain Business Models and Business Practices.

791.130 Severability.

Authority: 52 Stat. 1060, as amended; 29 U.S.C. 201–219.

§ 791.100 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. See 29 U.S.C. 201–19. The Administrator of the Wage and Hour Division will use these interpretations to guide the performance of his or her duties under the FLSA, and intends the interpretations to be used by employers, employees, and courts to understand employers' obligations and employees' rights under the FLSA. To the extent that prior administrative rulings, interpretations, practices, or enforcement policies relating to joint employer status under the FLSA are inconsistent or in

conflict with the interpretations stated in this part, they are hereby rescinded. The 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, notwithstanding that after any such act or omission in the course of such reliance, any such interpretation in this part "is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect." 29 U.S.C. 259.

§ 791.105 General Principles.

(a) An employer or joint employer may be an individual, partnership, association, corporation, business trust, legal representative, public agency, or any organized group of persons, excluding any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such a labor organization.

(b) An employee may have multiple employers under the FLSA. In most cases, each employment will be distinct from the others, and each employer will be responsible on its own for complying with the FLSA with respect to the employee. However, in some cases as discussed below, two or more employers may employ the employee in a manner that makes them joint employers of the employee such that they are together responsible for complying with the FLSA with respect to the employee.

(c) For there to be joint employment, each employer must exist as a separate entity. In some cases, it may be unnecessary to consider joint employment because the entities constituting the alleged employers are in fact a single entity and thus a single employer for purposes of FLSA compliance. For example, if two entities are separately incorporated but effectively operate as a single entity, they may in fact be a single employer under the FLSA. Neither incorporating a separate entity nor manipulating corporate formalities may be used to divide a business' operation and avoid the FLSA's requirements. Closely-related entities that are not in fact separate may be liable as a single employer under the FLSA without needing to consider joint employment.

§ 791.110 Two Scenarios of FLSA Joint Employment

(a) *Vertical joint employment*. In the "vertical" joint employment scenario, an employee is jointly employed by two or more employers that simultaneously benefit from the employee's work. Typically, the employee works one set of hours and there is no dispute that the employee has at least one employer for the work; the issue is whether another person that also benefits from the work is the employee's joint employer.

(b) *Horizontal joint employment*. In the "horizontal" joint employment scenario, an employee works separate hours for two (or more) employers in the same workweek, and the employers are sufficiently associated with each other with respect to the employment of the employee such that they are joint employers. Typically, it is undisputed that each employer employs the employee for some hours worked, and the issue is whether the employers are sufficiently associated with each other with respect to the employment of the employee. When there is horizontal joint employment, the employee's total hours worked across the workweek for each of the employers must be aggregated for purposes of FLSA compliance, and each employer is jointly and severally liable for the employee's wages due under the FLSA, including any overtime premiums due based on the aggregated hours worked.

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

§ 791.115 Determining Vertical Joint Employment.

(a) *Four factors to apply.* In the vertical joint employer scenario, four factors are relevant to the determination whether a person is a joint employer. Those four factors are

whether the person: (1) Hires or fires the employee; (2) Supervises and controls the employee's work schedule or conditions of employment to a substantial degree; (3) Determines the employee's rate and method of payment; and (4) Maintains the employee's employment records. No single factor is dispositive in determining joint employer status under the FLSA, as the determination will depend on all of the facts in a particular case.

(b) *Meaning of "employment records."* As used in this section, "employment records" means records, such as payroll records, that reflect, relate to, or otherwise record information pertaining to the hiring or firing, supervision and control of the work schedules or conditions of employment, or determining the rate and method of payment of the employee. Except to the extent they reflect, relate to, or otherwise record that information, records maintained by the potential joint employer related to the employer's compliance with the contractual agreements identified in § 791.125 do not make joint employer status more or less likely under the FLSA and are not considered employment records under this section. Satisfaction of the maintenance of employment records factor alone will not lead to a finding of joint employment.

(c) *Relevance of reserved control.* The potential joint employer's ability, power, or reserved right to act in relation to the employee is relevant for determining joint employer status, but the potential joint employer's actual exercise of control is more relevant than such ability, power, or right. For example, a potential joint employer's contractual authority to supervise, discipline, or fire employees is less relevant if in practice the potential joint employer never exercises such authority. Notwithstanding the foregoing, a potential joint employer's ability, power, or reserved right to act in connection with any of the contractual provisions or business practices identified in § 791.125 does not make joint employer status more or less likely under the FLSA.

(d) *Indirect control.* Indirect control is exercised by the potential joint employer through mandatory directions to another employer that controls the employee. But that

employer's voluntary decision to grant the potential joint employer's request, recommendation, or suggestion does not constitute indirect control that can demonstrate joint employer status. Acts that incidentally impact the employee also do not indicate joint employer status.

(e) *Consideration of additional factors.* Additional factors may be relevant for determining joint employer status in this scenario. For example, indicia of whether the potential joint employer exercises significant control over the terms and conditions of the employee's work in addition to the four factors identified in paragraph (a) above may be relevant. Indicia of whether the employee is economically dependent on the potential joint employer for work may also be relevant. For example, if the employee has a continuous or repeated relationship with the potential joint employer in that the potential joint employer continuously or repeatedly benefits from the employee's work (whether or not the other employers involved change), that may indicate joint employment. As an additional example, if the employee works at a location or facility that is owned or controlled by the potential joint employer that benefits from the employee's work, that may indicate joint employment. However, additional factors are generally less relevant than the four factors identified in paragraph (a) above, which typically carry greater weight in the analysis than any additional factors. And, if the four factors identified in paragraph (a) above unanimously indicate joint employment or no joint employment, there is a substantial likelihood that the indicated outcome is correct, and additional factors are highly unlikely, either individually or collectively, to outweigh the combined probative value of the four factors identified in paragraph (a) above.

(f) *Factors that are not relevant*. Notwithstanding the foregoing, the following factors are primarily probative of a worker's status as an employee or independent contractor and have no relevance in determining joint employer status: (1) Whether the employee is in a job that requires special skill, initiative, judgment, or foresight; (2) Whether the employee has the opportunity for profit or loss based on his or her managerial skill; and (3) Whether the employee invests in equipment or materials required for work or the employment of helpers.

(g) *Examples.* The following illustrative examples demonstrate the application of the principles described in this section under the facts presented and are limited to substantially similar factual situations:

(1)(i) *Example*. An office park company hires a janitorial services company to clean the office park building after-hours. According to a contractual agreement between 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?

(ii) *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 employees' conditions of employment is not enough to establish that it is a joint employer.

(2)(i) *Example*. A restaurant contracts with a cleaning company to provide cleaning services. The contract does not give the restaurant authority to hire or fire the cleaning company's employees or to supervise their work on the restaurant's premises. A restaurant official provides general instructions to the team leader from the cleaning company regarding the tasks that need to be completed each day, monitors the performance of the company's work, and keeps records tracking the cleaning company's completed assignments. The team leader from the cleaning company provides detailed supervision. At the restaurant's request, the cleaning company decides to terminate an individual worker for failure to follow the restaurant's instructions regarding customer safety, although the company had declined to terminate a different worker as requested by the restaurant the prior week. Is the restaurant a joint employer of the cleaning company's employees?

(ii) *Application*. Under these facts, the restaurant is not a joint employer of the cleaning company's employees because the restaurant does not exercise significant direct or indirect control over the terms and conditions of their employment. The restaurant's daily instructions and monitoring of the cleaning work is limited and does not demonstrate that the restaurant is a joint employer. Records of the cleaning team's work are not employment records under paragraph (b) of this section, and therefore, are not relevant in determining joint employer status. While the restaurant requested the termination of a cleaning company employee for not following safety instructions, the decision to terminate was made voluntarily by the cleaning company and therefore is not indicative of indirect control.

(3)(i) *Example*. A restaurant contracts with a cleaning company to provide cleaning services. The contract does not give the restaurant authority to hire or fire the cleaning company's employees or to supervise their work on the restaurant's premises. However, in practice a restaurant official oversees the work of employees of the cleaning company by assigning them specific tasks throughout each day, providing them with hands-on instructions, and keeping records tracking the work hours of each employee. On several occasions, the restaurant requested that the cleaning company hire or terminate individual workers, and the cleaning company agreed without question each time. Is the restaurant a joint employer of the cleaning company's employees?

(ii) *Application*. Under these facts, the restaurant is a joint employer of the cleaning company's employees because the restaurant exercises sufficient control, both direct and indirect, over the terms and conditions of their employment. The restaurant directly supervises the cleaning company's employees' work on a regular basis and keeps employment records. And the cleaning company's repeated and unquestioned acquiescence to the restaurant's hiring and firing requests indicates that the restaurant exercised indirect control over the cleaning company's hiring and firing decisions.

(4)(i) *Example*. A packaging company requests workers on a daily basis from a staffing agency. Although the staffing agency determines each worker's hourly rate of pay, the packaging company closely supervises their work, providing hands-on instruction on a regular and routine basis. The packaging company also 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?

(ii) *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 closely supervising their work and controlling their work schedules.

(5)(i) *Example*. A packaging company has unfilled shifts and requests a staffing agency to identify and assign workers to fill those shifts. Like other clients, the packaging company pays the staffing agency a fixed fee to obtain each worker for an 8-hour shift. The staffing agency determines the hourly rate of pay for each worker, restricts all of its workers from performing more than five shifts in a week, and retains complete discretion over which workers to assign to fill a particular shift. Workers perform their shifts for the packaging company at the company's warehouse under limited supervision from the packaging company to ensure that minimal quantity, quality, and workplace safety standards are satisfied, and under more strict supervision from a staffing agency supervisor who is on site at the packaging company. Is the packaging company a joint employer?

(ii) Application. Under these facts, the packaging company is not a joint employer of the staffing agency's employees because the staffing agency exclusively determines the pay and work schedule for each employee. Although the packaging company exercises some control over the workers by exercising limited supervision over their work, such supervision, especially

considering the staffing agency's supervision, is alone insufficient to establish that the packaging company is a joint employer without additional facts to support such a conclusion.

§ 791.120 Determining Horizontal Joint Employment.

(a) In the horizontal joint employer 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 FLSA. 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 other with respect to the employee for purposes of determining compliance with the FLSA. 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.

(b) 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.

(c) The following illustrative examples demonstrate the application of the principles described in this section under the facts presented and are limited to substantially similar factual situations:

(1)(i) *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?

(ii) *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)(i) *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?

(ii) *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 FLSA.

§ 791.125 Relevance of Certain Business Models and Business Practices.

(a) Operating as a franchisor or entering into a brand and supply agreement, or using a similar business model, does not make joint employer status more or less likely under the Act.

(b) The potential joint employer's contractual agreements with the employer requiring the employer to comply with general legal obligations or to meet certain standards to protect the health or safety of its employees or the public do not make joint employer status more or less likely under the Act. Similarly, the monitoring and enforcement of such contractual agreements

against the employer does not make joint employer status more or less likely under the Act. Such contractual agreements include, but are not limited to, mandating that employers comply with their obligations under the FLSA or other similar laws; or institute anti-harassment policies; requiring background checks; or requiring employers to establish workplace safety practices and protocols or to provide workers training regarding matters such as health, safety, or legal compliance. Requiring the inclusion of such standards, policies, or procedures in an employee handbook does not make joint employer status more or less likely under the Act.

(c) The potential joint employer's contractual agreements with the employer requiring quality control standards to ensure the consistent quality of the work product, brand, or business reputation do not make joint employer status more or less likely under the Act. Similarly, the monitoring and enforcement of such agreements against the employer does not make joint employer status more or less likely under the Act. Such contractual agreements include, but are not limited to, specifying the size or scope of the work project, requiring the employer to meet quantity and quality standards and deadlines, requiring morality clauses, or requiring the use of standardized products, services, or advertising to maintain brand standards.

(d) The potential joint employer's practice of providing the employer a sample employee handbook, or other forms, to the employer; 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) The following illustrative examples demonstrate the application of the principles described in this section under the facts presented and are limited to substantially similar factual situations.

(1)(i) *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 indicate that the Association is a joint employer of B's and C's employees, or that B and C are joint employers of each other's employees?

(ii) *Application*. Under these facts, nothing about the health or pension plans makes it more or less likely that the Association is a joint employer of B's or C's employees, or that B and C are 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.

(2)(i) *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 established by A, which includes paying employees 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. Do the code of conduct and the promise to abide by it indicate that Entity A is a joint employer of Employer B's employees?

(ii) *Application*. Neither the code of conduct nor the promise to abide by it described in this example make it more or less likely that Entity A is a joint employer of B's employees. Although Entity A requires Employer B to maintain a wage floor, B retains control over how and how much to pay its employees, and the example does not indicate that the wage floor is accompanied by any other indicia of control. Relatedly, 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.

(3)(i) *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 Franchisor A's brand, which gives Franchisee B access to certain proprietary software for business operation or payroll processing. In addition, Franchisor A provides Franchisee B with a sample employment application, a sample employee handbook, and other forms and documents for use in operating the franchise, such as sample operational plans, business plans, and marketing materials. 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. Doe any of these facts indicate that Franchisor A is a joint employer of Franchisee B's employees?

(ii). *Application*. None of the facts described in this example make it more or less likely that Franchisor A is a joint employer of B's employees. Franchisor A's business practices of providing optional samples, forms, and documents that relate to staffing and employment are not direct or indirect control over Franchisor B's employees that would be indicative of joint employer status.

§ 791.130 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.

PART 825—THE FAMILY AND MEDICAL LEAVE ACT OF 1993

7. The authority citation for part 825 continues to read as follows:

Authority: 29 U.S.C. 2654; 28 U.S.C. 2461 note (Federal Civil Penalties Inflation Adjustment Act of 1990); and Pub. L. 114-74 at sec. 701.

8. Amend § 825.106 by revising paragraph (a) to read as follows:

(a) Where two or more businesses exercise some control over the work or working conditions of the employee, the businesses may be joint employers under FMLA. Joint employers may be separate and distinct entities with separate owners, managers, and facilities. The criteria set forth in §§ 791.110 through 791.125 of this chapter apply to any determination of whether a joint employment relationship exists.

Dated: April 21, 2026

Andrew B. Rogers

Administrator, Wage and Hour Division

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