



DEPARTMENT OF LABOR

Wage and Hour Division

29 CFR Part 791

RIN 1235-AA37

Rescission of Joint Employer Status Under the Fair Labor Standards Act Rule

AGENCY: Wage and Hour Division, Department of Labor.

ACTION: Notice of proposed rulemaking; request for comments.

SUMMARY: This notice of proposed rulemaking (NPRM) proposes to rescind the final rule entitled “Joint Employer Status Under the Fair Labor Standards Act,” which published on January 16, 2020 and took effect on March 16, 2020. The proposed rescission would remove the regulations established by that rule.

DATES: Submit written comments on or before [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by Regulatory Information Number (RIN) 1235-AA37 by either of the following methods: Electronic Comments: Submit comments through the Federal eRulemaking Portal at <http://www.regulations.gov>. Follow the instructions for submitting comments. Mail: Address written submissions to Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue, N.W., Washington, D.C. 20210. Instructions: Please submit only one copy of your comments by only one method. Commenters submitting file attachments on 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 will become a matter of

public record and will be posted without change to <https://www.regulations.gov>, including any personal information provided. The Department will post 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. EST on [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER] for consideration.

The Department strongly recommends that commenters submit their comments electronically via <http://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. Submit only one copy of your comments by only one method. Docket: For access to the docket to read background documents or comments, go to the Federal eRulemaking Portal at <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Amy DeBisschop, Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, 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). Copies of this NPRM may be obtained in alternative formats (Large Print, Braille, Audio Tape or Disc), upon request, by calling (202) 693-0675 (this is not a toll-free number). TTY/TDD callers may dial toll-free 1-877-889-5627 to obtain information or request materials in alternative formats.

SUPPLEMENTARY INFORMATION:

I. Background

The Fair Labor Standards Act (FLSA or Act) requires all covered employers to pay nonexempt employees at least the federal minimum wage for every hour worked in a non-overtime workweek.¹ In an overtime workweek, for all hours worked in excess of 40 in a workweek, covered employers must pay a nonexempt employee at least one and one-half times

¹ See 29 U.S.C. 206(a).

the employee's regular rate.² The FLSA also requires covered employers to make, keep, and preserve certain records regarding employees.³

The FLSA does not define “joint employer” or “joint employment.” However, 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.”⁴ Section 3(e) generally defines “employee” to mean “any individual employed by an employer”⁵ and identifies certain specific groups of workers who are not “employees” for purposes of the Act.⁶ Section 3(g) defines “employ” to “include[] to suffer or permit to work.”⁷

A. Prior Guidance Regarding FLSA Joint Employment

In July 1939, a year after the FLSA's enactment, the Department's Wage and Hour Division (WHD) issued Interpretative Bulletin No. 13 addressing, among other topics, whether two or more companies may be jointly and severally liable for a single employee's hours worked under the FLSA.⁸ WHD recognized in the Bulletin that there is joint employment liability under the FLSA and provided examples of situations where two companies are and are not joint employers of an employee.⁹ For situations where an employee works hours for one company and works separate hours for another company in the same workweek, WHD focused on whether the two companies were “acting entirely independently of each other with respect to the employment of the particular employee” (in which case they were not joint employers) or, “on the other hand, the employment by [the one company] [wa]s not completely disassociated from the employment by [the other company]” (in which case they were joint employers and the hours worked for both

² See 29 U.S.C. 207(a).

³ See 29 U.S.C. 211(c).

⁴ 29 U.S.C. 203(d).

⁵ 29 U.S.C. 203(e)(1).

⁶ See 29 U.S.C. 203(e)(2)-(5).

⁷ 29 U.S.C. 203(g).

⁸ See Interpretative Bulletin No. 13, “Hours Worked: Determination of Hours for Which Employees are Entitled to Compensation Under the Fair Labor Standards Act of 1938,” ¶¶ 16–17. In October 1939 and October 1940, WHD revised other portions of the Bulletin that are not pertinent here.

⁹ See *id.*

would be aggregated for purposes of the Act).¹⁰ WHD stated in the Bulletin that it “will scrutinize all cases involving more than one employment and, 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.”¹¹

In 1958, WHD published a rule introducing 29 CFR part 791, entitled “Joint Employment Relationship under Fair Labor Standards Act of 1938.”¹² Section 791.2(a) reiterated that there is joint employment liability under the Act and stated that the determination “depends upon all the facts in the particular case.”¹³ It further stated 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).”¹⁴ Section 791.2(b) explained 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, a joint employment relationship generally will be considered to exist 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; or

(2) Where one employer is acting directly or indirectly in the interest of the other employer (or employers) in relation to the employee; or

(3) Where the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the

¹⁰ *Id.* ¶ 17

¹¹ *Id.*

¹² *See* 23 FR 5905 (Aug. 5, 1958).

¹³ 29 CFR 791.2(a) (1958).

¹⁴ *Id.*

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.”¹⁵

In 1961, WHD amended a footnote in § 791.2(a) to clarify that a joint employer is also jointly liable for overtime pay.¹⁶ Over the next several decades, WHD issued various guidance documents including Fact Sheets, opinion letters, as well as legal briefs reiterating the Department’s position concerning joint employment. *See, e.g.*, Op. Letter, FLSA (Dep’t of Labor Apr. 11, 2005), 2005 WL 2086804 (employees of health care system comprised of hospitals, nursing homes, and parent holding company); Op. Letter, FLSA (Dep’t of Labor Aug. 24, 1999), 1999 WL 1788146 (private duty nurses); Op. Letter, FLSA (Dep’t of Labor Jan. 27, 1998), 1998 WL 852621 (grocery vendor employees stocking grocery shelves); Op. Letter, FLSA (Dep’t of Labor Aug. 9, 1989), 1989 WL 1632931 (enclave program).

In 2014, WHD issued an Administrator’s Interpretation (Home Care AI) addressing how joint employment under the FLSA applies to certain home care workers.¹⁷ The Home Care AI explained that the FLSA’s definitions of “employer,” “employee,” and “employ,” “and therefore the scope of employment relationships the Act covers, are exceedingly broad.”¹⁸ The Home Care AI discussed application of 29 CFR 791.2 and stated that its “focus . . . is the degree to which the two possible joint employers share control with respect to the employee and the degree to which the employee is economically dependent on the purported joint employers.”¹⁹ WHD recognized that, “when making joint employment determinations in FLSA cases, the exact factors applied may vary,” but also stated that “a set of factors that addresses only control is not consistent with the breadth of employment under the FLSA” because an analysis based solely on the potential employer’s joint control “cannot be reconciled with [FLSA section 3(g)’s “suffer or permit”

¹⁵ 29 CFR 791.2(b) (1958) (footnotes omitted).

¹⁶ *See* 26 FR 7730, 7732 (Aug. 18, 1961).

¹⁷ *See* Administrator’s Interpretation No. 2014-2, “Joint Employment of Home Care Workers in Consumer-Directed, Medicaid-Funded Programs by Public Entities under the Fair Labor Standards Act” (Jun. 19, 2014), *available at* 2014 WL 2816951.

¹⁸ *Id.* at *2.

¹⁹ *Id.* at *2 n.4.

language], which necessarily reaches beyond traditional agency law.”²⁰ Accordingly, the Home Care AI applied a non-exclusive set of factors relating to the potential joint employer’s control and other aspects of the relationship to provide guidance regarding the possibility of joint employment in numerous hypothetical scenarios specific to the home care industry.²¹ WHD withdrew the Home Care AI on March 10, 2020.

In 2016, WHD issued an Administrator’s Interpretation (Joint Employment AI) addressing joint employment generally under the FLSA and the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), which uses the same definition of “employ” as the FLSA.²² Relying on the text and history of FLSA section 3(g) and case law interpreting it, the Joint Employment AI explained that joint employment, like employment generally, is expansive under the FLSA and “notably broader than the common law concepts of employment and joint employment.”²³ The Joint Employment AI further explained that “the expansive definition of ‘employ’ as including ‘to suffer or permit to work’ rejected the common law control standard and ensures that the scope of employment relationships and joint employment under the FLSA and MSPA is as broad as possible.”²⁴ The AI described how “suffer or permit” or “similar phrasing was commonly used in state laws regulating child labor and was ‘designed to reach businesses that used middlemen to illegally hire and supervise children.’”²⁵ The AI thus concluded that “the ‘suffer or permit to work’ standard was designed to expand child labor laws’ coverage beyond those who controlled the child laborer,” “prevent employers from using

²⁰ *Id.* at *2 n.5 (quoting *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 69 (2d Cir. 2003)).

²¹ *See id.* at *7-14; *see also id.* at *3 (“[A]ny assessment of whether a public entity is a joint employer necessarily involves a weighing of all the facts and circumstances, and there is no single factor that is determinative[.]”) (citing *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947)).

²² *See* Administrator’s Interpretation No. 2016-1, “Joint Employment under the Fair Labor Standards Act and Migrant and Seasonal Agricultural Worker Protection Act” (Jan. 20, 2016), *available at* 2016 WL 284582; *see also* 29 U.S.C. 1802(5) (“employ” under MSPA has “the meaning given such term under section 3(g) of the [FLSA]”).

²³ *Id.* at *3 (citing, *inter alia*, *Torres-Lopez v. May*, 111 F.3d 633, 639 (9th Cir. 1997); *Antenor v. D & S Farms*, 88 F.3d 925, 929 (11th Cir. 1996)).

²⁴ *Id.*

²⁵ *Id.* (quoting *Antenor*, 88 F.3d at 929 n.5).

‘middlemen’ to evade the laws’ requirements,” and ensure joint liability in a type of vertical joint employment situation (explained below).²⁶

The Joint Employment AI discussed two types of joint employment. It discussed horizontal joint employment, which exists where an employee is separately employed by, and works separate hours in a workweek for, more than one employer, and the employers “are sufficiently associated with or related to each other with respect to the employee” such that they are joint employers.²⁷ The Joint Employment AI explained that “the focus of a horizontal joint employment analysis is the relationship between the two (or more) employers” and that 29 CFR 791.2 provided guidance on analyzing that type of joint employment, and the AI gave some additional guidance on applying § 791.2.²⁸ The Joint Employment AI also discussed vertical joint employment, which exists where an “employee has an employment relationship with one employer (typically a staffing agency, subcontractor, labor provider, or other intermediary employer),” another employer is “receiv[ing] the benefit of the employee’s labor,” and “the economic realities show that he or she is economically dependent on, and thus employed by,” the other employer.²⁹ The Joint Employment AI explained that the vertical joint employment analysis does not focus on examining the relationship between the two employers but instead “examines the economic realities” of the relationship between the employee and the other employer that is benefitting from his or her labor.³⁰ The AI noted that “several Circuit Courts of Appeals have also adopted an economic realities analysis for evaluating vertical joint employment under the FLSA,” and that, “[r]egardless of the exact factors, the FLSA and MSPA require application of the broader economic realities analysis, not a common law control analysis, in determining vertical joint employment.”³¹ The AI advised that, “because of the

²⁶ *Id.*

²⁷ *Id.* at *4.

²⁸ *Id.* at *4-8.

²⁹ *Id.* at *2.

³⁰ *Id.* at *4.

³¹ *Id.*

shared definition of employment and the coextensive scope of joint employment between the FLSA and MSPA,” the non-exclusive, multi-factor economic realities analysis set forth by WHD in its MSPA joint employment regulation should be applied in FLSA vertical joint employment cases to analyze the relationship between the employee and the other employer, and that doing so “is consistent with both statutes and regulations.”³² The AI provided some additional guidance on applying the analysis.³³ WHD withdrew the Joint Employment AI on June 7, 2017.³⁴

B. 2020 Joint Employer Rule

In January 2020, WHD published a final rule entitled “Joint Employer Status Under the Fair Labor Standards Act,” which became effective on March 16, 2020 (Joint Employer Rule or Rule).³⁵ The Joint Employer Rule rewrote 29 CFR part 791. Currently, § 791.1 contains an introductory statement, § 791.2 contains the substance of the Rule and addresses both vertical joint employment (which it refers to as “the first joint employer scenario”) and horizontal joint employment (which it refers to as “the second joint employer scenario”), and § 791.3 contains a severability provision.³⁶

1. Joint Employer Rule’s Vertical Joint Employment Standard

For vertical joint employment, § 791.2(a)(1) states 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 cites FLSA section 3(d)’s definition of “employer.”³⁷ The Joint Employer Rule provided that

³² *Id.* at *5 (citing WHD’s multi-factor economic realities analysis for joint employment under MSPA set forth at 29 CFR 500.20(h)(5)). WHD issued its current MSPA joint employment regulation in 1997 via a final rule following notice-and-comment rulemaking. *See* 62 FR 11734 (Mar. 12, 1997).

³³ *See* 2016 WL 284582, at *8-12.

³⁴ *See* News Release 17-0807-NAT, “US Secretary of Labor Withdraws Joint Employment, Independent Contractor Informal Guidance” (Jun. 7, 2017), *available at* <https://www.dol.gov/newsroom/releases/opa/opa20170607>.

³⁵ *See* 85 FR 2820 (Jan. 16, 2020). WHD had published a notice of proposed rulemaking requesting comments on a proposal. *See* 84 FR 14043 (Apr. 9, 2019). The final rule adopted “the analyses set forth in the NPRM largely as proposed.” 85 FR 2820.

³⁶ *See* 29 CFR 791.1, 791.2, and 791.3.

³⁷ 29 CFR 791.2(a)(1) (citing 29 U.S.C. 203(d)) (emphasis added).

section 3(d) is the sole statutory provision in the FLSA for determining “joint employer status” under the Act—to the exclusion of sections 3(e) and 3(g).³⁸ The Joint Employer 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 Act.”³⁹ 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 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.”⁴⁰ The Rule concluded that this language from section 3(d), “by its plain 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 Act.”⁴¹ The Rule relied on the Supreme Court’s decision in *Falk v. Brennan*⁴² and the Court of Appeals for the Ninth Circuit’s decision in *Bonnette v. California Health & Welfare Agency*⁴³ to “support focusing on section 3(d) as determining joint employer status.”⁴⁴

Section 791.2(a)(1) states that “four factors are relevant to the determination” of whether the other employer is a joint employer in the vertical joint employment situation.⁴⁵ Those four factors are 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

³⁸ See generally 85 FR 2825-28.

³⁹ *Id.* at 2827.

⁴⁰ *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.”).

⁴¹ *Id.*

⁴² 414 U.S. 190 (1973).

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

⁴⁴ 85 FR 2827.

⁴⁵ 29 CFR 791.2(a)(1).

employment records.⁴⁶ The Joint Employer Rule stated that its four-factor test was “derived from” *Bonnette*.⁴⁷ In *Bonnette*, the Ninth Circuit affirmed a finding of vertical joint employment after considering whether the other 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.⁴⁸

The Joint Employer Rule’s four-factor analysis deviated from *Bonnette*’s analysis in several ways. First, the Rule articulates the first factor as whether the other employer “[h]ires or fires the employee” as opposed to whether it had “the power” to hire and fire.⁴⁹ Section 791.2(a)(3)(i) states that the “potential joint employer must actually exercise . . . one or more of these indicia of control to be jointly liable under the Act,” 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 joint employer status without some actual exercise of control.”⁵⁰ Second, the Joint Employer Rule changed the second factor to consider whether the potential joint employer supervises and controls work schedules or conditions of employment “to a substantial degree.” This phrase is absent from the test articulated in *Bonnette* (although *Bonnette* found that, on the factual record before it, the potential joint employers “exercised considerable control” in that area).⁵¹ Third, § 791.2(a)(2) states that “[s]atisfaction of the maintenance of employment records factor alone will not lead to a finding of joint employer status,” but *Bonnette* did not provide that limitation.⁵² Finally, § 791.2(b) states 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

⁴⁶ See 29 CFR 791.2(a)(1)(i)-(iv).

⁴⁷ 85 FR 2830.

⁴⁸ See 704 F.2d at 1469-1470.

⁴⁹ Compare 29 CFR 791.2(a)(1)(i) with *Bonnette*, 704 F.2d at 1469-1470.

⁵⁰ 29 CFR 791.2(a)(3)(i) (citing 29 U.S.C. 203(d)).

⁵¹ Compare 29 CFR 791.2(a)(1)(ii) with *Bonnette*, 704 F.2d at 1469-1470.

⁵² Compare 29 CFR 791.2(a)(2) with *Bonnette*, 704 F.2d at 1469-1470.

employer exercises significant control over the terms and conditions of the employee's work."⁵³ *Bonnette*, however, stated that its four factors "provide a useful framework for analysis in this case," but "are not etched in stone and will not be blindly applied," and that "[t]he ultimate determination must be based 'upon the circumstances of the whole activity.'"⁵⁴

In addition to generally excluding factors that are not indicative of the potential joint employer's control over the employee's work, the Joint Employer Rule specifically excluded any consideration of the employee's economic dependence on the potential joint employer.⁵⁵ The Rule asserted that "economic dependence is relevant when applying section 3(g) and determining whether a worker is an employee under the Act; however, determining whether a worker who is an employee under the Act has a joint employer for his or her work is a different analysis that is based on section 3(d)."⁵⁶ The Rule further asserted 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."⁵⁷

2. Joint Employer Rule's Horizontal Joint Employment Standard

To determine horizontal joint employment, the Joint Employer Rule adopted the standard in the prior version of 29 CFR 791.2 with non-substantive revisions.⁵⁸ Section 791.2(e)(2) states that, in this "second joint employer scenario", "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.⁵⁹ It further states 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

⁵³ 29 CFR 791.2(b).

⁵⁴ 704 F.2d at 1470 (quoting *Rutherford Food*, 331 U.S. at 730).

⁵⁵ 29 CFR 791.2(c) ("[T]o determine joint employer status, no factors should be used to assess economic dependence.").

⁵⁶ 85 FR 2821.

⁵⁷ *Id.* at 2836.

⁵⁸ *Id.* at 2844-45.

⁵⁹ 29 CFR 791.2(e)(2).

each for purposes of determining compliance with the Act.”⁶⁰ It identifies the same three general examples of sufficient association as the prior version of 29 CFR 791.2.⁶¹

3. Joint Employer Rule’s Additional Provisions

The Joint Employer Rule adopted additional provisions that apply to both vertical and horizontal joint employment. Section 791.2(f) addresses the consequences of joint employment and provides 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 compliance” with the Act.⁶² Section 791.2(g) provides 11 “illustrative examples” of how the Rule may apply to specific factual situations implicating both vertical and horizontal joint employment.⁶³

C. *Decision Vacating Most of the Joint Employer Rule*

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 Joint Employer Rule violated the Administrative Procedure Act (APA).⁶⁴ The Department moved to dismiss the lawsuit on the grounds that the States did not have standing. The district court denied that motion on June 1, 2020.⁶⁵ The district court issued an order on June 29, 2020 permitting 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 (Intervenors) to intervene as

⁶⁰ *Id.*

⁶¹ Compare 29 CFR 791.2(e)(2)(i)-(iii) with 29 CFR 791.2(b)(1)-(3) (1958).

⁶² 29 CFR 791.2(f).

⁶³ 29 CFR 791.2(g).

⁶⁴ See *New York, et al. v. Scalia*, No. 1:20-cv-01689 (S.D.N.Y. complaint 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).

⁶⁵ See 464 F. Supp.3d 528.

defendants in the case.⁶⁶ The parties filed cross-motions for summary judgment, which the district court decided on September 8, 2020.⁶⁷

The district court vacated the Joint Employer Rule’s “novel standard for vertical joint employer liability” because its “revisions to that scenario are flawed in just about every respect.”⁶⁸ The district court found that the Rule violated the APA because it was contrary to the law—specifically, it conflicted with the FLSA.⁶⁹ The district court identified three conflicts: the Rule’s reliance on the FLSA’s definition of “employer” in section 3(d) as the sole textual basis for joint employment liability; its adoption of a control-based test for determining vertical joint employer liability; and its prohibition against considering additional factors beyond control, such as economic dependence.⁷⁰ In addition, the district court found that the Rule was “arbitrary and capricious” in violation of the APA for three reasons: the Rule did not adequately explain why it departed from WHD’s prior interpretations; the Rule did not consider the conflict between it and WHD’s MSPA joint employment regulations; and the Rule did not adequately consider its cost to workers.⁷¹

The district court concluded that the Joint Employer 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).⁷² The court determined that, because the Rule’s “non-substantive revisions to horizontal joint employer liability are severable,” § 791.2(e) “remains in effect.”⁷³ The Department and the Intervenors appealed the district court’s decision, and the appeal is pending before the Court of Appeals for the Second Circuit.⁷⁴ The Department and the Intervenors each

⁶⁶ See 2020 WL 3498755.

⁶⁷ See 2020 WL 5370871.

⁶⁸ *Id.* at *34.

⁶⁹ See *id.* at *15.

⁷⁰ See *id.* at *16-31.

⁷¹ See *id.* at *31-34.

⁷² *Id.* at *34.

⁷³ *Id.*

⁷⁴ See *New York, et al. v. Scalia*, No. 20-3806 (2d Cir. appeal docketed Nov. 6, 2020).

filed an opening brief with the Second Circuit on January 15, 2021 in support of the Rule; the States' response brief is due on April 16, 2021.

II. Proposal to Rescind

The Department proposes to rescind the Joint Employer Rule. Although the Rule went into effect on March 16, 2020, the U.S. District Court for the Southern District of New York vacated most of the Rule in a September 8, 2020 decision.⁷⁵ The Department's reasons for proposing to rescind the Joint Employer Rule are explained below, and the Department requests comments on its proposal.

A. Further Consideration of the Statutory Analysis and Whether the Test for Vertical Joint Employment Is Unduly Narrow

The statutory analysis and test for vertical joint employment set forth in the Joint Employer Rule is different from the analyses and tests applied by every court to have considered joint employer questions prior to the Rule's issuance, as well as WHD's previous enforcement approach. In reviewing the Rule, the Southern District of New York concluded that it was contrary to law and arbitrary and capricious. Further consideration is needed in order to fully analyze and possibly address the concerns raised by the court. As such, the Department proposes to rescind the Rule to allow it to engage in further legal analysis, in order to ensure that lawful and clear guidance is being provided to the regulated community.

1. Statutory Basis of the Rule

In *New York, et al. v. Scalia*, the district court found that the Rule conflicts with the FLSA and was thus contrary to law in violation of the APA. The court raised several issues regarding the Rule's statutory analysis of the Act. First, the district court rejected the Rule's assertion that the FLSA's definition of "employer" in section 3(d) is the sole textual basis under the FLSA for determining joint employment. Because section 3(d) defines "employer" by referencing employees, and section 3(e)(1) in turn defines "employee" by referencing "employ"

⁷⁵ See 2020 WL 5370871, at *34.

(defined in section 3(g)), “all three definitions are relevant to determining joint employer status under the FLSA.”⁷⁶ The district court faulted the Rule for bifurcating the statutory definitions and using “different tests for ‘primary’ and ‘joint’ employment.”⁷⁷ According to the district court, “[t]here is . . . no independent test for joint employment under the FLSA,” “[a]n entity is an employer if it meets the FLSA’s definition,” and “[i]t is a joint employer if it meets the definition and another entity also meets the definition.”⁷⁸ The district court concluded that the Rule’s “novel interpretation that section 3(d) is the sole textual basis for joint employer liability conflicts with the FLSA” and “is reason enough to conclude that the [Rule] must be set aside.”⁷⁹

Looking to the language of the statute itself, WHD is concerned that the text of section 3(d) alone may not easily encompass all scenarios in which joint employment may arise; multiple employers may “suffer or permit” an employee to work and could thus be joint employers under section 3(g) without one working “in the interest of an employer” under section 3(d).⁸⁰ Moreover, the district court in *New York v. Scalia* noted that the Rule “disregarded” the operative language of section 3(d) which begins with “includes” instead of “means.”⁸¹ The court explained that under principles of statutory construction, it is sufficient to prove employer status by showing that the entity acted directly or indirectly in the interest of an employer in relation to an employee, but the Rule wrongly converted this into a necessary condition for proving employer status.⁸² WHD recognizes that under the FLSA, an “employer” “includes any person acting directly or indirectly in the interest of an employer in relation to an employee,” “includes a public agency,” but “does not include any labor organization (other than when acting as an

⁷⁶ *Id.* at *16.

⁷⁷ *Id.* at *17.

⁷⁸ *Id.*

⁷⁹ *Id.* at *25.

⁸⁰ For example, specific to the context of vertical joint employment, it may make little sense to conceive of joint employers that are typically located higher in a hierarchical business structure (e.g., general contractors and staffing agency clients) as “acting directly or indirectly in the interest of” acknowledged employers lower in the structure, such as subcontractors or staffing agencies.

⁸¹ 2020 WL 5370871, at *18.

⁸² *Id.*

employer) or anyone acting in the capacity of officer or agent of such labor organization”); by its own terms, section 3(d) is not exhaustive.⁸³ Additionally, there is case law indicating that section 3(d) was written for the purpose of imposing responsibility upon the agents of employers, as the court observed in *Greenberg v. Arsenal Building Corp.*, 144 F. 2d 292, 294 (2d Cir. 1944) (explaining that “the section would have little meaning or effect if such were not the case”).⁸⁴

According to the district court, the Rule also ignored the history and purpose of the “suffer or permit” language in section 3(g), which Congress adopted “to expand joint employer liability.”⁸⁵ The district court found that the Rule “defies congressional intent” by ignoring section 3(g).⁸⁶ Section 3(g)’s “suffer or permit” language was intended to include as an employer entities that used intermediaries to shield themselves from liability as employers.⁸⁷ Accordingly, the Rule’s use of 3(d) to the exclusion of 3(g) may not be faithful to the Act’s definitions or Congress’ intent in enacting them.

WHD also notes that the Rule set forth a statutory basis for vertical joint employment, based on section 3(d), that applied a different analytical framework to different employers (*i.e.* “substantial control” for “joint employers” vs. “economic realities” for “employers”), and this approach has not been utilized by any court. Rather, all of the circuit courts of appeals to have considered joint employment under the FLSA have looked to the economic realities test as the

⁸³ 29 U.S.C. 203(d) (emphasis added).

⁸⁴ The Supreme Court reversed an unrelated part of the Second Circuit’s holding in *Greenberg*. See 324 U.S. 697, 714-16 (1945). *Greenberg* is not alone in concluding that section 3(d)’s “includes any person acting directly or indirectly in the interest of an employer in relation to an employee” language was intended to impose liability on an employer’s agents. See, e.g., *Donovan v. Agnew*, 712 F.3d 1509, 1513 (1st Cir. 1983) (section 3(d) was “intended to prevent employers from shielding themselves from responsibility for the acts of their agents”); *Dole v. Elliott Travel & Tours, Inc.*, 942 F.2d 962, 965-66 (6th Cir. 1991) (relying on section 3(d) to hold individually liable the owner/officer who exercised operational control of the employer); *Arias v. Raimondo*, 860 F.3d 1185, 1191-92 (9th Cir. 2017) (Through section 3(d), “Congress clearly means to extend [the FLSA’s] reach beyond actual employers. [The attorney’s] activity in this case on behalf of his clients illustrates the wisdom of this extension.”), *cert. denied*, 138 S. Ct. 673 (2018).

⁸⁵ 2020 WL 5370871, at *20; see also 29 U.S.C. 203(g).

⁸⁶ 2020 WL 5370871, at *20

⁸⁷ See *Rutherford Food*, 331 U.S. at 728; *Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125, 136-140 (4th Cir. 2017).

proper framework, and have not identified section 3(d) as the sole textual basis for joint employment. In particular, the case law heavily relied upon in the Rule from the First, Third, and Fifth Circuits, as well as the *Bonnette* decision itself, all apply an economic realities analysis when determining joint employment under the FLSA.⁸⁸ Additionally, the Rule discussed the Supreme Court’s decision in *Falk v. Brennan* at length, relying on it to buttress its statutory interpretation argument.⁸⁹ The district court, however, concluded that “*Falk* cuts against the Department’s argument that section 3(d) is the sole textual basis for joint employer liability” because *Falk* cited to the statutory definition of “employee” as well as “employer” and observed that the FLSA’s definition of employer is expansive.⁹⁰ The Rule’s approach also represented a significant shift from WHD’s longstanding analysis; WHD had never excluded sections 3(e) and (g) from the joint employment analysis and had instead consistently applied an economic realities framework that did not exclude the definitions of “employ” or “employee” when determining joint employer liability, as discussed above.

In view of the foregoing, WHD believes that further consideration is needed in order to ensure that its joint employment analysis is grounded in all relevant statutory definitions, and it tentatively questions whether the Rule’s approach falls short of doing so in a supportable way. A textual analysis based only on section 3(d) may ignore the Act’s other relevant statutory definitions and may needlessly bifurcate the analysis. Additionally, as a textual matter and as indicated above, section 3(d) may not easily encompass all scenarios in which joint employment may arise; multiple employers may simultaneously “suffer or permit” an employee to work and could thus be joint employers under section 3(g) without one working “in the interest of an employer” under section 3(d). Section 3(g) defined “employ” as it did with the intent of including as an employer entities that used intermediaries that employed workers but disclaimed

⁸⁸ See, e.g., *Baystate Alternative Staffing, Inc. v. Herman*, 163 F.3d 668, 675 (1st Cir. 1998); *In re Enterprise Rent-A-Car Wage & Hour Emp’t Practices Litig.*, 683 F.3d 462, 469-470 (3d Cir. 2012); *Gray v. Powers*, 673 F.3d 352, 357 (5th Cir. 2012); *Bonnette*, 704 F.2d at 1469.

⁸⁹ See 85 FR 2822, 2827.

⁹⁰ 2020 WL 5370871, at *23.

that they themselves were employers of the workers.⁹¹ WHD believes further analysis is needed in order to evaluate whether using 3(d) to the exclusion of 3(e) and 3(g) to determine joint employment is faithful to the Act's definitions and Congress' intent in enacting them.

2. Whether the Rule's Test Is Impermissibly Narrow Because It Is Control-Based

For vertical joint employment, the Rule adopted a four-factor test focused on control.⁹² It generally excluded factors that were not indicative of a potential joint employer's control, noting that additional factors may be considered "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,"⁹³ and specifically excluded any consideration of the employee's economic dependence on the potential joint employer.⁹⁴

The district court found that the test adopted by the Rule is "impermissibly narrow" because it "unabashedly adopts a control-based test" and is thus contrary to the FLSA's text and case law.⁹⁵ The district court cited *Nationwide Mutual Insurance Co. v. Darden*⁹⁶ and circuit courts of appeals decisions for the proposition that the FLSA rejects the common law control standard for employment.⁹⁷ The district court particularly relied on *Zheng v. Liberty Apparel* to explain that, although control can be sufficient to establish joint employer status, control is not necessary and cannot be the sole inquiry.⁹⁸ According to the district court, the "Rule's emphasis on control as the touchstone of joint employer liability flows from [its] interpretive error" of "separating section 3(d) from sections 3(g) and 3(e)."⁹⁹ The district court concluded that

⁹¹ See *Rutherford Food*, 331 U.S. at 728; *Salinas*, 848 F.3d at 113

⁹² See 29 CFR 791.2(a)(1)(i-iv).

⁹³ 29 CFR 791.2(b) (emphasis added).

⁹⁴ See 29 CFR 791.2(c) ("[T]o determine joint employer status, no factors should be used to assess economic dependence.").

⁹⁵ See 2020 WL 5370871, at *27.

⁹⁶ 503 U.S. 318 (1992). In *Darden*, the Court stated that the FLSA defines "employ" "expansively" and with "striking breadth" and "stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles." *Id.* at 326.

⁹⁷ See 2020 WL 5370871, at *26 (citing cases).

⁹⁸ See *id.* (citing 355 F.3d at 69).

⁹⁹ *Id.* at *29.

“[b]ecause a control-based test for joint employer liability is unduly narrow, the [Rule] must be set aside.”¹⁰⁰ The district court added that the “Rule must also be vacated because it unlawfully limits the factors the Department will consider in the joint employer inquiry.”¹⁰¹ According to the district court, excluding economic dependence generally, certain economic dependence factors, and certain other considerations (such as allowing the operation of a store on one’s premises) from the joint employer inquiry contradicts case law and WHD’s prior views.¹⁰²

As another reason for rescission, WHD believes it is necessary to consider and address these concerns that the Rule is unduly narrow. WHD recognizes that while tests differ among the circuit courts of appeals, all courts consistently use a totality-of-the-circumstances economic realities approach to determine the scope of joint employment under the FLSA, rather than limiting the focus exclusively to control. In addition to *Bonnette*, upon which the Rule heavily relied, multiple other circuit court decisions relied upon by the Rule ground their joint employment analyses in the overarching totality-of-the-circumstances economic realities standard.¹⁰³ Likewise, the decisions that have not applied the *Bonnette* factors generally ground their joint employment analyses in the totality-of-the-circumstances economic realities standard too.¹⁰⁴

In view of the foregoing, WHD proposes to rescind the Rule and reserve part 791 for further consideration because WHD believes that it is vitally important to ensure that its interpretation of the FLSA regarding joint employment is wholly consistent with the statutory language, purpose, and Congressional intent, as well as aligned with longstanding legal principles.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *See id.* at *29-30 (explaining that the “Rule’s enumeration of specific economic dependence factors as irrelevant also contravenes *Rutherford*”).

¹⁰³ *See, e.g., Baystate*, 163 F.3d at 675; *Enterprise*, 683 F.3d at 469; *Gray*, 673 F.3d at 354-55.

¹⁰⁴ *See, e.g., Zheng*, 355 F.3d at 69-75; *Salinas*, 848 F.3d at 142-43; *Torres-Lopez*, 111 F.3d at 639-644 (noting that an economic realities analysis applies when determining joint employment and that the concept of joint employment, like employment generally, “should be defined expansively” under the FLSA).

B. *Taking into Account Prior WHD Guidance*

Not only is the vertical joint employment analysis set forth in the Joint Employer Rule different from the analyses applied by every court to have considered the issue prior to the Rule's issuance, but WHD had never before applied the Rule's analysis. Upon initial further review of the Joint Employer Rule, WHD understands the concern that the Rule did not sufficiently take into account and explain departures from WHD's prior joint employment guidance. This concern provides additional support for proposing to rescind the Rule.

It is well-settled that “[a]gencies are free to change their existing policies as long as they provide a reasoned explanation for the change.”¹⁰⁵ When an agency changes its position, “it need not demonstrate . . . that the reasons for the new policy are *better* than the reasons for the old one.”¹⁰⁶ “But the agency must at least ‘display awareness that it is changing position.’”¹⁰⁷ The agency's explanation is sufficient if “the new policy is permissible under the statute, . . . there are good reasons for it, and . . . the agency *believes* it to be better, which the conscious change of course adequately indicates.”¹⁰⁸ And when explaining a changed position, “an agency must also be cognizant that longstanding policies may have ‘engendered serious reliance interests that must be taken into account.’”¹⁰⁹ In such cases, the policy change itself does not need “further justification,” but “a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.”¹¹⁰ For these reasons, an unexplained inconsistency “in agency policy is ‘a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.’”¹¹¹

¹⁰⁵ *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) (citing *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981-82 (2005); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 863-64 (1984)).

¹⁰⁶ *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

¹⁰⁷ *Encino*, 136 S. Ct. at 2126 (quoting *Fox Television*, 556 U.S. at 515, and removing emphasis).

¹⁰⁸ *Fox Television*, 556 U.S. at 515.

¹⁰⁹ *Encino*, 136 S. Ct. at 2126 (quoting *Fox Television*, 556 U.S. at 515).

¹¹⁰ *Fox Television*, 556 U.S. at 515-16.

¹¹¹ *Encino*, 136 S. Ct. at 2126 (quoting *Brand X*, 545 U.S. at 981).

In the case of the Joint Employer Rule, the district court acknowledged that the Rule’s “justifications for engaging in rulemaking are valid” and that “[p]romoting uniformity and clarity given the (at least superficially) widely divergent tests for joint employer liability in different circuits is a worthwhile objective.”¹¹² The court added that it was “sympathetic to the [Rule’s] concern that putative joint employers face uncertainty, and that this uncertainty is costly,” and it made clear that its decision to vacate most of the Rule did “not imply that the Department cannot engage in rulemaking to try to harmonize joint employer standards.”¹¹³

The district court concluded, however, that the Joint Employer Rule “did not adequately explain why it departed from its prior interpretations.”¹¹⁴ The district court described the Rule as “a volte-face” from WHD’s MSPA joint employment regulation “in multiple respects.”¹¹⁵ The court noted that WHD’s 1997 MSPA final rule explained that MSPA joint employment rests on its statutory definition of “employ,” which is the same as the FLSA’s definition of “employ,” and that WHD said then that the FLSA’s definition of “employ” rejects the traditional common law control test.¹¹⁶ The district court explained that the Joint Employer Rule “failed to acknowledge that it had shifted its position from the [MSPA joint employment regulation], much less explain why” even though it quoted a commenter who identified this change in position.¹¹⁷ The court also concluded that the Joint Employer Rule did not “satisfactorily explain why it departed from” the Home Care AI and the Joint Employment AI, both of which, in contrast to the Rule, stated that the FLSA joint employment analysis cannot be limited to control.¹¹⁸ The court determined that this “inconsistency demands an explanation” but the Rule “did not acknowledge that it was

¹¹² 2020 WL 5370871, at *33.

¹¹³ *Id.*

¹¹⁴ *Id.* at 31.

¹¹⁵ *Id.*

¹¹⁶ *See id.* (citing 62 FR 11734 & 11745).

¹¹⁷ *Id.* (citing 85 FR 2833).

¹¹⁸ *Id.* (citing 2014 WL 2816951, at *2 n.5 and 2016 WL 284582, at *9 and comparing them to 85 FR 2821).

departing from” the Home Care AI and the Joint Employment AI nor “explain why it now believes [that they] were wrong.”¹¹⁹

Having initially considered the Joint Employer Rule in comparison to prior and existing guidance, WHD tentatively shares the concern that the Rule did not adequately account for inconsistencies with its previous guidance. WHD’s MSPA joint employment regulation¹²⁰ and its 1997 final rule¹²¹ implementing it remain in effect. And although the Home Care AI and the Joint Employment AI were withdrawn before the effective date of the Joint Employer Rule, WHD has not provided substantive reasons for withdrawing them in relation to the contrary guidance in the Rule. WHD believes that these circumstances are an additional reason for proposing to rescind the Joint Employer Rule.

C. *The Joint Employer Rule’s Vertical Joint Employment Analysis Has Not Been Widely Adopted by Courts*

Since promulgation of the Joint Employer Rule, courts (including the Southern District of New York’s decision vacating the analysis in *New York v. Scalia*) have declined to adopt the Rule’s vertical joint employment analysis.¹²² Indeed, WHD is aware of only two cases in which a court has adopted the Rule’s vertical joint employment analysis.¹²³ Moreover, a number of circuit courts of appeals previously established an analytical framework for vertical joint employment cases, and all of these analyses are different from the analysis in the Joint Employer

¹¹⁹ *Id.*

¹²⁰ *See* 29 CFR 500.20(h)(5).

¹²¹ *See* 62 FR 11745-46.

¹²² *See Reyes-Trujillo v. Four Star Greenhouse, Inc.*, No. 20-11692, 2021 WL 103636, at *7-9 (E.D. Mich. Jan. 12, 2021) (agreeing that the Joint Employer Rule’s “exclusive focus on the purported joint employer’s control runs counter to the FLSA’s expansive definition of ‘employer’” and thus declining to adopt the Rule’s analysis); *Elsayed v. Family Fare LLC*, No. 1:18-cv-1045, 2020 WL 4586788, at *4 (M.D.N.C. Aug. 10, 2020) (finding “it unnecessary to wade into whether the DOL’s [Joint Employer] Rule is entitled to *Brand X* deference or whether the [Rule] is lawful under the APA” and instead “rely[ing] on established Fourth Circuit precedent” regarding joint employment).

¹²³ *See Clyde v. My Buddy The Plumber Heating & Air, LLC*, No. 2:19-cv-00756-JNP-CMR, 2021 WL 778532 (D. Utah Mar. 1, 2021); *Sanders v. Glendale Rest. Concepts, LP*, No. 19-cv-01850-NYW, 2020 WL 5569786 (D. Colo. Sept. 17, 2020).

Rule.¹²⁴ This judicial landscape suggests that withdrawing the Rule would not be disruptive. Among other things, the Rule has not significantly affected judicial analysis of FLSA joint employment cases, and rescinding the Rule could potentially alleviate any confusion over the joint employment standard applied by courts. In addition, WHD does not believe that it will be difficult or burdensome to educate and reorient its enforcement staff if the Joint Employer Rule is rescinded.

D. *Effects on Employees of the Vertical Joint Employment Analysis*

The Joint Employer Rule acknowledged that, although it would not change the wages due an employee under the FLSA in the vertical joint employment scenario, “it may reduce the number of businesses currently found to be joint employers from which employees may be able to collect back wages due to them under the Act.”¹²⁵ The Rule further acknowledged that, “[t]his, in turn, may reduce the amount of back wages that employees are able to collect when their employer does not comply with the Act and, for example, their employer is or becomes insolvent.”¹²⁶ One commenter—the Economic Policy Institute (EPI)—did submit a quantitative analysis of the monetary amount that would transfer from employees to employers as a result of the Rule.¹²⁷ WHD responded that, although it “appreciates EPI’s quantitative analysis,” it “does not believe there are data to accurately quantify the impact of this [R]ule.”¹²⁸ WHD added that it “lacks data on the current number of businesses that are in a joint employment relationship, or to estimate the financial capabilities (or lack thereof) of these businesses and therefore is unable to estimate the magnitude of a decrease in the number of employers liable as joint employers.”¹²⁹

The Rule discussed in a qualitative manner some potential benefits to employees, such as

¹²⁴ See 85 FR 2831 (comparing the Rule’s four-factor analysis to the various analyses adopted by circuit courts of appeals).

¹²⁵ *Id.* at 2853.

¹²⁶ *Id.*

¹²⁷ See *id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

“promot[ing] innovation and certainty in business relationships” and encouraging business to engage in certain practices with an employer that “could benefit the employer’s employees.”¹³⁰

The district court determined that the Joint Employer Rule “does not adequately consider [its] cost to workers” or “try to account for this effect” and was arbitrary and capricious for that reason, among others.¹³¹ The district court stated that the Rule entirely disregarded its cost to workers and that its explanation for doing so—its inability to quantify those costs—was unsatisfactory.¹³² The court noted that the Rule’s “inability-to-quantify rationale is especially unpersuasive” because the Rule similarly failed to quantify its “supposed benefits” while taking those benefits into account.¹³³ Although the court recognized that rules do not have to provide quantitative explanations or precisely parse costs and benefits, it determined that ignoring the cost to workers was not justified in the circumstances of the Joint Employer Rule.¹³⁴

WHD tentatively shares the concern that the Joint Employer Rule may not have adequately considered the costs for employees. This concern is premised in part on WHD’s role as the agency responsible for enforcing the FLSA and for collecting back wages due to employees when it finds violations, as well as a recent Presidential Memorandum instructing the Director of the Office of Management and Budget to recommend new procedures for regulatory review that better “take into account the distributional consequences of regulations.”¹³⁵ As noted in the economic analysis, this rescission could impact the well-being and economic security of workers in low-wage industries, many of whom are immigrants and people of color, because FLSA violations are more severe and widespread in low-wage labor markets.¹³⁶ WHD also

¹³⁰ *Id.*

¹³¹ 2020 WL 5370871, at *32; *see also id.* at *33 (The Rule “effectively assumed that [it] would cost workers nothing—an obviously unreasonable assumption.”).

¹³² *See id.* at *32-33.

¹³³ *Id.* at *33.

¹³⁴ *See id.* at *33 (citing cases).

¹³⁵ Modernizing Regulatory Review: Memorandum for the Heads of Executive Departments and Agencies (Jan. 20, 2021), published at 86 FR 7223 (Jan. 26, 2021).

¹³⁶ Annette Bernhardt, Ruth Milkman, et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America’s Cities*, 2009, available at <https://www.nelp.org/wp-content/uploads/2015/03/BrokenLawsReport2009.pdf>.

questions whether a rule that may result in employees being employed by fewer employers, as the Joint Employer Rule acknowledges may be its result, effectuates the FLSA's purpose, recognized repeatedly by the Supreme Court, to provide broad coverage to employees.¹³⁷ WHD believes that these potential negative effects on employees, which may make it more difficult for workers to collect back wages owed and incentivize workplace fissuring,¹³⁸ are serious concerns that may have a disproportionate impact on low-wage and vulnerable workers. These concerns are an additional reason for proposing to rescind the Joint Employer Rule.

E. Horizontal Joint Employment

In the horizontal joint employment scenario, one employer employs an employee for one set of hours in a workweek, and one or more other employers employ the same employee for separate hours in the same workweek. If the two (or more) employers jointly employ the employee, the hours worked by that employee for all of the employers must be aggregated for the workweek and all of the employers are jointly and severally liable.¹³⁹

For horizontal joint employment, the Joint Employer Rule adopted the standard in the prior version of 29 CFR 791.2 with non-substantive revisions, reflecting the Department's historical position, which is also consistent with the relevant case law.¹⁴⁰ This analysis focuses on the degree of the employers' association with respect to the employment of the employee. Although this NPRM proposes to rescind the entire Rule, including the horizontal joint employment provisions for reasons discussed below, WHD is not considering revising its longstanding horizontal joint employment analysis.

¹³⁷ See, e.g., *Rutherford Food*, 331 U.S. at 729 (“This Act contains its own definitions, comprehensive enough to require its application to many persons and working relationships, which prior to this Act, were not deemed to fall within an employer-employee category.”) (quoting *Walling v. Portland Terminal Co.*, 330 U.S. 148, 150 (1947)); *United States v. Rosenwasser*, 323 U.S. 360, 362-63 (1945) (“A broader or more comprehensive coverage of employees [than that of the FLSA] . . . would be difficult to frame.”).

¹³⁸ The Joint Employer Rule described workplace fissuring as the increased reliance by employers on subcontractors, temporary help agencies, and labor brokers rather than hiring employees directly. See 85 FR 2853 n.100.

¹³⁹ See 29 CFR 791.2(e)(1).

¹⁴⁰ See 85 FR 2844-45.

The Rule structured 29 CFR 791.2 such that the horizontal joint employment provisions are intertwined with the vertical joint employment provisions, and it would be difficult, as a practical matter, for the horizontal joint employment provisions to stand alone. For example, the Rule’s horizontal joint employment analysis is located in subsection (e) of 29 CFR 791.2.¹⁴¹ Section 791.2(f) addresses the consequences of joint employment for both the vertical and horizontal scenarios, and section 791.2(g) provides 11 “illustrative examples” of how the Rule may apply to specific factual situations implicating both vertical and horizontal joint employment.¹⁴² Accordingly, because of the interconnected nature of section 791.2’s provisions, WHD believes that simply retaining section 791.2(e) or some portions of part 791 would be unworkable and potentially confusing, and thus proposes to rescind the entire Rule. Nonetheless, the Department is not reconsidering the substance of its longstanding horizontal joint employment analysis.

F. *Effect of Proposed Rescission*

If the Joint Employer Rule is rescinded, as proposed here, Part 791 of Title 29 of the Code of Federal Regulations would be removed in its entirety and reserved. The Department is not proposing any regulatory guidance to replace the guidance currently located in Part 791, so any commenter feedback addressing or suggesting such a replacement or otherwise requesting that WHD adopt specific guidance if the Joint Employer Rule is rescinded will be considered to be outside the scope of this NPRM. In addition to the reasons for the proposed rescission explained above, rescission of the Joint Employer Rule and removal of Part 791 would allow WHD an additional opportunity to consider legal and policy issues relating to FLSA joint employment.

III. Paperwork Reduction Act

¹⁴¹ See 29 CFR 791.2(e).

¹⁴² See 29 CFR 791.2(f), (g). The district court vacated sections 791.2(f) and (g) and all other provisions of section 791.2 except for subsection (e). See 2020 WL 5370871, at *34.

The Paperwork Reduction Act of 1995 (PRA) and its attendant regulations¹⁴³ 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.¹⁴⁴ This NPRM does not contain a collection of information subject to Office of Management and Budget approval under the PRA.

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

A. Introduction

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.¹⁴⁵ 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 rescission is economically significant under section 3(f) of Executive Order 12866.

¹⁴³ See 44 U.S.C. 3501 *et seq.*; 5 CFR part 1320.

¹⁴⁴ See 44 U.S.C. 3506(c)(2)(B); 5 CFR 1320.8.

¹⁴⁵ See 58 FR 51,735, 51,741 (Oct. 4, 1993).

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. The analysis below outlines the impacts that the Department anticipates may result from this proposed rescission and was prepared pursuant to the above-mentioned executive orders.

B. Background

The FLSA requires a covered employer to pay nonexempt employees at least the federal minimum wage for every hour worked in a non-overtime workweek and (in an overtime workweek) premium pay of at least one and one-half times the employee's regular rate of pay for all hours worked in excess of 40. The FLSA defines "employer" to "include[] any person acting directly or indirectly in the interest of an employer in relation to an employee"¹⁴⁶; "employee" to generally mean "any individual employed by an employer"¹⁴⁷; and "employ" to "include[] to suffer or permit to work."¹⁴⁸ Two or more employers may jointly employ an employee and thus be jointly and severally liable for every hour worked by the employee in a workweek.

In January 2020, WHD published a final rule entitled "Joint Employer Status Under the Fair Labor Standards Act," which became effective on March 16, 2020 (Joint Employer Rule or Rule). The Rule provides a four-factor test for determining joint employer status in vertical joint employment situations. Those four factors are whether the potential joint employer: (1) hires or fires the employee; (2) supervises and controls the employee's work schedule or conditions of

¹⁴⁶ 29 U.S.C. 203(d).

¹⁴⁷ 29 U.S.C. 203(e)(1).

¹⁴⁸ 29 U.S.C. 203(g).

employment to a substantial degree; (3) determines the employee's rate and method of payment; and (4) maintains the employee's employment records. For horizontal joint employment situations, the Joint Employer Rule made non-substantive revisions to WHD's existing standard. For reasons discussed in Section II above, the Department is now proposing to rescind the Joint Employer Rule and to remove the regulations in 29 CFR part 791.

C. Costs

1. Rule Familiarization Costs

Rescinding the Joint Employer Rule would impose direct costs on businesses that will need to review the rescission. To estimate these regulatory familiarization costs, the Department determined: (1) the number of potentially affected entities, (2) the average hourly wage rate of the employees reviewing the rescission, and (3) the amount of time required to review the rescission. It is uncertain whether these entities would incur regulatory familiarization costs at the firm or the establishment level. For example, in smaller businesses there might be just one specialist reviewing the rescission, while larger businesses might review it at corporate headquarters and determine policy for all establishments owned by the business. To avoid underestimating the costs of this proposed rescission, 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 rescission, and the upper bound of the range assumes one specialist per establishment.

The most recent data on private sector entities at the time this NPRM was drafted are from the 2017 Statistics of U.S. Businesses (SUSB), which reports 5,996,900 private firms and 7,860,674 private establishments with paid employees.¹⁴⁹ Because the Department is unable to

¹⁴⁹ Statistics of U.S. Businesses 2017, <https://www.census.gov/data/tables/2017/econ/susb/2017-susb-annual.html>, 2016 SUSB Annual Data Tables by Establishment Industry.

determine how many of these businesses have workers with one or more joint employers, this analysis assumes all businesses will undertake review.

The Department believes ten minutes per entity, on average, to be an appropriate review time here. This rulemaking is a proposed rescission and would not set forth any new regulations or guidance regarding joint employment. Additionally, as it believed when it issued the Joint Employer Rule, the Department believes that many entities are not joint employers and thus would not spend any time reviewing the proposed rescission. Therefore, the ten-minute review time represents an average of no time for the majority of entities that are not joint employers, and potentially more than ten minutes for review by some entities that might be joint employers.

The Department's analysis assumes that the proposed rescission would be reviewed by Compensation, Benefits, and Job Analysis Specialists (SOC 13-1141) or employees of similar status and comparable pay. The median hourly wage for these workers was \$31.04 per hour in 2019, the most recent year of data available.¹⁵⁰ The Department also assumes that benefits are paid at a rate of 46 percent¹⁵¹ and overhead costs are paid at a rate of 17 percent of the base wage, resulting in a fully loaded hourly rate of \$50.60.

The Department estimates that the lower bound of regulatory familiarization cost range would be \$ 50,675,004 ($5,996,900 \text{ firms} \times \$50.60 \times 0.167 \text{ hours}$), and the upper bound, \$ 66,424,267 ($7,860,674 \text{ establishments} \times \$50.60 \times 0.167 \text{ hours}$). The Department estimates that all regulatory familiarization costs would occur in Year 1.

Additionally, the Department estimated average annualized costs of this proposed rescission over 10 years. Over 10 years, it would have an average annual cost of \$6.7 million to \$8.8 million, calculated at a 7 percent discount rate (\$5.8 million to \$7.6 million calculated at a 3 percent discount rate). All costs are in 2019 dollars.

¹⁵⁰ Occupational Employment and Wages, May 2019, <https://www.bls.gov/oes/current/oes131141.htm>.

¹⁵¹ The benefits-earnings ratio is derived from the Bureau of Labor Statistics' Employer Costs for Employee Compensation data using variables CMU1020000000000D and CMU1030000000000D.

2. *Other Costs*

The Department acknowledges that there may be other potential costs to the regulated community, such as reduced clarity from the lack of regulatory guidance. Because it lacks data on the number of businesses that are in a joint employment relationship or those that changed their policies as a result of the Joint Employer Rule, the Department has not quantified these potential costs, which are expected to be de minimis. Although the rescission would remove the regulations at 29 CFR part 791, the Department believes that this will not result in substantial costs or decreased clarity for the regulated community because, as discussed above, courts already apply a joint employment analysis different from the analysis in the Joint Employer Rule and generally have not adopted the Rule's analysis.

D. Transfers

The Department acknowledged that the Joint Employer Rule could limit the ability of workers to collect wages due to them under the FLSA because when there is only one employer liable, there are fewer employers from which to collect those wages and no other options if that sole employer lacks sufficient assets to pay.¹⁵² Because the Joint Employer Rule provided new criteria for determining joint employer status under the FLSA and given the specifics of those criteria, it potentially reduced the number of businesses found to be joint employers from which employees may be able to collect back wages due to them under the Act. This, in turn, would reduce the amount of back wages that employees are able to collect when an employer does not comply with the Act and, for example, was or became insolvent.

Like the Joint Employer Rule, this rescission would not change the amount of wages due any employee under the FLSA. Rescinding the Joint Employer Rule could result in a transfer from employers to employees in the form of back wages that employees would thereafter be able to collect. The Department lacks data on the current number of businesses that are in a joint employment relationship, or to estimate the financial capabilities (or lack thereof) of these

¹⁵² See 85 FR 2853.

businesses and therefore is unable to estimate the magnitude of an increase in the number of employers liable as joint employers.

Although the Rule would not have changed the amount of wages due to an employee, the narrower standard for joint employment could have incentivized “workplace fissuring.” Research has shown that this type of domestic outsourcing can suppress workers’ wages, especially for low-wage occupations.¹⁵³

In 2019, the Economic Policy Institute (EPI) submitted a comment to the Joint Employer NPRM in which they calculated that the rule would result in transfers from employees to employers of over \$1 billion.¹⁵⁴ EPI explained that these transfers would result from both an increase in workplace “fissuring” as well as from an increase in wage theft by employers. Rescinding this standard could help mitigate this impact. The Department is unable to determine to what extent these transfers occurred while the Joint Employer Rule was in effect, and therefore has not provided a quantitative estimate of transfers from employers to employees because of this rescission. The Department is also unable to estimate the increase in back wages that employees would be able to collect because of this change.

This proposed rescission could also benefit some small businesses, because the Joint Employer Rule’s narrowing of the joint employment standard could make them solely liable and responsible for complying with the FLSA without relying on the resources of a larger business in certain situations.

The Department welcomes comments and data to help quantify these transfers.

E. Benefits

¹⁵³ Arindrajit Dube and Ethan Kaplan, “Does Outsourcing Reduce Wages in the Low-Wage Service Occupations? Evidence from Janitors and Guards,” *ILR Review* 63, no. 2 (January 2010): 287–306.

¹⁵⁴ Celine McNicholas and Heidi Shierholz, *EPI comments regarding the Department of Labor’s proposed joint-employer standard*, June 25, 2019. <https://www.epi.org/publication/epi-comments-regarding-the-department-of-labors-proposed-joint-employer-standard/>

The Department believes that rescinding the Joint Employer Rule would result in benefits to workers and would strengthen wage and hour protections for vulnerable workers. Removing a standard for joint employment that is narrower than the standard applied by courts and WHD's prior standards may enable more workers to collect back wages to which they would already be entitled under the FLSA. This could particularly improve the well-being and economic security of workers in low-wage industries, many of whom are immigrants and people of color, because FLSA violations are more severe and widespread in low-wage labor markets.¹⁵⁵

The Department welcomes any comments and data on quantifying the benefits associated with this proposed rescission.

V. Regulatory Flexibility Act (RFA) Analysis

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121 (1996), requires federal agencies engaged in rulemaking to consider the impact of their proposals on small entities, consider alternatives to minimize that impact, and solicit public comment on their analyses. The RFA requires the assessment of the impact of a regulation on a wide range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions. Accordingly, the Department examined this proposed rescission to determine whether it would have a significant economic impact on a substantial number of small entities. The most recent data on private sector entities at the time this NPRM was drafted are from the 2017 Statistics of U.S. Businesses (SUSB), which reports 5,996,900 private firms and 7,860,674 private establishments with paid employees.¹⁵⁶ Of these, 5,976,761 firms and 6,512,802 establishments have fewer than 500 employees. Because the Department is unable to determine

¹⁵⁵ Annette Bernhardt, Ruth Milkman, et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities*, 2009, available at <https://www.nelp.org/wp-content/uploads/2015/03/BrokenLawsReport2009.pdf>.

¹⁵⁶ Statistics of U.S. Businesses 2017, <https://www.census.gov/data/tables/2017/econ/susb/2017-susb-annual.html>, 2016 SUSB Annual Data Tables by Establishment Industry.

how many of these businesses have workers with one or more joint employers, this analysis assumes all businesses will undertake review.

The per-entity cost for small business employers is the regulatory familiarization cost of \$8.43, or the fully loaded mean hourly wage of a Compensation, Benefits, and Job Analysis Specialist (\$50.60) multiplied by 1/6 hour (ten minutes). Because this cost is minimal for small business entities, and well below one percent of their gross annual revenues, which is typically at least \$100,000 per year for the smallest businesses, the Department certifies that this proposed rescission will not have a significant economic impact on a substantial number of small entities.

The Department welcomes any comments and data on this Regulatory Flexibility Act Analysis, including the costs and benefits of this proposed rescission on small entities.

VII. Executive Order 13132, Federalism

The Department has (1) reviewed this proposed rescission in accordance with Executive Order 13132 regarding federalism and (2) determined that it does not have federalism implications. The proposed rescission 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.

VIII. Executive Order 13175, Indian Tribal Governments

This proposed rescission 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 in 29 CFR Part 791

Wages.

PART 791—[REMOVED AND RESERVED]

For the reasons set forth in the preamble, and under the authority of 29 U.S.C. 201-219, the Department proposes to remove and reserve 29 CFR part 791.

Signed this 4th day of March, 2021.

Jessica Looman,

Principal Deputy Administrator, Wage and Hour Division.

[FR Doc. 2021-04867 Filed: 3/11/2021 8:45 am; Publication Date: 3/12/2021]