



## COALITION FOR A **DEMOCRATIC WORKPLACE**

Division of Regulations, Legislation, and Interpretation  
Wage and Hour Division  
U.S. Department of Labor, Room S—3502  
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Washington, D.C. 20210

By electronic submission: <http://www.regulations.gov>

### **RE: RIN 1235-AA26; Joint Employer Status Under the Fair Labor Standards Act; Notice of Proposed Rulemaking**

These comments are submitted on behalf of the Coalition for a Democratic Workplace (“CDW”) and the undersigned organizations<sup>1</sup> (“the Commenters”), pursuant to the Department of Labor’s (“the Department” or “the DOL”) Notice of Proposed Rulemaking and Request for Comments regarding Joint Employer Status under the Fair Labor Standards Act, 84 Fed. Reg. 14043 (April 9, 2019) (“Proposed Rule”). For the reasons outlined below, the Commenters urge the Department to adopt the Proposed Rule with some minor modifications. These proposed modifications, which the Commenters respectfully submit, will enhance predictability and stability of the Rule’s application.

CDW is a collection of nearly 500 organizations<sup>2</sup> representing the interests of millions of employers nationwide. All of CDW’s members are or represent the interests of “employers” as defined by the Fair Labor Standards Act (“the FLSA” or “the Act”) and are consequently affected by the Proposed Rule. CDW advocates for its members on numerous issues of significance related to federal employment policy and interpretations and applications of the Act.

The undersigned organizations represent employers operating in nearly every conceivable industry in all 50 states and many territories.

### **Comments**

The Proposed Rule adopts a consistent, common-sense standard for determining joint employer status under the FLSA. The Commenters support the Rule’s acknowledgment that the facts of the relationship between the employee and the employer should govern the joint employer determination, not the structure of the relationship between purported joint employers or business-to-business partners. Moreover, the Proposed Rule’s emphasis on the actual exercise of control as a prerequisite to a joint employer finding encourages cooperation between businesses without exposing them to potential liability under an uncertain standard.

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<sup>1</sup> See Appendix A.

<sup>2</sup> A full list of CDW’s Members is available at <https://myprivateballot.com/about/>.



COALITION FOR A  
**DEMOCRATIC WORKPLACE**

The Commenters are uniquely positioned to provide insight on this proposal as they represent businesses of all types that depend on complex contractual relationships to meet customer and consumer demands, including agreements between licensors and licensees, franchisors and franchisees, and employer entities—such as construction companies, manufacturers, hospitals, wholesalers, retailers, and hotels—and vendors, suppliers, and subcontractors.

**1. The Proposed Rule Would Provide Clear Guidance for Employers and Appropriately Codify the Essential Aspects of the Employment Relationship**

The Proposed Rule will help to encourage the development of a unified standard for evaluating joint employer liability under the FLSA. The current scattershot collection of tests used in the federal courts for evaluating joint employer questions under the Act has produced uncertainty for employers, especially those with national operations. The Proposed Rule’s adoption of the test used for decades by the U.S. Court of Appeals for the Ninth Circuit (the “*Bonnette* Test”) would resolve that uncertainty by establishing a sensible and easy-to-apply standard.

In *Bonnette v. California Health & Welfare Agency*, the Ninth Circuit held that state and county agencies were the joint employers of in-home care workers for purposes of the minimum wage provisions of the Act.<sup>3</sup> In reaching its decision, the Court stated that the employment relationship should not be evaluated based on “isolated factors,” but instead should be based on the economic reality of the relationship between the employee and the putative employer. The court announced a four-part test for determining whether a putative employer held an employment relationship with an employee for purposes of the FLSA: “whether the alleged 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.”<sup>4</sup> The Court acknowledged these four factors should not be applied blindly, but rather must be viewed within the context of the whole relationship.

In the decades since the Ninth Circuit’s decision in *Bonnette*, other federal courts have adopted its four-part framework and applied the same or a similar test.<sup>5</sup> Others, however, have declined to adopt *Bonnette*. Of the courts that have declined, several have either failed to recognize any formal joint employer test, or developed tests with completely different legal and theoretical predicates.<sup>6</sup> As recently as 2017, the Fourth Circuit announced its own joint employer standard that radically departs from the logic of *Bonnette* and establishes an incredibly broad test suggesting even a single

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<sup>3</sup> *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983).

<sup>4</sup> *Id.* at 1470.

<sup>5</sup> See *Baystate Alternative Staffing v. Herman*, 163 F.3d 668 (1<sup>st</sup> Cir. 1998); *Ivanov v. Sunset Pools Mgmt. Inc.*, 567 F.Supp.2d 189, 194-95 (D.D.C. 2008); *Williams v. Henagan*, 595 F.3d 610 (5<sup>th</sup> Cir. 2010).

<sup>6</sup> See, e.g., *Zheng v. Liberty Apparel Co.*, 355 F.3d 61 (2<sup>nd</sup> Cir. 2003) (applying a ten-factor test to determine joint employer status); *In re Enter. Rent-A-Car. Wage & Emp’t Practices Litig.*, 683 F.3d 462 (3d. Cir. 2012) (partially adopting *Bonnette*, but emphasizing that *Bonnette* factors are not exhaustive).



COALITION FOR A  
**DEMOCRATIC WORKPLACE**

instance of reserved (but unexercised) indirect control could establish a joint employer relationship.<sup>7</sup> The variance in standards from jurisdiction to jurisdiction has produced illogically divergent outcomes—in some instances, cases with similar facts have been decided differently based on the different standards applied in each of the deciding courts.<sup>8</sup>

The Department contributed to the unstable nature of this law in several recent Administrator’s Interpretations. In Administrator’s Interpretation No. 2015-1, the DOL analyzed the “economic realities” language used by several courts to opine that any person who is “economically dependent” on an employer is that entity’s employee.<sup>9</sup> The Department based this rationale on the FLSA’s broad definition of “employ:” to “suffer or permit” work.<sup>10</sup> One year later, the Department issued another Administrator’s Interpretation rejecting the idea that a finding of vertical joint employment depends on the control exercised by a putative joint employer, instead suggesting that an entity can be a vertical joint employer if the employee of another business is economically dependent on that entity.<sup>11</sup> We applaud the Secretary for since rescinding this guidance. Unfortunately, the broad tests suggested in those Administrator’s Interpretations have been cited by plaintiffs’ counsel and various courts as support for adoption of open-ended and vague standards that lack the clarity and predictability desired by the business community.<sup>12</sup>

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<sup>7</sup> *Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125 (4<sup>th</sup> Cir. 2017). It is noteworthy that in announcing its new, six-part test, which focuses primarily on whether two entities are “completely disassociated” from one another, the Fourth Circuit misapplied the DOL’s current joint employer regulation. In its present form, 29 C.F.R. §791.2(a) addresses “horizontal” joint employment—whether two entities, each of which separately employ the same employee, should be required to aggregate the employee’s hours for overtime purposes. While the *Salinas* Court borrowed heavily from the current regulation in fashioning its test, the facts of the case involved the far more common “vertical” joint employment scenario, in which an employee has only one actual employer, but performs work that benefits a separate entity. In vertical joint employment—the primary subject of the Proposed Rule—the focus has always been, and always should be, on the relationship between the putative joint employer and the employee, not the relationship between the two entities. The Fourth Circuit’s failure to recognize this critical distinction highlights the need for the clarification the Proposed Rule would bring.

<sup>8</sup> See Vano Haroutunian & Avraham Z. Cutler, [The Conflict Between the Circuits in Analyzing Joint Employment Under the FLSA: Why the Supreme Court Should Grant Certiorari in Zheng v. Liberty Apparel](#), 12 Engage: J. Federalist Soc’y Prac. Groups 77, 79 (2011) (citing how different joint employer tests led to different outcomes under the same facts).

<sup>9</sup> WHD Administrator’s Interpretation No. 2015-1, “The Application of the Fair Labor Standards Act’s ‘Suffer and Permit’ Standard in the Identification of Employees Who are Misclassified as Independent Contractors.”

<sup>10</sup> 29 U.S.C. § 203(g).

<sup>11</sup> WHD Administrator’s Interpretation No. 2016-1, “Joint employment under the Fair Labor Standards Act and Migrant and Seasonal Agricultural Worker Protection Act.”

<sup>12</sup> See *Salinas*, 848 F.3d 125; *Merrill v. Pathway Leasing LLC*, No. 16-CV-02242-KLM, 2018 WL 2214471, at \*6 (D. Colo. May 14, 2018) (adopting the *Hall-Salinas* test to determine joint employer liability); *Harris v. Med. Transportation Mgmt., Inc.*, 300 F. Supp. 3d 234, 243 (D.D.C. 2018) (court declines to reach decision regarding plaintiffs’ request to adopt *Salinas* test because it focuses on the “relevant relationship” as set for in the Department of Labor regulations).



COALITION FOR A  
**DEMOCRATIC WORKPLACE**

This patchwork of rules presents significant challenges for employers desirous of uniform national business and employment practices. The cloudy legal landscape around the question of joint employment has left employers unsure whether (and where) their practices are, or are not, exposing them to unwanted legal risks. In some cases, maintenance of a uniform policy or practice is not feasible. This is clearly out-of-step with Congress’s goal of creating a national standard for fair pay practices.<sup>13</sup>

The Proposed Rule would go a long way towards reducing this uncertainty. Codifying the four-step *Bonnette* test would produce a rule that is clear, easy to apply, and more predictable than the majority of tests now in use in the federal courts. The Proposed Rule’s emphasis on the actual exercise of control before a finding of joint employment status is also consistent with Section 3(d) of the Act, which defines “employer” to include “any person acting directly or indirectly in the interest of an employer in relation to an employee.”<sup>14</sup> It is also similar to the test proposed by the National Labor Relations Board (“the NLRB”) related to the National Labor Relations Act (“the NLRA”), which would provide more uniformity among federal employment laws.<sup>15</sup>

In this regard, the Proposed Rule’s slight modification of the first *Bonnette* factor from whether the putative joint employer has the power to hire or fire employees to whether it actually does so is likewise consistent with Section 3(d) of the Act, as well as the Rule’s general policy goals. The Proposed Rule clearly expresses the Department’s view that reserved but unexercised control should not affect the joint employer relationship. The modified first element of the *Bonnette* test more accurately captures the economic reality of the relationship and is more probative of the “ultimate inquiry” in determining joint employer status: “whether a potential joint employer, as a matter of economic reality, actually exercises sufficient control over an employee to qualify as a joint employer under the Act.”<sup>16</sup>

## **2. The Proposed Rule Provides Needed Stability for the Regulated Community and Encourages Business-to-Business Cooperation**

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<sup>13</sup> H. Rep. No. 2182, 75th Cong., 3d Sess., p. 6-7 (“There are to be no differentials either between sections of the United States, between industries, or between employers. No employer in any part of the United States in any industry affecting interstate commerce need fear that he will be required by law to observe wage and hour standards higher than those applicable to his competitors”); see also *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of Am.*, 325 U.S. 161, 167, 65 S. Ct. 1063, 1066, 89 L. Ed. 1534 (1945) (finding “Congress intended...to achieve a uniform national policy of guaranteeing compensation for all work or employment engaged in by employees covered by the Act”).

<sup>14</sup> 29 U.S.C. 203(d)(emphasis added).

<sup>15</sup> See *The Standard for Determining Joint-Employer Status*, 83 Fed. Reg. 179 (Sept. 14, 2018) (proposed rule for joint employer liability under the National Labor Relations Act, focusing on actual exercise of control that is more than limited and routine).

<sup>16</sup> 84 FR 14044.



COALITION FOR A  
**DEMOCRATIC WORKPLACE**

The Proposed Rule will benefit the business community by establishing a more stable and predictable standard for determining joint employer status. In addition, with the added certainty the Proposed Rule would provide, businesses would be more willing and able to assist other businesses with legal compliance on a variety of issues, thereby benefitting employees as well. The Commenters respectfully submit that this is an important policy objective, as the recent uncertainty regarding joint employer status has inhibited business-to-business collaboration and, in some instances, job growth. When companies do not know whether certain business practices may lead to legal exposure, they are less likely to engage in those practices.

This has particularly been the case during the past several years, which have seen major shifts in the landscape of joint employer liability extending beyond the FLSA context. The NLRB announced a significant change in its joint employer standard in 2015,<sup>17</sup> and more recently has proposed its own clarifying rule.<sup>18</sup> Given the significant recent focus on the question of joint employment generally, business owners and economists have shared their views and findings regarding the effect of uncertain joint employer standards on the business community.

Testimony and analysis have shown several common responses to the uncertainty around potential joint employer liability.<sup>19</sup> In some cases, companies are ceasing or limiting business-to-business agreements altogether, particularly with smaller entities, which results in fewer opportunities for small businesses to provide specialized services to larger business partners. In others, larger businesses maintain their relationships with smaller organizations, but increase the amount of control they exercise over their business partners because of concerns that a partner's mistake could lead to their own liability.

Both franchisors and franchisees reported negative economic effects because of uncertainty regarding joint employer status. In response to surveys conducted by the International Franchise Association and the U.S. Chamber of Commerce related to the NLRB's proposed new joint employer standard, franchisors said they cut back significantly on assistance provided to franchisees.<sup>20</sup> More than 90 percent of franchisors surveyed said they implemented defensive

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<sup>17</sup> See *Browning Ferris Industries of California, Inc.*, 362 NLRB No. 186 (2015).

<sup>18</sup> See "The Standard for Determining Joint-Employer Status," 83 FR 46681.

<sup>19</sup> See, e.g., Testimony of Clint Ehlers, President, FASTSIGNS, testimony of Catherine Monson, CEO, FASTSIGNS, and testimony of Jagruti Panwala, hotel owner and operator (*Expanding Joint Employer Status: What Does it Mean for Workers and Job Creators*, H. Comm. on Education and the Workforce, Subcomm. on Health, Employment, Labor and Pensions, 113th Cong. 16-18; 24-26, (Sept. 9, 2014)); Testimony of John Sims IV, Owner/Operator Rainbow Station at the Boulders (*Who's the Boss? The "Joint Employer" Standard and Business Ownership*, S. Comm. on Health, Education, Labor and Pensions, 114th Cong. (Feb. 5, 2015)); Testimony of Vinay Patel, President and CEO, Fairbrook Hotels, and written statement of Stuart Hershman, Esq. on behalf of International Franchise Association (*Risky Business: Effects of New Joint Employer Standards for Small Firms*, H. Small Business Comm., Subcomm. on Investigations, Oversight and Regulations 114th Cong. (March 17, 2016).

<sup>20</sup> The IFA and U.S. Chamber of Commerce surveyed franchisees and franchisors from various industries, including hospitality, healthcare, quick-service restaurants, and salons.





COALITION FOR A  
**DEMOCRATIC WORKPLACE**

distancing behaviors to avoid potential liability, including reducing training resources, providing fewer or less detailed sample documents for franchisees, decreasing supervision of operations and performance standards, and refusing to provide legal advice. Franchisees reported feelings of isolation and lack of support from their franchisor partners and said they missed out on many of the benefits that encouraged them to enter into a franchise relationship in the first place.

The effect of reduced interactions between franchisees and franchisors resulted in slowed growth, reduced expansion and fewer entrepreneurial opportunities for both franchisees and franchisors. For example, in response to the IFA/U.S. Chamber survey, franchisees reported revenue suppression rates between two and ten percent because of the additional expenses they needed to incur on seeking advice from outside counsel or third-party groups rather than their franchisor partners. Franchisors commented that they were less likely to enter into franchise agreements with less experienced or new franchisee-owners, because they could not provide the type of assistance and oversight they traditionally provided to help new partners get off the ground and succeed. Franchisees also reported problems with talent acquisition because of the lack of collaboration with franchisors, resulting in staffing shortages in key positions that prevented the franchises from reaching their full revenue potential.<sup>21</sup>

Supply chain businesses also face marginalization and reduced opportunity under a broad and ambiguous joint employer standard. A study by the American Action Forum estimated the NLRB's joint employer rule affects more than 54 million workers, including more than 46 million in supply chain businesses that provide goods or services to business partners, rather than directly to consumers.<sup>22</sup> A vague joint employer rule discourages businesses from entering into relationships with supply chain companies because of the increased risk, and in turn increased potential cost, of those relationships. A reduction in supply chain business would harm American workers, because supply chain jobs represent some of the higher paying jobs in the economy.<sup>23</sup> It would also harm American businesses that rely on supply chain companies to provide expertise in discrete, specialized areas to ensure product and service quality.

All of these concerns have equal application in the FLSA context. The statute and its joint employer rules affect at least as many American workers as the NLRA. FLSA litigation is typically more expensive and time consuming for employers than NLRB administrative charges. In many cases, fears over shared liability for the wage and hour violations of a business partner can be an even greater deterrent to the formation and/or maintenance of business relationships than

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<sup>21</sup> For example, one franchise reported it could employ about six additional stylists for its salon business if it had recruiting assistance from its franchisor and that each stylist could create \$50,000 in annual revenue. Other businesses made similar reports. Many franchisors had previously provided assistance or recommendations to franchisees regarding talent acquisition but refrain from doing so because of joint employer liability risks.

<sup>22</sup> Gitis, Ben, *The Joint Employer Standard and the Supply Chain*, American Action Forum (Nov. 26, 2018) (<https://www.americanactionforum.org/research/joint-employer-standard-and-supply-chain/>).

<sup>23</sup> *Id.* (finding supply chain workers make, on average, up to 50 percent more than workers in non-supply chain jobs).



COALITION FOR A  
**DEMOCRATIC WORKPLACE**

concerns related to shared labor law liabilities. As a result, the need for clarity and predictability is just as great under the FLSA (if not greater) as it is under the NLRA.

The Commenters therefore welcome the Proposed Rule’s recognition that in the business-to-business context, substance matters more than form. The language in the rule that states “[t]he potential joint employer’s business model...does not make joint employer status more or less likely” captures the concerns of many businesses involved in franchising or subcontracting. Franchisors represent a significant portion of the American economy and should not be treated differently merely because they utilize an interconnected business model that has thrived in the country for decades. The Proposed Rule’s exceptions language reassures these employers that if they allow sufficient independence for their contract partners, they will not face unintended liability merely because of the structure of the relationship.

These exceptions will also encourage the regulated community to continue to exchange best practices, which ultimately benefits employees. Franchisors often provide sample handbooks or other employment documents to their franchisees, not because they wish to control the franchisees’ employees, but because these resources help their small business partners succeed independently. Moreover, in both franchisor and contractor contexts, the franchisor or prime contractor may be required to ensure their smaller partners follow certain laws or contract requirements. Courts have acknowledged that employers in contracting relationships need to exercise some amount of supervision over their contract partners.<sup>24</sup> But they also realize the “substantial and valuable place that outsourcing, along with the subcontracting relationships that follow from outsourcing, have come to occupy in the American economy” and that such relationships are “unlikely to be mere subterfuge to avoid complying with labor laws.”<sup>25</sup>

The Proposed Rule’s exclusion from liability of certain types of business-to-business cooperation will simultaneously encourage the sharing of resources with small businesses and subcontractors while reducing the likelihood (due to the potential over-exercise of control by larger partners that have no choice but to maintain certain supplier or franchised relationships) that those smaller businesses will have to sacrifice independence and entrepreneurial control in order to maintain meaningful business relationships.

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<sup>24</sup> *Zheng v. Liberty Apparel Co. Inc.*, 355 F.3d 61, 73 (2d Cir. 2003) (noting that a joint employer test should consider both the type of control exercised by putative employer over the work of the employee *and* whether the putative employer “function[s] as employers of the plaintiff rather than mere business partners of plaintiffs’ direct employer,” to avoid overbroad reach of joint employer liability); *Jacobson v. Comcast Corp.*, 740 F. Supp. 2d 683, 690 (D. Md. 2010) (distinguishing between control over an employee and general quality control of a contract partner’s work, and finding “a high level of supervision and control is not an automatic trigger for joint employment,” when such it is focused on the quality of the product rather than the day-to-day performance of the employee).

<sup>25</sup> *Id.*



COALITION FOR A  
**DEMOCRATIC WORKPLACE**

**3. The Proposed Rule is Consistent with the FLSA’s Purpose and Regulatory Framework**

The Proposed Rule furthers the legislative purpose of the Act by eliminating the overly broad and difficult-to-define “not completely disassociated” standard from the vertical joint employment context, while remaining faithful to the definition of “employer” under section 3(d) of the FLSA. The definition provides that an entity must “act[] directly or indirectly...in relation to an employee,” to qualify as an employer. The Proposed Rule’s emphasis on the actual exercise of control—i.e., that the putative employer has to take some action in relation to a group of employees in order to be their joint employer—appropriately captures the essence of Section 3(d) of the Act. Moreover, and contrary to likely critics of the Proposed Rule, its focus on the definition of “employer” as the term most relevant to the joint employer analysis does not undermine the Act’s separate goal of covering a broad range of working relationships. Instead, it acknowledges the unique context of joint employment and seeks to eliminate the proliferation of open-ended and amorphous joint employer tests that have impeded on traditional, lawful business relationships in ways that are inconsonant with the Act.

An early Department of Labor Interpretive Bulletin explained one of the policy justifications for the development of rules surrounding joint employer liability under the FLSA.<sup>26</sup> The Department expressed concern about “wage chiselers” who created sham arrangements in which an employee would work full-time for one employer, and then work additional hours for a nominally different “employer” that was really one-in-the-same. These entities would not pay overtime payments to the employee for the additional work performed for the “second” employer, even though, in reality, all work was really performed for the same entity. The Department explained that these types of arrangements should not escape liability under the FLSA. It is this type of manipulation—intended to deprive employees of full compensation—that the concept of joint employer liability seeks to prevent.

In this regard, some courts have recognized that the question of whether an entity is a joint employer is really the same as asking whether they are an “employer” in the first place.<sup>27</sup> Thus, it makes sense that the Proposed Rule (and its modified *Bonnette* test) focus on Section 3(d) of the Act, without significant consideration of the Act’s definition of “employ” under 3(g). While it is true that the Act is intended to be broad in reach, a reasonably limited application of joint employer liability does not deprive employees of remedies for FLSA violations. Instead, it merely limits the universe of potentially responsible parties. If the Act’s definitions of “employ” and “employer” provide a clear primary employer, as is the case in most joint employment situations, it is sound policy not to extend liability to another entity that does not employ the employees in question

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<sup>26</sup> Interpretive Bulletin No. 13, “Hours Worked: Determination of Hours for Which Employees are Entitled to Compensation Under the Fair Labor Standards Act of 1938” (1940).

<sup>27</sup> See, e.g., *Wirtz v. Lone Star Steel Co.*, 405 F.2d 668 (5<sup>th</sup> Cir. 1968) (applying the traditional test to determine whether a worker qualified as an employee or an independent contractor to the joint employer analysis).





COALITION FOR A  
**DEMOCRATIC WORKPLACE**

unless it is actually exercising direct and significant control over their employment.<sup>28</sup> Otherwise, the primary employer is, and should be, responsible for violations of the Act.

#### **4. The Proposed Rule Can Be Strengthened with Some Minor Adjustments**

The Commenters support the Proposed Rule but believe the Department can improve the rule and its future application with a few small adjustments.

*i. The Commenters propose defining or explaining “conditions of employment” as used in Part (a)(1)(ii) of the Proposed Rule.*

As written, the Proposed Rule contains some repetition that makes its practical application potentially unclear. Part (a)(1)(ii) of the Proposed Rule considers whether a putative joint employer “supervises and controls the employee’s work schedule or conditions of employment,” (i.e., factor two in the *Bonnette* test). Part (b)(1) of the Proposed Rule allows further consideration of whether a putative joint employer is “exercising significant control over the terms and conditions of the employee’s work.” The Department proposes that this limitation would apply to consideration of “additional factors” beyond the four primary factors borrowed from *Bonnette*. While this is a welcome limiting principle for consideration of evidence that falls outside of any one of the four primary factors, the concept overlaps somewhat with *Bonnette* factor two, which could cause some confusion in application.

The Commenters propose limiting the term “conditions of employment” used in Part (a)(1)(ii) to those conditions actually considered in *Bonnette*. In *Bonnette*, the Court limited its use of the term “conditions of employment” to an analysis of whether the appellants exercised control over “the number of hours each chore worker would work and exactly what tasks would be performed.” *Bonnette*, 704 F.2d at 1470. It also considered that the state “intervened when problems arose which the recipient and the chore worker could not resolve.” *Id.* In essence, the Court assigned a narrow meaning to the term “conditions of employment,” which related directly to scheduling and assignment of tasks.

Accordingly, the Commenters suggest modifying Part (a)(1)(ii) to read: “**Supervises and controls the employee’s individual work schedule or the employee’s particular, day-to-day tasks.**”

*ii. The Commenters Propose Expanding the List of Irrelevant Forms of Limited and Routine Control or Cooperation Listed in Part (d)(4) of the Proposed Rule.*

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<sup>28</sup> See, e.g., *Morgan v. MacDonald*, 41 F.3d 1291, 1293 (9th Cir. 1994) (finding the *Bonnette* test factors “are properly applied when an individual is clearly employed by one of several entities and the only question is which one.”); *Vanskike v. Peters*, 974 F.2d 806, 809 (7th Cir. 1992) (same).



## COALITION FOR A **DEMOCRATIC WORKPLACE**

The Commenters also propose distinguishing Part (b)(1) from Part (a)(1)(ii) by adding specificity around what it means to “exercis[e] significant control over the terms and conditions of the employee’s work.” Since the Proposed Rule’s primary intent is to focus the joint employer analysis on the four *Bonnette* factors, the consideration of “additional factors” should not be allowed to swallow the rule in future practical applications. To limit the potential for an overly expansive reading of Part (b)(1), the Commenters propose expanding the list of the excluded forms of limited and routine control or cooperation listed in Part (d)(4) of the Proposed Rule and cross-referencing those Parts so that it is clear that the excluded practices listed in Part (d)(4) are not “additional factors” under Part (b)(1).

The Commenters would modify Part (d)(4) as follows (new language italicized):

**The potential joint employer’s contractual agreements with the employer requiring the employer to, for example, set a wage floor, institute sexual harassment policies, establish workplace safety practices, require morality clauses, adopt similar generalized business practices, or otherwise *adopt or comply with policies, training or programs intended: (1) by any entity to require compliance by its suppliers, vendors, subcontractors or other entities with whom it has a business relationship with any federal, state or local law, regulation or other legal requirement; (2) by any franchisor to require, maintain or enforce the standardized services, products, processes or product delivery of the business system to which the franchisee has agreed to participate; (3) by any entity to require, implement or administer any social responsibility code or policy, including safety and security policies, with respect to suppliers, vendors, subcontractors or other entities with whom it has a business relationship; (4) by any franchisor to require, maintain or enforce the brand protection standards required of persons who enter into franchising agreements with such franchisor; (5) by any entity to require and establish time parameters when the activity or work in question is to be performed; (6) by any entity to require and establish quality service or outcome standards for any activity or work to be performed; (7) by any entity to require an individual to wear any type of uniform or any other type of identification that mentions in any manner the entity’s brand; (8) by any entity to require, maintain or enforce product, brand or reputational protection standards for its products, goods or services; (9) to implement third-party delivery and courier services, or technology-based shared staffing applications (including, but not limited to, insurance, training, financing and leasing services); and (10) by any association whose primary purpose is to negotiate and administer multi-employer collective bargaining agreements on behalf of its employer-members, do not make joint employer status more or less likely under the Act.***

***Optional training programs or optional management and operational tools, including, but not limited to, business consulting and data analysis, that a***



## COALITION FOR A **DEMOCRATIC WORKPLACE**

*franchisor or other entity offers to franchisees or other contracting entities, shall not constitute evidence of joint employer status.*

*The presence of any factor listed herein shall not constitute evidence of the exercise of “significant control over the terms and conditions of the employee’s work” as set forth in Part (b)(1) above.*

These proposed exceptions cover common forms of routine, attenuated control that franchisees or contractors often exercise over the business partners that do not affect the terms and conditions of employment. For example, businesses need to enforce brand protection requirements and social responsibility programs included in their contracts and make sure projects are completed on time and up to standards.<sup>29</sup> They also have an interest in ensuring their business partners comply with other federal laws, including laws preventing sexual harassment and the Occupational Safety and Health Act. These types of attenuated controls do not affect the terms and conditions of the complying business’ employees, and should not factor into the joint employer analysis under the FLSA. The clear limits imposed by this definition will confine the “additional factors” considerations in Part (b)(1) of the test to its proper use.

### *iii. The Commenters Propose Removing Example No. 4.*

The Commenters generally support the examples included in the Proposed Rule because they are clear. Still, there are infinite potential factual situations that could arise involving alleged joint employer relationships, so it is important that all of the examples present concrete outcomes. Example 4 does not do so. The Commenters therefore suggest its removal or clarification.

Example 4 involves the contracting of landscaping services by a country club to an outside provider. In the example, a country club official “sporadically” assigns tasks and provides “periodic” instructions to the contractors’ employees and keeps “intermittent” records. These vague limiting terms make it unclear exactly how often the country club official supervises the work of the provider’s employees. Further, the example suggests that the country club directs, but does not order, the landscaping company to fire an employee for failure to follow a club official’s instructions. But it is not clear what instruction was given – was it a mere task assignment (i.e. trim the hedges on the fourth hole), or was it a more important instruction, like asking the worker not to harass country club members or not to use drugs or alcohol at work? These differences are potentially significant because there is a difference between asking for the contractor’s employee

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<sup>29</sup> Brand protection and social responsibility programs can have significant economic impacts on Retaining Companies or franchisors because of their effect on consumer trust in the business. See Sun, Mengqi, “What Loss of Trust Costs Companies in Dollars and Cents,” *Wall Street Journal* (Oct. 31, 2018) (<https://blogs.wsj.com/riskandcompliance/2018/10/31/what-loss-of-trust-costs-companies-in-dollars-and-cents/>) (finding businesses lose as much as \$180 billion in revenue based on lost consumer trust, including as it relates to brand value).



## COALITION FOR A **DEMOCRATIC WORKPLACE**

to perform a particular work task and requiring a contractor's employee to comply with established anti-harassment policies or laws.

Because the example is vague, the Commenters suggest removing it from the Proposed Rule. At a minimum, the Department should add more detail about the frequency with which the country club official directs the employees' work or the reason for the country club official's direction to the provider to fire the employee. Example 5 captures a similar working relationship, but with sufficient details to avoid the potential for misinterpretation that might occur with Example 4.

### **5. Conclusion**

The Commenters support the Department's Proposed Rule and encourage the Department to move forward with the rulemaking process as quickly as possible. The Proposed Rule aims to align the federal courts regarding the standard for joint employer liability under the FLSA, an objective that is faithful with the Act's goal of creating a consistent federal wage law. It is also beneficial to companies with multistate operations. Moreover, the adoption of the modified *Bonnette* test helps to ensure that employers that meaningfully affect the terms and conditions of employment can be held accountable for wage violations, without unduly burdening employers who may reserve or exercise insignificant amounts of control over employment due to the inherent nature of business-to-business contracting.

Ultimately, the stability and predictability provided by the Proposed Rule will benefit employers and employees alike by allowing traditional American business models to flourish without fear of unforeseen legal obligations. Moreover, employees will not be left without remedies for wage violations. As such, the Department should adopt the Proposed Rule, including the modifications suggested by the Commenters herein.

American Hotel and Lodging Association  
Associated Builders and Contractors  
International Foodservice Distributors Association  
Independent Electrical Contractors  
National Association of Manufacturers  
National Association of Wholesaler-Distributors  
National Council of Chain Restaurants  
National Retail Federation  
Retail Industry Leaders Association  
US Chamber of Commerce