April 12, 2021

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

Ms. Amy DeBisschop
Director
Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor
Room S-3502
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Dear Ms. DeBisschop:

The Society for Human Resource Management’s (“SHRM”) mission is to create better workplaces where businesses and workers thrive together. SHRM’s vision is to build a world of work that works for all. The Department of Labor’s (“DOL” or “Department”) Joint Employer Rule is of particular interest to SHRM and our 300,000+ HR professionals and business executive members who impact the lives of more than 115 million workers and their families.

In today’s economy, businesses are increasingly utilizing flexible staffing solutions that raise complex questions about the responsibilities and liabilities of job creators searching for critical talent in a competitive market. Awareness of the circumstances which create an employment relationship based on both the acts of, and agreements between, the parties involved is at the core of human resource management. Previous vague standards promulgated by DOL left many employers and HR professionals unaware that a joint employer relationship had been established. The establishment of clear standards for the employer-employee relationship is critical. SHRM continues to advocate for sound public policy which is consistently and predictably applied thereby limiting litigation and confusion for workers and employers alike.

On March 12, 2021, the DOL issued a Notice of proposed rulemaking and request for comments, seeking to rescind the Joint Employer Rule entitled “Joint Employer Status Under the Fair Labor Standards Act,” which was published on January 16, 2020, and effective on March 16, 2020 (“Joint Employer Rule”). The proposed rescission would remove the regulations, in toto, established by that rule, without “proposing any regulatory guidance to replace the guidance currently located in Part 791,” leaving employers generally, and HR professionals specifically, to navigate the problematic, vague and difficult-to-apply standard previously generated by the courts and the Department through guidance memos and interpretations. For these reasons, as well as reasons set forth below and in Exhibit 1, SHRM supports the Joint Employer Rule, which
creates a clearly defined standards benefiting all workers and workplaces, and opposes the Notice of Rescission.¹


**SHRM Comments Opposing the Notice of Rescission Of the Joint Employer Rule**

A. The “Joint Employer Status Under the Fair Labor Standards Act” Rule Provided Much-Needed Clarity for HR Professionals Seeking Compliance And Should Not be Rescinded

SHRM generally supported the Department’s initial proposal, which recognized that the regulatory framework around joint employment was unnecessarily unclear and too difficult to apply. The proposal represented a large step forward in assisting HR professionals with a more uniform, clear, and certain standard. SHRM remains confident that the Joint Employer Rule, if it remains in place, will reduce litigation and provide employers and workers with additional certainty in assessing their obligations and rights under the FLSA, in the context of a wide variety of business relationships, relationships that are becoming exponentially more complicated as technological capacity expands. These complicated relationships, in-and-of themselves, were reason enough for SHRM to support the much simpler, comprehensive, and uniform Joint Employer Rule published last year.

The Joint Employer Rule also clarifies the distinction between “vertical” and “horizontal” joint employment, a much-needed clarification for HR professionals as the business world gets more complicated. SHRM also supported the centerpiece of the rule: establishing — in the context of “vertical” joint employment — a four-factor test based on the concepts explained in Bonnette v. California Health & Welfare Agency, 704 F.2d 1465 (9th Cir. 1983). Of particular help to HR professionals, the Joint Employer Rule makes clear that the maintenance of employment records, standing alone, does not establish joint employer status. As an additional matter of clarification, the rule specifically delineates factors that are not relevant to the determination of FLSA joint employer status, such as operating as a franchisor, entering into a brand and supply agreement, or using a similar business model.

The Bonnette-based test provides clear guidance to businesses seeking to maintain full compliance with their obligations under the FLSA. The Bonnette factors address the main aspects of an employment relationship. 704 F.2d at 1470 (internal citation omitted) (cited at 84 Fed. Reg. at 14046). The Bonnette factors are focused on the relationship between the worker and the putative employer, specifically that the definition of “employer” in 29 U.S.C. § 203(d) guides the joint employer inquiry. The factors are designed to get to the central question: whether the putative joint employer exercised substantial control over the terms and conditions of the work of the employees and should thus share in liability where appropriate.

In short, the Joint Employer Rule takes a modern, pragmatic view of joint employer concerns, recognizing the importance of incentivizing entities which own and manage the work environment to create uniform policies that serve employees and other non-employee personnel

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¹ SHRM has attached as Exhibit 1 to these Comments its brief in support of the joint employer rule in State of New York, et al vs. Eugene Scalia, et al and International Franchise Association, et al., No. 1:20-cv-1689 (GHW) (S.D.N.Y. September 8, 2020). Exhibit 1 contains further support for SHRM’s position that the Joint Employer Rule should not be rescinded.
— whether the workers are independent contractors, subcontractors, temporary, franchisee, contract workers, other employees of third parties, and other arrangements.

B. The Department Should Not Rescind A Rule That Provides A Clear, Workable, Understandable, Standard HR Professionals Confidently May Rely On In Determining Joint Liability

1. Certainty is Paramount for HR Professionals

The certainty provided by the rule is almost as important as the rule’s sound grounding in creating good public policy. The FLSA itself does not define the joint employment relationship, so the test for the same has somewhat developed — since 1939 through court decisions, interpretive bulletins, rulemaking, various guidance documents including fact sheets, opinion letters, legal briefs noting the Department’s position concerning joint employment, and administrator’s interpretations. This hodgepodge of guidance left HR professionals questioning whether any action would result in joint employer liability, essentially dis-incentivizing employers from engaging in conduct which, as noted below, would be beneficial to the national workforce overall simply to avoid joint employer liability.

More specifically, SHRM continues to support the clarity the Rule provides on the differences between “vertical” and “horizontal” joint employment. With no real regulatory guidance addressing these differences — indeed, should the rule be rescinded, the previous confusing regulatory language at 29 CFR 791, would once again be the law of the land — applying the joint employment concepts that have been developed over time has proven to be both difficult and confusing. Concepts developed for “horizontal” have little utility to “vertical” and vice versa. For more than 60 years, the issue has been left unaddressed in the regulation. We appreciate the effort to provide clear and understandable explanations of when the two sets of concepts apply, which has greatly assisted HR professionals in making determinations of joint employment.

2. Scenarios Demonstrating Importance of the Rule

The Joint Employer Rule provides that factors such as operating as a franchisor, entering into a brand and supply agreement, or simply providing another employer with a sample employee handbook or other forms are not relevant to the joint employer analysis. Imagine hypothetically, an HR professional who received a request to share a COVID-19 safety plan with another employer interested in providing the safest workplace possible. Prior to the issuance of the Joint Employer Rule, simply sharing a reopening plan with another employer — conduct that should be celebrated — would point toward joint liability; the Joint Employer Rule, conversely, clarified that employers may provide important workplace information, training, and other forms of protections designed to improve the work environment to all workers without becoming a joint employer.

Another COVID-19 scenario unearthed at the initial stages of the pandemic occurred when essential businesses knew that they had to provide face coverings and protective personal equipment to their employees, but it was unclear whether they could do the same for any on-site, nonemployee worker without creating joint employer concerns. This problem was eradicated by the issuance of the new rule. If the Rule is rescinded, SHRM is concerned that employers will lack this necessary guidance that creates more certainty in the employment world than we have witnessed in the joint employer context.
3. **The Rule Relieved Tension Between State and Federal Laws**

While the Department was considering the Joint Employer Rule, New York State issued guidance mandating that businesses provide protective equipment to independent contractors. See New York State Empire State Development, *Frequently Asked Questions (FAQ) on New York Forward and Business Reopening*, at FAQ 18, available at [https://esd.ny.gov/nyforward-faq](https://esd.ny.gov/nyforward-faq). New York State also mandates that employers have the same policies for their employees and contractors. See New York State Department of Health, *INTERIM GUIDANCE FOR OFFICE-BASED WORK DURING THE COVID-19 PUBLIC HEALTH EMERGENCY*, at 3, available at [https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/offices-interimguidance.pdf](https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/offices-interimguidance.pdf) (defining “employees” to generally include “the office-based businesses/tenants and their employees and/or contractors”).

Mandatory workplace sexual harassment training creates similar problems. Take, for example, The Stop Sexual Harassment in NYC Act, which requires employers to ensure their independent contractors complete the annual training. Ultimately, providing these types of trainings are a positive development in the workplace and public policy should encourage these types of trainings, but the previous joint employer analysis may have resulted in joint employment liability for employers who comply with the law.

Finally, it should be noted that companies have a strong interest in auditing service provider policies and practices around certain areas such as pay practices, documentation of employees’ immigration status, and safety measures in the workplace (amongst others) in order to conform compliance with such laws. Under the confounding analysis before the new rule, companies were effectively discouraged from conducting such audits out of fear of becoming a joint employer of their service providers’ workers. Prior to the Rule, service recipients or franchisors risked joint employer liability by merely asking relevant questions of service providers to ensure that they were in compliance with applicable labor and employment laws. The Joint Employer Rule allows service recipients to take reasonable steps to ensure that contractors or other service providers are in full compliance with labor and employment laws without opening themselves up to joint employer concerns.

The above scenarios leave employers questioning which guidance to follow – state public health laws or federal joint employer regulations? Adhering to the former could result in joint employer liability under the FLSA. Thankfully, the new Rule did away with this difficult scenario by clarifying that this kind of conduct would not result in joint employer liability under the FLSA. Businesses should not be punished for taking steps to ensure third-party compliance with the law.


As noted above, certainty is paramount for HR professionals. Changes in the policy positions taken by the Department of Labor on issues of essential importance to employers leaves HR professionals in a difficult position, as they attempt to comply with ever-changing guidance from the Department.

Not only does the changing direction from the Department affect the ability of HR professionals to simply do their jobs, it also diminishes the precedential value of direction promulgated by such Agencies. SHRM maintains that rescinding a rule promulgated through the formal rule making process sets a dangerous precedent that diminishes the precedential value a
court will afford direction coming from such agencies. At bottom, rescission of this rule will likely cause any court to look at future joint employment direction, or any other federal agency rulemaking, with a skeptical eye, unknowingly diminishing the very power of the agency.

D. Apart From Procedural Reasons to Not Rescind the Rule, The Rule is Also Grounded in Sound Public Policy

In proposing the rule, the Department was guided by the Ninth Circuit’s well-reasoned decision in Bonnette v. California Health and Welfare Agency. The rule also aligns with the FLSA’s concepts of employment. Similarly, by distancing itself from prior pronouncements espousing “economic dependence” as the hallmark for joint employment (or suggesting that certain business models are inherently joint employment), the Department appropriately returned the focus of the joint employment inquiry to the FLSA’s statutory language. Ultimately, by ensuring that the inquiry is directed as a putative joint employer’s actual control over critical terms of employment, the proposal stands on solid ground statutorily, and is consistent with the relevant Supreme Court authority. As a result, SHRM supported the Department’s proposal.

Moreover, for joint employment, the Rule did away with the previously unworkable and confusing “Not Completely Disassociated” Standard. Prior to publication of the new rule, the regulation contained a single standard — “not completely disassociated” — that was wholly inadequate for addressing the overwhelming majority of joint employer issues, namely those involving putative “vertical” joint employment (e.g., relationships involving subcontracting, staffing, franchising, supply chain). As the Department properly noted, in putative vertical joint employer scenarios, “the employer and the other [benefited] person are almost never ‘completely disassociated,’ and the real question is . . . whether the other person’s actions in relation to the employee merit joint and several liability under the Act.” 84 Fed. Reg. at 14044. The “not completely disassociated” standard was developed for “horizontal” joint employment, as the Department explained in the preamble to its NPRM on the rule itself. Specifically, the standard focused on those situations in which related companies attempted to evade overtime obligations by separately paying a worker for different sets of hours through sham “separate” entities. See id. at 14044-45. This concern is not present in the “vertical” context; the direct employer is always liable for any minimum wage or overtime violations. The Department’s abandonment of the “not completely disassociated” standard for “vertical” joint employment was well founded and will continue to allow businesses to make more meaningful determinations of joint employer status.

Conclusion

SHRM believes the Joint Employer Rule is sound public policy and should not be rescinded. The Joint Employer Rule fundamentally embraces the complex nuances of the modern workforce, and both allows and incentivizes employers to take reasonable steps to protect all workers and workplaces.

Emily M. Dickens
Chief of Staff, Head of Government Affairs & Corporate Secretary
EXHIBIT 1
IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, et al,

Plaintiffs,

vs.

EUGENE SCALIA, et al,

Defendants.

Civil Action No. 20-cv-1689 (GHW)

BRIEF OF AMICUS CURIAE THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT IN SUPPORT OF DEFENDANT-INTERVENORS' CROSS MOTION FOR SUMMARY JUDGMENT

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INTERESTS OF AMICUS CURIAE

The Department of Labor’s ("DOL") joint employer rule is of particular interest to the Society for Human Resource Management ("SHRM"), the nation’s preeminent HR trade association. With over 300,000 HR and business executive members who represent the interest of more than 115 million workers and families globally, SHRM is the foremost expert, convener, and thought leader on issues impacting today’s evolving workplaces.

In today’s economy, businesses are increasingly utilizing flexible staffing solutions that raise complex questions about the responsibilities and liabilities of job creators searching for critical talent in a competitive market. Awareness of the circumstances which create an employment relationship based on both the acts of, and agreements between, the parties involved is at the core of human resource management. Previous vague standards promulgated by DOL left many employers and HR professionals unaware that a joint employer relationship had been established. For this reason, the establishment of clear standards for the employer-employee relationship is critical. SHRM continues to advocate for sound public policy which is consistently and predictably applied thereby limiting litigation and confusion for workers and employers alike. SHRM’s expertise in human resources practices provides a unique perspective that is helpful to the consideration of issues presented before the Court.

INTRODUCTION

A critical component of the District Court’s analysis in this matter is whether the Final Rule is sound public policy. *Auto. Club of New York, Inc. v. Port Auth. of New York & New Jersey*, No. 11 CIV. 6746 RJH, 2011 WL 5865296, at *2 (S.D.N.Y. Nov. 22, 2011) (internal citations omitted); *see also United States v. KPMG LLP*, No. 05 CR. 903 (LAP), 2007 WL 541956, at *2 (S.D.N.Y. Feb. 15, 2007) (granting leave to appear as amicus curiae “to address the public policy reasons why the Order should be vacated and enforcement of the DPA should be denied.”). SHRM submits that the Final Rule is firmly rooted in sound public policy and that
this factor strongly weighs in favor of granting the Defendant-Intervenors’ Cross-Motion for Summary Judgment.

In short, the Final Rule takes a modern, pragmatic view of joint employer concerns, recognizing the importance of incentivizing entities who own and manage the work environment to create uniform policies that serve employees and other non-employee personnel—whether the workers are independent contractors, subcontractors, temporary, franchisee, contract workers, other employees of third parties, and other arrangements. Such concerns have always been present, but the current COVID-19 pandemic has further exacerbated concerns over the current joint employer standard, making the Final Rule a timely and necessary exercise in rulemaking. Businesses must have the clarity that the Final Rule provides so that they can continue to address important concerns in the workplace without fear of running afoul of technical and outdated regulations on what constitutes a joint employer. Indeed, any ruling that grants the Plaintiff’s Motion for Summary Judgment will almost certainly discourage efforts by employers to provide resources and information to make the workplace better for all workers, employees and non-employees alike.

ARGUMENT

I. The Department of Labor’s Final Rule Is Sound Public Policy That Creates A Clearly Defined Standard Benefitting All Workers and Workplaces

A modern workforce requires a modern view of the joint employer concept. There is no question that the Final Rule embodies such a view. After all, the modern workplace is not only employee driven. As the Defendant-Intervenors point out, many workers today provide services as non-employees, whether as independent contractors, consultants, subcontractors, temporary workers, or leased employees. Likewise, employees of franchisees play important roles in representing franchise brands through their interactions with clients and customers. All of these workers, regardless of their formal employment status, should be able to benefit from the training, resources, and positive workplace practices as those who are directly employed in
the same workplace. Prohibiting this type of workplace enhancement because of outdated joint employer concerns essentially freezes the Fair Labor Standards Act in 1933 when it was first passed. These joint employer concerns are not trivial matters and may expose employers to significant financial liability over certain aspects of the workers’ employment relationship, over which they have no control.

The Final Rule clarifies that employers may provide important workplace information, training, and other forms of protections designed to improve the work environment to all workers without becoming a joint employer. Ultimately, this is sound public policy because it incentivizes companies to set basic lawful standards, provide fundamental resources, trainings, and information, and ensure the existence of proper safety measures to all workers in the workplace regardless of whether the worker is an employee. Companies that are concerned that all workers receive certain resources, trainings, and compliant pay and other practices should not be penalized for these proactive pro-worker, pro-workplace and pro-employer affirmative acts that benefit all in the workplace, including all workers, regardless of whether or not they are employed by the workplace in which they provide services or are provided these resources.

In order to illustrate this point, we offer three examples:

a. **COVID-19 Safety Measures**

Perhaps nothing has proven this point better than the grave challenges employers have faced with COVID-19. For instance, during the initial stages of the pandemic, essential businesses knew that they had to provide face coverings and protective personal equipment to their employees, but it was unclear whether they could do the same for any on-site, non-employee workers without creating joint employer concerns. This is an absurd result that the current regulation actually encourages. Companies should not be discouraged from protecting the entire workplace from COVID-19 due to joint employer concerns. *See generally Allen*

In an ironic twist, New York State, one of the Plaintiffs in this very case, has recognized this same concern and issued guidance mandating that businesses provide protective equipment to independent contractors. *See New York State Empire State Development, Frequently Asked Questions (FAQ) on New York Forward and Business Reopening*, at FAQ 18, https://esd.ny.gov/nyforward-faq. New York State has also recognized this concern in their reopening documents by mandating that employers have the same policies for their employees and contractors. *See New York State Department of Health, INTERIM GUIDANCE FOR OFFICE-BASED WORK DURING THE COVID-19 PUBLIC HEALTH EMERGENCY*, at 3, https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/offices-interim-guidance.pdf (defining “employees” to generally include “the office-based businesses/tenants and their employees and/or contractors.”). Yet, absent clarity with this Final Rule, employers are arguably left in the proverbial Catch-22. Does providing PPE or other COVID-19 safety precautions, even because of this NY mandate, make one a joint employer under federal law? Do employers open themselves up to liability claims by following this guidance? And even if not, if New York State provided clear and defined rules for employers without incurring joint employer liability, what is so different from the Department of Labor through the Final Rule essentially taking the same action?

The concern over worker health and safety as a result of COVID-19 also acutely impacts the franchisor/franchisee relationship. The bottom line is that franchisors have a significant interest in ensuring that the employees of their franchisees are not put in unsafe work environments or exposed to the potential severe health consequences associated with COVID-19. *See Lisa Nagele-Piazza, DOL's Proposed Joint-Employer Rule Gives Real-World
Examples, Society for Human Resource Management, https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/dol-proposed-joint-employer-rule-gives-real-world-examples.aspx (May 16, 2019). In such extraordinary times, without the Final Rule, franchisors are left with an impossible choice: they can do nothing and risk irreparable damage to the franchisees' employees and brand if the general public or franchisee employees become infected at a franchise location; or, they can use their available resources to improve the safety and work environment of workers who are not their employees, but risk potential joint employer liability down the road. Especially now, amidst a pandemic, businesses should not be discouraged from taking safety precautions due to joint employer concerns. Instead, businesses should be incentivized (even if only to remove potential liability) to improve the safety and wellbeing of their employees and non-employees alike.

b. Mandatory Workplace Sexual Harassment Trainings

The Stop Sexual Harassment in NYC Act was passed by the New York City Council on May 9, 2018. N.Y.C. ADMIN CODE § 8-107(30)(b). The Act requires that employers with 15 or more employees in the previous calendar year conduct annual, interactive anti-sexual harassment training for all employees employed in New York City. Id. In 2020, the New York City Commission on Human Rights made clear that employers are required to have their independent contractors complete the annual training. See NYC Commission on Human Rights, Stop Sexual Harassment in NYC Act Frequently Asked Questions, https://www1.nyc.gov/site/cchr/law/sexual-harassment-training-faqs.page. Ultimately, providing these types of trainings are a positive development in the workplace and public policy should encourage these types of trainings. After all, no worker should be subjected to sexual harassment at work. The Final Rule allows and encourages workplaces to conduct similar
respectful workplace trainings without running afoul of joint employer concerns throughout the United States.

c. **Auditing Service Provider Policies and Practices**

Companies have a strong interest in auditing service provider policies and practices around certain areas such as pay practices, documentation of employees' immigration status and safety measures in the workplace (amongst others) in order to confirm compliance with such laws. Under the absurdity of the current rule, companies are effectively discouraged from conducting such audits out of fear of becoming a joint employer of their service providers' workers. For instance, service recipients or franchisors risk joint employer liability by merely asking relevant questions of service providers to ensure that they are in compliance with applicable labor and employment laws. The Final Rule allows service recipients to take reasonable steps to ensure that contractors or other service providers are in full compliance with labor and employment laws without opening themselves up to joint employer concerns. Businesses should not be punished for these prophylactic steps to ensure third-party compliance with the law.

**CONCLUSION**

Overall, the Final Rule is sound public policy and this factor should weigh strongly in favor of granting the Defendant-Intervenors' Cross-Motion for Summary Judgment. The Final Rule fundamentally embraces the nature of the modern workforce, and both allows and incentivizes employers to take reasonable steps to protect all workers and workplaces.
Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 24, 2020 this document was filed through the Court's Electronic Case Filing (ECF) system and thus copies will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

/s/ Charles M. Guzak