VIA ELECTRONIC SUBMISSION

April 12, 2021
Ms. Amy DeBisschop
Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor
Room S-3502
200 Constitution Ave., N.W.
Washington, DC 20210

Re: RIN 1235–AA37, Comments on DOL's Rescission of Joint Employer Status Under the Fair Labor Standards Act Rule

Dear Ms. DeBisschop:

Associated Builders and Contractors hereby submits the following comments to the U.S. Department of Labor's Wage and Hour Division in response to the above-referenced proposed rule published in the *Federal Register* on March 12, 2021, at 86 Fed. Reg. 14038.

About Associated Builders and Contractors

ABC is a national construction industry trade association representing more than 21,000 members. ABC and its 69 chapters help members develop people, win work and deliver that work safely, ethically and profitably for the betterment of the communities in which ABC and its members work. ABC's membership represents all specialties within the U.S. construction industry and is comprised primarily of firms that perform work in the industrial and commercial sectors. Moreover, the vast majority of our contractor members are classified as small businesses. Our diverse membership is bound by a shared commitment to the merit shop philosophy in the construction industry, which is based on the principles of nondiscrimination due to labor affiliation and the awarding of construction contracts through open, competitive bidding based on safety, quality and value.

As an intervenor in the ongoing litigation *New York v. Scalia*, ABC supports and incorporates by reference comments being filed by Littler's Workplace Policy Institute on the notice of proposed rulemaking, which represents all the trade association intervenors in that pending appeal. ABC further supports WPI's request for additional time to file comments on the NPRM, since the current deadline of April 12 gives inadequate time for commenting parties to address the complex issues raised by the NPRM. The NPRM should be held in abeyance in any event to await the outcome of the pending appeal in the second circuit. In the comments below, ABC focuses on issues of primary importance to the construction industry.

ABC's Comments in Response to DOL's Proposed Rule

On April 9, 2019, the WHD issued the Joint Employer Status Under the Fair Labor Standards Act proposed rule to update and clarify its interpretation of joint-employer status under the FLSA.[1] ABC submitted comments in support of the department's proposed changes on June 25.[2]

On Jan. 16, 2020, the WHD issued the joint employer final rule.[3] ABC applauded the final rule, which promised to make the joint employment test more narrow and focused when it went into effect on March 16.

Soon after, on Feb. 26, 18 states sued the department in federal court to strike down its final rule.[4] A business coalition that includes ABC intervened in the case, in part to defend the construction industry against unwarranted attacks on the industry's long-established methods of doing business by the state plaintiffs.[5]

On Sept. 8, a U.S. District Court for the Southern District of New York judge ruled that parts of the department's joint employer final rule are illegal.[6] The court struck down the rule as it applies to "vertical" employment, which occurs when an employee works for one company but may be economically dependent on or controlled by another company. The decision does not affect "horizontal" employment, which occurs when the employee has employment relationships with two or more employers and the employers are sufficiently associated.

ABC believes the judge got it wrong on both procedural and substantive grounds and filed a notice of appeal on Nov. 6.[7] On Jan. 15, 2021, ABC joined in the brief of intervenor-appellant filed by the trade associations who filed the joint appeal.[8] The department filed its own brief to the appeals court, criticizing the district court decision.[9]

On March 12, the department published a proposed rule to rescind the joint employer final rule.[10] Throughout the proposal, the department makes clear that the primary reason for the proposed rescission of the final rule is that the district court ordered it to be vacated. The proposed rule cites the district court's decision more than 40 times, quoting from the opinion extensively and in each instance claiming support for rescission from the district court's findings.[11]

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[1] 84 Fed. Reg. 14043.
[2] https://www.regulations.gov/comment/WHD-2019-0003-12723.
[3] 85 Fed. Reg. 2820.
[4] State of New York v. Scalia, 1:20-cv-01689 (S.D. N.Y. Feb. 26, 2020).
[5] State of New York v. Scalia, 1:20-cv-01689 (S.D. N.Y. June 11, 2020).
[6] State of New York v. Scalia, 1:20-cv-01689-GHW (S.D. N.Y. Sept. 8, 2020).
[7] State of New York v. Scalia, 1:20-cv-01689-GHW (S.D. N.Y. Nov. 6, 2020).
[8] State of New York v. Scalia, No. 20-03806, No. 20-03815 (consolidated) (2nd Cir. Jan. 15, 2021).
[9] *Id*.
[10] 86 Fed. Reg. 14038.
[11] Id.

On March 31, the department filed a motion asking the federal appellate court to hold the appeal in abeyance for six months, until Oct. 18, 2021, in order to allow the department time to review and analyze the comments and make a final determination regarding rescission of the joint employer final rule.[12] The department cited no legal precedent in support of its motion and relied entirely on the proposed joint employer rescission rule, which in turn relies primarily on the district court decision which is now on appeal.

On April 8, the second circuit denied the department's motion to hold the appeal in abeyance.[13]

As further explained below, ABC opposes the department's proposed rule rescinding the joint employer rule. The current rule clarifies the department's interpretation of joint employer status under the FLSA and promotes certainty for employers and employees. The department's proposed rule to rescind the final rule is arbitrary and capricious, particularly in its primary reliance on the district court decision, which the department itself has criticized as wrongly decided in the pending appeal.

1) The Continuing Need for the Rule's New Four-part Balancing Test.

The construction industry has long consisted primarily of specialized, separate employers who come together on specific construction projects to achieve the highest degree of quality, safety and productivity, while maintaining their separate status from project to project. Owners, developers, design firms, construction managers, general contractors, subcontractors and staffing agencies, to name only the most common specialties, each play unique roles in the construction process on individual jobsites. Their functions routinely overlap, but they typically remain separate entities with their own workforces.

The most common construction jobsites are multi-employer worksites. Typically, the general contractor or construction manager schedules and coordinates the work of many subcontractors, often in multiple tiers, who perform their services simultaneously or in sequence. The general contractor directs the work on the site and controls the schedule, which may be affected by weather, availability of materials, local building inspection regimes and many other factors. A general contractor must exercise a certain amount of control over its subcontractors and their employees simply to ensure the safe and efficient performance of the work.

The department's final rule recognized that standard construction methods require project owners and/or prime contractors to exercise routine control over the site in ways that indirectly affect many employees' terms and conditions of employment, converting the independent employers of such employees into "joint employers" within the meaning of the FLSA without any legitimate sense.

[12] State of New York v. Walsh, No. 20-03806, No. 20-3815 (2nd Cir. March 31, 2021).
[13] *Id.*, Order dated April 8, 2021.

ABC applauded the department's replacement of its previous, outdated joint employment rule, because the text of that rule had led to significant confusion among the different federal court circuits. In large part this confusion resulted from the statement in the old regulation that joint employers can include any two business entities that are "not completely disassociated" from each other.[14] This and other factors, including conflation of the statutory definitions for "employer" and "employee,"[15] had led courts to issue divergent and inconsistent rulings on the joint employer issue.[16] These rulings confused and frustrated efforts of construction employers to maintain long-standing industry practices that have allowed the industry to perform services on a cost-efficient basis, but which are now placed in jeopardy by the over-broad joint employer standard espoused by some courts and increased litigation costs resulting from the judicial confusion.

The department's rule correctly observes that the Ninth Circuit's test for joint employment, announced in *Bonnette v. California Health and Welfare Agency*, has gained the greatest following among a plurality of circuits, including the First Circuit,[17] Fifth Circuit,[18] Sixth Circuit,[19] some Seventh Circuit cases and the Tenth Circuit,[20] with minor variations. The *Bonnette* test considers whether the alleged employer (1) has the power to hire and fire the employees in question; (2) supervises and controls employee work schedules or conditions of payment; (3) determines the rate and method of payment; and (4) maintains employment records. These factors are not applied "blindly" but are viewed within the context of the whole relationship between and among multiple employers.

The *Bonnette* standard is the most consistent, with long-settled and understood conventions in the construction industry, particularly regarding the relationships between owners, general contractors, subcontractors, vendors, suppliers and staffing companies. Each of these industry actors has an important role to play in the many types of construction, and the *Bonnette* standard

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[14] 29 C.F.R. 791.2(b). *See, e.g., Salinas v. Commercial Interiors, Inc*., 848 F.3d 125, 137-139 (4th Cir. 2017), repeatedly citing the department's "disassociated" regulatory language as grounds for imposing an overbroad joint employment standard to construction contractors and subcontractors.

[15] As the department's proposed rule points out, Section 3(d) of the FLSA is the sole section that defines "employer" (as a person "acting directly or indirectly in the interest of an employer in relation to an employee"), while Section 3(g)'s separate definition of "employ" (to "suffer or permit" to work) has been improperly cited by some courts as a basis for finding joint employer status. *See, e.g., Salinas v. Commercial Interiors, Inc*., 848 F.3d at 140.

[16] *Compare Zhen v. Liberty Apparel Co*., 355 F.3d 61 (2d Cir. 2003) (applying a six-factor joint employer test); *Enterprise Rent-A-Car Wage & Hour Employment Practices Litigation*, 683 F.3d 462 (3d Cir. 2012) (applying four different factors); *Salinas v. Commercial Interiors, Inc*., 848 F.3d 125 (4th Cir. 2017) (applying six different factors); and *Freeman v. Key Largo Volunteer Fire and Rescue Dept., Inc*., 494 Fed. Appx. 940 (11th Cir. 2012) (applying an eight-factor test); with *Bonnette v. California Health and Welfare Agency*, 704 F.2d 1465 (9th Circ. 1983) (applying a four-factor test based on exercise of control over essential elements of employment).

[17] *See Baystate Alternative Staffing, Inc. v. Herman*, 163 F.3d 668 (1st Cir. 1998).

[18] *See Watson v. Graves*, 909 F.2d 1549 (5th Cir. 1990).

[19] *See Skills Dev. Servs., Inc. v. Donovan*, 728 F.2d 294, 300-01 (6th Cir. 1984).

[20] *See Johnson v. Unified Government of Wyandotte County*, 371 F.3d 723 (10th Cir. 2004).

allows them to perform their necessary functions without inadvertently becoming joint employers. By contrast, the extremely misguided views expressed by the Fourth Circuit in *Salinas v. Commercial Interiors, Inc*.[21] fail to recognize the construction industry's longstanding methods—indeed the Fourth Circuit arbitrarily refused to give any weight to longstanding industry practices in its overbroad joint employer test.[22]

ABC therefore supports the department's rule codifying the *Bonnette* test, with an additional emphasis on "actual," as opposed to reserved but unexercised control by one employer over another's employees, as the test that is most consistent with the statutory definition of "employer." ABC also agrees with the department's correct separation of the statutory concepts defining "employee" and "employer."

ABC further agrees with the current rule's clarification that certain factors are not relevant to questions of joint employer status. Most notably, the rule clarifies that "economic dependence" on the potential joint employer does not determine the potential joint employer's liability. ABC particularly supports the three examples of "economic dependence" factors that the department excluded from the joint employer analysis relating to the construction industry, i.e., whether the employee is in a specialty job or a job otherwise requiring special skill, initiative, judgment or foresight; has the opportunity for profit or loss based on managerial skill; and invests in equipment or materials required for work or the employment of helpers.

As further noted above, ABC strongly supports the department's clarification that only the definition of an "employer" in section 3(d) of the FLSA, 29 USC § 203(d), determines joint employer status, not the definition of "employee" in section 3(e)(1) or the definition of "employ" as "to suffer or permit work" in section 3(g) of the FLSA, 29 USC §§ 203(e)(1), (g). The FLSA defines "employer" as including "any person acting directly or indirectly in the interest of an employer in relation to an employee."

2) The NPRM's Primary Reliance on the District Court Decision in *New York v. Scalia* is Arbitrary and Capricious.

As set forth more fully in WPI's comments, the NPRM relies heavily on the district court decision in *New York v. Scalia* as grounds for rescinding the rule. The NPRM cites the decision more than 40 times and in each case asserts that some aspect of the district court's opinion challenges the validity of the rule. This reliance is arbitrary in light of the fact that, less than three months ago, the department filed a brief to the court of appeals declaring that each of the same aspects of the district court decision was wrong and should be reversed.

[21] 848 F.3d 125 (4th Cir. 2017).
[22] Id. at 143-44.

For example, DOL concludes in the NPRM that "the text of section 3(d) alone may not easily encompass all scenarios in which joint employment may arise."[23] This position directly contradicts DOL's position in its brief, which rejected the district court's conclusion that the FLSA's definitions of "employer," "employ" and "employee," must be read together as "flawed."[24]

Similarly, DOL claims in the NPRM that the district court "faulted the Rule for...using 'different tests for "primary" and "joint" employment.'"[25] Yet, DOL's brief to the appeals court faulted the district court for "incorrectly concluding" that the joint employer rule applies different tests for "'primary' and 'joint' employment" and for attacking a test the Rule "did not adopt."[26]

As another example, DOL further relies on the district court's conclusion that the final rule "ignored the history and purpose of the 'suffer and permit' language in section 3(g), which Congress adopted 'to expand joint employer liability.'"[27] DOL's NPRM is, once again, in conflict with the conclusions in its brief, in which DOL argued that "nothing in the Rule affects the broad scope of who is an employee under the FLSA."[28]

The NPRM is also directly inconsistent with DOL's own discussion of the joint employer related case law under the FLSA in the appeal brief. DOL explained in its brief why "[t]he [d]istrict [c]ourt's [c]riticism of the Joint Employer Rule's [f]ocus on [c]ontrol [w]as [u]nfounded."[29]

As yet another example, DOL explains in the NPRM that it shares the district court's concern "that the Joint Employer Rule may not have adequately considered the costs for employees."[30] Yet, in its brief, DOL explained that "[t]he district court's belief that the department did not provide a 'satisfactory explanation' fails to appreciate that the agency was unable to quantify the estimated costs due to the lack of concrete data."[31] DOL further explained in its brief that "even assuming arguendo that [DOL] could theoretically obtain this data, the agency was not required to undertake an empirical economic analysis."[32] No empirical data on the number of joint employer

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[23] 86 Fed. Reg. 14042.
[24] Brief for Defendants-Appellants at 39, Nos. 20-3806, 20-3815 (consolidated) (2d Cir. Jan. 15, 2021), ECF No. 58.
[25] 86 Fed. Reg. 14042.
[26] Brief for Defendants-Appellants at 40-41, Nos. 20-3806, 20-3815 (consolidated) (2d Cir. Jan. 15, 2021), ECF No. 58.
[27] *Id.*
[28] Brief for Defendants-Appellants at 40, Nos. 20-3806, 20-3815 (consolidated) (2d Cir. Jan. 15, 2021), ECF No. 58.
[29] *Id.* at 44 (bold in original).
[30] 86 Fed. Reg. 14045.
[31] Brief for Defendants-Appellants at 56, Nos. 20-3806, 20-3815 (consolidated) (2d Cir. Jan. 15, 2021), ECF No. 58.
[32] *Id.* (citing *Catskill Mountains Chapter of Trout Unlimited v. EPA*, 846 F.3d 492, 523 (2d Cir. 2017)) ("[W]hile an agency may support its statutory interpretation with factual materials or cost-benefit analyses, an agency need not do so in order for its interpretation to be regarded as reasonable.").

relationships in the construction industry exists; nor has anyone accurately determined whether joint employers are responsible for any reduction in wages or alleged increases in so-called wage theft in the construction industry. There is accordingly no basis for rescinding the rule on the basis of unproven costs to employees.

In light of the pending nature of the appeal from the district court decision, at a minimum the NPRM should be held in abeyance pending the outcome of the appeal. If the district court decision is reversed, then few if any of the grounds for the NPRM would remain valid.

Conclusion

For all of the foregoing reasons, and for the reasons set forth in Littler's WPI comments, ABC opposes the proposal to rescind the joint employment final rule. The final rule remains necessary to bring greater clarity and uniformity to the joint employer standard under the FLSA. Contrary to the NPRM and the erroneous district court decision on which the NPRM relies, the final rule is entirely lawful and consistent with the FLSA. ABC asks DOL to withdraw the NPRM or at a minimum to hold the proposed rescission in abeyance until after a final decision in the appeal from the district court's ruling in *New York v. Scalia.*

Respectfully Submitted,

Ben Brubeck
Vice President of Regulatory, Labor and State Affairs

Of Counsel: Maurice Baskin, Esq.
Littler Mendelson, P.C.
815 Connecticut Ave., N.W.
Washington, DC 20006