NWJP
NORTHWEST WORKERS' JUSTICE PROJECT

June 22, 2026

Submitted via https://www.regulations.gov/document/WHD-2026-0067-0001/

Daniel Navarrete, Director
Division of Regulations, Legislation, and
Interpretation
Wage and Hour Division
U.S. Department of Labor, Room S-3502
200 Constitution Avenue NW
Washington, D.C. 20210

**Comments on RIN 1235-AA48: Joint Employer Status Under the Fair Labor Standards Act, Family and Medical Leave Act, and Migrant and Seasonal Agricultural Worker Protection Act**

Dear Director Navarrete:

Northwest Workers' Justice Project ("NWJP") submits these comments on the Department of Labor's ("Department" or "DOL") Notice of Proposed Rulemaking ("NPRM") regarding the standard for determining who is a joint employer under the Fair Labor Standards Act ("FLSA"), Family and Medical Leave Act ("FMLA"), and Migrant and Seasonal Agricultural Worker Protection Act ("AWPA")[1]. RIN 1235-AA48; 91 Fed. Reg. 21878 (Apr. 23, 2026) ("NPRM").

NWJP is a not-for-profit law firm representing low wage, immigrant, and contingent workers in Oregon and the Pacific Northwest with respect to employment matters. It has extensive experience representing workers in litigation arising under the FLSA and AWPA, and has

[1] Although DOL uses the acronym "MSPA" to refer to the Migrant and Seasonal Agricultural Worker Protection Act, the U.S. Supreme Court has used "AWPA" when discussing the statute. *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 640 (1990) and *Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 597 (2011). The Fourth, Fifth, Sixth, Seventh, Ninth, Tenth and Eleventh Circuits also refer to the statute as "AWPA." *Howard v. Malcolm,* 852 F.2d 101 (4th Cir. 1988); *Malacara v. Garber,* 353 F.3d 393 (5th Cir. 2003); *Flores v. Rios,* 36 F.3d 507 (6th Cir. 1994); *Reyes v. Remington Hybrid Seed Co.*, 495 F.3d 403 (7th Cir. 2007); *Dico, Inc. v. Diamond,* 35 F.3d 348 (8th Cir. 1994); *Torres-Lopez v. May*, 111 F.3d 633 (9th Cir. 1997); *Alfaro-Huitron v. Cervantes Agribusiness,*|982 F.3d 1242 (10th Cir. 2020); *Antenor v. D & S Farms*, 88 F.3d 925, 928, n.3 (11th Cir. 1996). Accordingly, farm worker advocates consistently refer to the law as "AWPA."

frequently litigated the scope of employment under those statutes. It has frequently participated in Department of Labor rulemaking under the FLSA and AWPA. NWJP also acts as the anchor organization for the Low Wage Workers Legal Network, a national network of over 1,000 legal advocates working in forty states and the District of Columbia.

The NPRM at issue in this rule-making is profoundly flawed and would have a significant negative impact on long-standing worker protections. DOL should withdraw its proposed rule.

1. *The proposed rules are contrary to Congress' intent to protect workers under the FLSA, AWPA, and FMLA.*

Congress enacted the FLSA in 1938 to "correct and as rapidly as practicable to eliminate" "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. § 202. The FLSA was passed to "lessen, so far as seemed then practicable, the distribution in commerce of goods produced under subnormal labor conditions," *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 727 (1947), *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945); *Sec'y of Labor v. Lauritzen*, 835 F.2d 1529 (7th Cir. 1987) (Easterbrook, J., concurring). *See also Lehigh Valley Coal Co. v. Yensavage*, 218 F. 547, 553 (2d Cir. 1914) (Judge Learned Hand noting that employment statutes were meant to "upset the freedom of contract").

The overly restrictive joint employer test being proposed by the Department would encourage more businesses to avoid their duties to ensure compliance with the FLSA for employees they are jointly responsible for in the name of "innovation" and "economic growth." This unacceptable result is inconsistent with the FLSA's stated purpose. "Courts have adopted an expansive interpretation of the definitions of 'employer' and 'employee' under the FLSA, in order to effectuate the broad remedial purposes of the Act." *Torres-Lopez v. May*, 111 F.3d 633, 639 (9th Cir. 1997) (citations omitted); see also, *Caro-Galvan v. Curtis Richardson, Inc.*, 993 F.2d 1500, 1505-07 (11th Cir. 1993).

Likewise, Congress passed AWPA with a broad scope and remedial purpose in mind. AWPA was adopted in 1983 after Congress acknowledged that its earlier effort to protect agricultural workers—through the Farm Labor Contract Registration Act of 1963—had "failed to reverse the historical pattern of abuse and exploitation of migrant and seasonal farm workers." 1982 U.S.C.C.A.N. 4549. Courts have pointed to this history and the legislation's humanitarian purpose when choosing to construe the Act—and the population of workers it protects—broadly. *Bracamontes v. Weyerhaeuser Co.*, 840 F.2d 271, 276 (5th Cir.), cert. denied, 488 U.S. 854, 109 S. Ct. 141, 102 L. Ed. 2d 113 (1988); s*ee also*, *Morante-Navaro v. T&Y Pine Straw Inc.*, 350 F.3d 1163, 1166 (11th Cir. 2003). Narrowing the scope of which employers are required to ensure compliance with the protections provided under AWPA would be contrary to the law and harmful to the people it protects.

Nor is narrowing the scope of employers required to ensure compliance with FMLA consistent with the Congressional purposes leading to the adoption of FMLA. Among those purposes enumerated by Congress were promoting the stability and economic security of families and the goal of equal employment opportunities for men and women. 29 U.S. Code § 2601(b). Since

joint employment is relevant to the question of employer size for the purpose of determining eligibility under FMLA for medical leave, many workers will continue to suffer the adverse consequences that Congress found they commonly experience, 29 U.S. Code § 2601(a)(3)-(6), and their families will not benefit from the adequate care and family development Congress meant to ensure. 29 U.S. Code § 2601(a)(2).

While the Department acknowledges that its proposed test is narrower than the analysis used in many courts and even its own existing AWPA regulations; it focuses only on the impact that will have on workers' ability to collect in the event of a lawsuit about violations and dismisses even that significant impact as "unlikely to be significant." 91 FR 21910. At no point in its analysis does it acknowledge that the significance of this inability to actually enforce the statutorily mandated rights is most acute for the most vulnerable workers, those that the statutes were intended to protect.[2] By reducing the employers required to ensure compliance with the FLSA, AWPA and FMLA's minimum standards, this proposed rule will reduce compliance with those statutes and is thus flatly contrary to Congress' intent and far beyond the bounds of acceptable agency action.

While DOL touts that its proposed rule will spur economic innovation by making it easier to form business relationships, Congress has already stated its clear finding that such avoidance of FLSA's minimum standards "burdens commerce" and "constitutes an unfair method of competition." 29 U.S.C. § 202. DOL cannot use its rules and preferred policy positions to override Congress' expressed intent. Although DOL implies workers will be unharmed despite reduced ability to hold their employers accountable for a failure to ensure their rights are respected, that assertion is unsupported in the NPRM and contrary to the evidence as well as NWJP's experience representing workers who are jointly employed by multiple entities.

2. *The proposed rule fails to satisfy its stated primary objective of reducing confusion.*

The proposed rule will create, not reduce, confusion and increase litigation over employment status under the affected statutes. First, the proposed rule is not consistent with the case law and therefore is not a permissible interpretation. This will only leave employers confused about their obligations as they struggle to weigh controlling case law with the proposed interpretive rule.

The FLSA contemplates that more than one employer can and should be held responsible for its provisions when a company decides to outsource all or a portion of its workforce to staffing companies or other subcontractors. Under its expansive statutory definitions of employment, the FLSA includes work relationships that were not within the traditional common-law definition of

[2] *See, e.g.,* Kaylee Tornay, Oregon's labor bureau failed to collect nearly $5 million in wage theft claims since 2015, INVESTIGATE WEST (Dec. 4, 2023), https://www.investigatewest.org/oregons-labor-bureau-failed-to-collect-nearly-5-million-in-wage-theft-claims-since/; Eunice Hyunhye Cho, Tia Koonse, and Anthony Mischel, *Hollow victories: the crisis in collecting unpaid wages for California's workers*, National Employment Law Project (June 2013), https://www.nelp.org/app/uploads/2015/02/ Hollow-Victories.pdf.

employment. *Rutherford*, 331 U.S. at 729. The NPRM, in contrast, proposes a test that is notably narrower than the common law test. Though the Department purports to have taken the test from *Bonnette v. California Health and Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983); it differs in multiple important ways. First, it deemphasizes the relevance of the power or right to control the workers. Second, it requires a "substantial degree" of supervision or control. These differences are only compounded by the Department's fundamental misreading of the ruling of the case. Though the Ninth Circuit found those factors relevant to that case, and *sufficient* to demonstrate a joint employment relationship, at no point did the court determine it was *necessary* to satisfy those factors to establish such a relationship. *Id*. at 1470, citing *Rutherford*, 331 U.S. at 730. In *Zheng v. Liberty Apparel, Inc*., 355 F.3d 61, 69 (2nd Cir. 2003), the court underscored this distinction between the *Bonnette* factors being ***sufficient*** to establish employment under the FLSA, but ***not necessary*** for employment to exist. The court in *Zheng* then established a broader set of factors to be considered on remand. *Id*. at 71-72.

It is unsurprising that the *Bonnette* factors indicating common law control of the work are reflected in numerous cases that set out factors to consider in evaluating employment under the FLSA. Since FLSA employment is broader than common law, employment measures establishing common law employment would also signal FLSA employment. This, however, doesn't support the assertion that those factors should be used exclusively. The elevation of these factors as the primary consideration and the insistence that other factors are of lesser or even no relevance despite their historic inclusion in the analysis is patently contrary to the well-established law governing this analysis. One need look no farther than *Rutherford Foods,* the landmark Supreme Court case on FLSA employment, to understand this. In that case the boners were hired and fired by the chief boner, who controlled their pay, and had complete control over their work. 331 U.S. at 724-25. Nonetheless, the court found that the boners were jointly employed by the processor on the basis of other relevant economic realities factors. *Id*. at 730.[3]

The Department's regulations about the scope of employment under the FLSA cannot establish new legal standards; rather, they speak only to the agency's view of the statute and how the agency will seek to enforce it. *See Skidmore v. Swift Co*, 323 U.S. 134, 140 (1944). The regulations being proposed would be interpretive regulations, which are only binding on the courts to the extent that they are found to be persuasive. *Skidmore v. Swift Co*, 323 U.S. 134, 140 (1944); *see also Loper Bright Enters. v. Raimondo*, 603 US 369, 400 (2024) (rejecting the idea that an agency interpretation could be permissible if it "is not the one the court, after applying all relevant interpretive tools, concludes is best."). Given the weight of 80-plus years of case law in

[3] Although the NPRM acknowledges that *Rutherford* is relevant to the definition of employ under the FLSA, and briefly summarizes the factors the Court considered, it otherwise ignores its relevance to the question of how to determine whether a joint employment relationship exists. It acknowledges the flawed assertion that it was only an independent contractor case that it made in its 2020 rulemaking, but proposes a test that is inconsistent with *Rutherford*'s analysis. The Supreme Court did not make a distinction between independent contractor analysis and joint employer analysis and the primary question before court in that case was whether the boners were jointly employed by the processing plant. *Rutherford*, 331 U.S. at 730; *see also Torres-Lopez*, 111 F.3d at 650. The agency is not free to ignore what the U.S. Supreme Court has said on the matter.

the Supreme Court and across the circuits, the likely result will be that the courts will continue to follow their own precedents, not the hastily concocted interpretive regulations that radically depart both from those precedents and the agency's own, long-held views. But their analysis, and the calculations of litigants, would be muddied by the Department's adoption of a radical new view if this rule change is implemented. This very uncertainty is a sure recipe for a deluge of new litigation to understand whether, and to what extent, the law has shifted. In the process worker protections intended by Congress will be denied or delayed. Employers who want to comply will be caught up in the lack of clarity, and those who would exploit vulnerable workers will no doubt seize the opportunity presented by this confusion to attempt to do so. The economy will suffer.

Second, even if the Department's proposal was a permissible interpretation of the standard, the significant changes will lead to additional lack of clarity due to conflicts between the new test and the long-established version that was in effect during the time period when many states, including Oregon, adopted the economic realities test to determine employment status under their own wage and hour laws in both independent contractor and joint employer contexts. The proposed rule will thus also decrease clarity and increase litigation in state courts on this issue, which is directly opposite of DOL's stated goals in proposing this rule. And in the meantime, we will have different versions of the test determining employment relationships under state and federal law, resulting in potentially different outcomes, a morass that will be bad for employers and workers.

Finally, putting questions of the permissibility of the proposed changes aside, implementing the new rule will also lead to more confusion because the rule itself, as drafted, is confusing. The proposal of similar but narrower primary factors as well as how to interpret the additional language about only somewhat relevant factors mark significant shifts in the law and determining outcomes under this new approach will require years of litigation to develop the case law to help inform employers and workers of the bounds of when the factors tip towards a joint employment relationship. The 80-plus years of case law on FLSA employment relationships will be useless because of the changes proposed. To suggest such dramatic changes to a rule in the name of increasing certainty and reducing confusion and litigation simply makes no sense and the offered justifications are insufficient to justify the shift.

3. *The proposed rule is a stark departure from over 85 years of agency interpretation.*

DOL first published guidance related to joint employment under the FLSA in 1939. In 1958, DOL issued regulations formalized longstanding policies that had been in place for many years. 91 FR 21879 (discussing early guidance on joint employment standards). Since then, the Department has promulgated regulations addressing joint employment in certain agricultural contexts, under AWPA, and under the FMLA. While these regulations do not provide detailed guidance in all circumstances, they establish certain basic principles consistent with the case law, including that the determination depends on all the facts in a particular case viewed in totality and that the ultimate question is the economic reality of the situation. The Department now proposes, after more than 85 years, to abandon those principles without legal or practical

justification. This proposal marks a significant departure and an unprecedented shift in the interpretation of the law, and one that is poorly reasoned, unjustified, and thus unlawful.

The Department's interpretations have remained consistent through at least the Wage and Hour Administrator's official interpretations, Administrator's Interpretation No. 2014–2, concerning joint employer status in the context of home care workers and Administrator's Interpretation No. 2016–1, concerning joint employment under the FLSA and Migrant and Seasonal Agricultural Worker Protection Act. These longstanding, consistent interpretations of the Department of Labor over many decades are clear in their reading of the FLSA as a very broad statute, encompassing work situations that are broader than the common law, with joint employment emanating from that broad understanding of the scope of employment. This NPRM represents a radical departure from those policies, and the Department has not given a rational explanation for this reversal.

When the AWPA regulations were last substantially revised—in ways that broadened, not restricted, coverage—the goal was "to clarify the definition of ''joint employment'' under [AWPA], with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty." 62 Fed.Reg. 11747. It is difficult to understand, and the NPRM makes no attempt to explain, what has changed since then, how the rules are not working, and why these new regulations are now needed to avoid confusion or litigation. A clear, common law-based analysis of joint employment as proposed here might, indeed, be simpler to apply. So would a rule that said each employee can only have one employer—or a rule that said that no employer who contracts out work has to assure that those workers are paid the minimum wage. Of course, such a rule would not comply with the FLSA's mandate to assure sufficient breadth of coverage to accomplish its purpose. *Antenor et al. v. D & S Farms,* 88 F.3d 925. Nor would the rule proposed by the NPRM.

4. *DOL did not adequately consider alternatives or potential negative effects of its proposed rule narrowing the joint employer standard.*

The Department, while offering consistency as a reason for changing the rules, fails to consider the most straightforward alternative way to achieve this consistency and clarity without hurting the workers it is supposed to protect: by adopting FLSA regulations implementing the well-established joint employer principles already established in the AWPA regulations. Instead, the agency does the opposite and insists it has to replace the AWPA regulations in order to achieve consistency with their new narrow approach under the FLSA. To remove regulations that have been in place for almost 30 years with no specific rationale beyond the need for consistency is arbitrary and capricious and unlawful.

The Department also fails to consider the alternative approach of developing one test for FLSA employment relationships, including both independent contractor relationships and joint employment relationships, as is the practice in some circuits. At its core, these tests are asking the same questions – is a particular person or entity an employer of a particular worker. Although some of the different factors may have varying relevance in different contexts, a totality of the circumstances approach allows for different emphasis without introducing the confusion of an

overlapping but different test. The Department does not consider this approach and the benefit it would provide in terms of simplicity.

The Department also cavalierly ignores the significant negative effects on workers that the proposed rule would cause. Reducing the number of entities considered joint employers reduces a worker's ability to collect their wages if their most immediate employer disappears or is insolvent, which the Department noted in the NPRM but dismissed without evidence or further discussion as "unlikely to be significant." 91 FR 21910. This matters the most to low-wage workers in instable jobs who are most likely to be employed by temp agencies, labor contractors, and other outsourced intermediaries where joint employment relationships under the current state of the law are most common.

The Department fails completely to consider other harmful impacts on workers: farmworkers who will not be entitled to be paid the minimum wage if their joint employer's man hours are not counted towards their coverage, workers in horizontal joint employment situations who will no longer be entitled to overtime wages for hours worked above forty in a week if their two employers are no longer considered joint employers, workers who will no longer be protected by the FMLA because their joint employer's employees are not counted towards the 50 employees required for coverage.

The Department ignores these harms and insists that their proposed changes will help workers because it will improve their awareness of available rights and remedies. It is hard to fathom how an improved awareness of one's lack of rights and remedies could possibly be said to improve the situation for a low wage worker who may not have been sure they were covered but once they learn they are, has strong remedies to pursue.

*5. Aspects of the analysis under the individual factors are also flawed and inconsistent with long-establish court precedent.*

In addition to the global issues identified above, there are many instances of flawed reasoning, impermissible restrictions, and confusing analysis that undermine the specific language proposed for each factor in the proposed rule.

- Horizontal joint employment under Proposed §§ 791.110(b) and 791.120: The proposed language improperly narrows analysis without justification by replacing longstanding interpretation of whether entities were "completely disassociated" with question of whether they are "sufficiently associated."
- Workweek analysis under Proposed § 791.110(c): Especially combined with the emphasis on exercised control rather than the power to control, emphasizing a week-by-week assessment creates a potentially confusing and impractical situation where an employer may be a joint employer or not on alternating weeks depending on the actions they took that week.
- Relevance of reserved control under Proposed § 791.115(c): The proposed rule discounts the impact that a contractual right to control workers has on their dependence on a business. This is rationally unsound. A right to terminate workers' employment becomes

an implicit threat that, of course, makes them more dependent on the business that has that right, regardless of whether a worker ever in fact is terminated. The business is served by this effort to ensure compliance by fear of termination, not by actually terminating their employees.

- Indirect control under Proposed § 791.115(d): This proposed rule emphasizes a distinction between mandatory instructions vs. recommendations voluntarily followed, but ignores power dynamics that make such a distinction hard to discern particularly in situations of true economic dependence. This factor is especially confusing and concerning when read in conjunction with the proposed language about certain business practices, and could lead to extensive reserved and actual control of an employer being discounted inappropriately.
- Relevance of economic dependence factors under Proposed § 791.115(e) and (f): Despite acknowledging the relevance of the definition of employ under the FLSA, the agency insists the ultimate issue is who benefits from the work and not economic dependence.
- Relationship between control and certain business practices under Proposed § 791.125(b) and (c): The rule purports to exempt from consideration any control that results from or relates to the employer's desire to impose health and safety standards, deadline, quality control measures, anti-harassment policies, morality clauses, required standardized products or services, and other "similar" types of control. These additional terms are so vague and broad as to be able to be arguably applied to any type of control a business might wish to exert over an individual or subcontractor and will make it almost impossible to demonstrate control.

## Conclusion

It is no coincidence that corporate outsourcing is rampant in low-wage, labor-intensive industries, such as delivery services, janitorial services, agriculture, transportation, and home care and housekeeping, as well as in app-dispatched work. The clients of NWJP are overwhelmingly workers who do not have economic power in the workplace and will be vulnerable to abuse due to these proposed changes if they are implemented. The Department of Labor should not adopt an arbitrary standard that creates incentives for employers to contract away their legal duties and immunize themselves from responsibility for the workplace conditions they create. Such a standard would degrade workers' labor conditions, permit wage theft and unlawful child labor, and shift all economic risks to the workers, depriving them of their statutory rights.

On behalf of its vulnerable clients, NWJP calls upon the Department to withdraw this unfortunate proposal.

Sincerely,

Bonnie Allen-Sailer
Staff Attorney

D. Michael Dale
Senior Attorney