



June 25, 2019

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Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor
Room S-3502
200 Constitution Avenue NW
Washington, DC 20210

RE: Comments of the Association for Corporate Growth on “Joint Employer Status Under the Fair Labor Standards Act,” Notice of Proposed Rulemaking and Request for Comments, Regulatory Information Number (RIN) 1235-AA26

The Association for Corporate Growth (“ACG”) welcomes the opportunity to comment on the Notice of Proposed Rulemaking (“NPRM” or “Notice”) and Request for Comments with regards to the “Joint Employer Status Under the Fair Labor Standards Act,” published in the *Federal Register* on April 9, 2019,¹ and subsequent comment extension on May 14, 2019² by the Department of Labor (“Department” or “DOL”).

Under the NPRM, the DOL proposes that “if an employee has an employer who suffers, permits, or otherwise employs the employee to work and another person simultaneously benefits from that work, the other person is the employee’s joint employer under the Act for those hours worked only if that person is acting directly or indirectly in the interest of the employer in relation to the employee.”³

According to the Department, the proposed rulemaking is intended to update and clarify its interpretation of joint employer status under the Fair Labor Standards Act (“FLSA”), which has not been

¹ Department of Labor, *Notice of Proposed Rulemaking and Request for Comments*, 84 Fed. Reg. 14043 (April 19, 2019)(“NPRM”).

² Department of Labor, *Proposed Rule; Extension of Comment Period*, 84 Fed. Reg. 21301 (May 14, 2019).

³ NPRM at 14044. (emphasis added)

meaningfully revised in over six decades.⁴ ACG agrees that the proposed changes will “promote certainty for employers and employees, reduce litigation, promote greater uniformity among court decisions, and encourage innovation in the economy,”⁵ and therefore encourages the Department to adopt the proposal as expeditiously as possible. ACG strongly believes that this proposal is critical to provide much-needed certainty surrounding joint employer liability of U.S. businesses, particularly middle-market businesses which are the drivers of U.S. job growth.

I. Background on the Association for Corporate Growth

Founded in 1954, ACG is the only global organization dedicated to driving middle-market growth. ACG represents nearly 15,000 middle-market professionals throughout chapters across the world, including in every major metropolitan city in the U.S. Our members include private capital providers, executives, and advisers in the middle-market business and dealmaking community.

Together, ACG members own and operate 26,000 businesses within the U.S.

Data demonstrates the critical role that ACG’s middle-market private capital providers play in growing jobs and boosting the economy. For example, between 1998 through 2017, private equity-backed companies grew jobs by 60%, while all other companies in the U.S. economy grew jobs by 24%.⁶ A substantial majority of this growth (72%) was created specifically by middle-market private capital-backed companies.⁷ Given the outsized job creation propelled by the middle market, the definition of a joint employer under the FLSA is of particular concern to ACG members.

II. Comments of ACG in Support of the NPRM

The NPRM takes several steps to increase clarity and certainty in determining joint employer status under the FLSA. In particular, the proposal replaces the current “not completely disassociated” standard – which can lead to overly broad findings of joint employer liability – with a four-factor balancing test

⁴ NPRM at 14055.

⁵ See, NPRM at 14043.

⁶ See, “Driving Growth: The Impact of Middle-Market Private Equity on the U.S. Economy,” available at <http://growtheconomy.org>.

⁷ *Id.*

that assesses whether the potential joint employer: (1) exercises the power to hire or fire the employees; (2) supervises and controls employee work schedules or conditions of employment; (3) determines the rate and method of employee payment; and (4) maintains employment records. The Department explains that additional factors may be used to determine joint employer status, but only if they are indicative of whether the potential joint employer is exercising significant control over the terms and conditions of the employee's work, or otherwise acting directly or indirectly in the interest of the employer in relation to the employee. Finally, among other things, the Department explains that an employee's "economic dependence" on the potential joint employer does not determine the potential joint employer's liability under the FLSA.⁸

In ACG's view, there are several compelling policy reasons for the Department to adopt the NPRM expeditiously to clarify joint employer status under the FLSA, including:

- **Provides clarity and reduces unnecessary compliance costs.** The proposed four-factor balancing test is clear and easy to apply. This means U.S. businesses will have more notice of what the joint employer rule actually requires and can spend less resources trying to figure out if certain activity would give rise to joint employer liability.
- **Appropriately limits the exposure of middle-market businesses, the primary drivers of job growth, from overly broad joint employer liability.** The new proposal, which utilizes a clear test, reasonably restricts when a business would be considered a joint employer for wage and overtime violations. As a result, employee-plaintiffs would face a more difficult hurdle in bringing meritless joint employer claims and judges would be able to more quickly dismiss frivolous lawsuits.

⁸ The Department also explains the following do not make joint employer status more or less likely: certain business models (e.g., operating as a franchisor); certain business practices (e.g., providing a sample employee handbook to a franchisee or allowing an employer to operate a facility on one's premises); and certain business agreements (e.g., requiring an employer to institute workplace safety measures, wage floors, or sexual harassment policies).

- **Facilitates economic growth.** A properly fitting joint employer standard promotes economic growth by thwarting the high costs businesses must face in defending against meritless joint employer claims.
- **Promotes innovation and certainty in business relationships.** As indicated by the Department, uncertainty surrounding which activities could give rise to joint employer liability could have a chilling effect on a potential joint employer's willingness to engage in beneficial behavior (such as providing a sample employee handbook or establishing an association health plan that is also used by the employer), or bargaining for certain meaningful contractual provisions (such as requiring the employer to institute workplace safety practices, a wage floor, sexual harassment policies, morality clauses, or other measures intended to encourage compliance with the law or to promote other desired business practices). The NPRM reduces this uncertainty through the clear balancing test and illustrative examples of activity that would/would not confer joint employer liability.
- **Increases judicial fairness and predictability.** Currently, as the Department recognizes, circuit courts use a variety of multi-factor tests to determine joint employer status. As a result, organizations operating in multiple jurisdictions may be subject to joint employer liability in one jurisdiction, but not in another, for the same business practices. The NPRM would provide guidance to courts to promote greater uniformity among court decisions and therefore increased consistency and predictability for businesses facing joint employer claims.

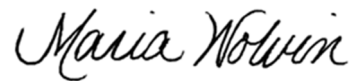
III. Conclusion

Middle-market business owners and investors need a standard for determining joint employer status under the FLSA that is clear, consistent, and balanced in order to ensure they can continue growing jobs and expanding business opportunities without facing unknown legal liability. The NPRM lays out a clear four-factor balancing test for determining joint employer liability that provides clarity and reduces unnecessary compliance costs; appropriately limits the exposure of middle-market businesses, the primary drivers of job growth, from overly broad joint employer liability; facilitates

economic growth; promotes innovation and certainty in business relationships; and increases judicial fairness and predictability. For these reasons, ACG strongly supports the Proposed Rule and urges the Department to finalize it as expeditiously as possible.

ACG appreciates the opportunity to comment on the Notice and welcomes the opportunity to further discuss any of the issues addressed in this letter. If you have any questions, or if we can provide any additional information, please feel free to contact Maria Wolvin, Vice President & Senior Counsel, Public Policy, at mwolvin@acg.org or at 312-957-4274.

Sincerely,

A handwritten signature in black ink that reads "Maria Wolvin". The signature is written in a cursive, flowing style.

Maria Wolvin
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Washington, D.C. 20001

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