NATIONAL WOMEN'S LAW CENTER
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Wage and Hour Division,
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Room S-3502
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Comments on RIN 1235-AA26: Joint Employer Status Under the Fair Labor Standards Act

Submitted at: https://www.regulations.gov/comment?D=WHD-2019-0003-0001

Dear Ms. DeBisschop:

The National Women's Law Center opposes the Department of Labor's ("Department" or "DOL") proposed rulemaking that severely limits the responsibilities of contracting employers under the Fair Labor Standards Act ("FLSA" or "the Act"), in contravention of the Act's purposes and its statutory definitions. The DOL's proposed rule ignores a statutory definition, Supreme Court authority, and decades of federal Circuit Court precedent with a test that would encompass almost no subcontracting companies, and would especially hurt those low-wage workers who need the protections of the FLSA the most: those who are placed in jobs via temp or staffing agencies, and those who work in heavily contracted janitorial, construction, manufacturing, and warehousing jobs, to name a few.

The National Women's Law Center ("the Center" or "NWLC") has worked for over 45 years to advance and protect women's equality and opportunity—with a focus on women's employment, education, income security, health, and reproductive rights—and has long worked to remove barriers to equal treatment of women in the workplace, particularly those barriers that make it more difficult for women to gain access to justice when they have suffered from illegal and abusive treatment at work.

The Center works with and on behalf of women in commonly subcontracted workforces—both workforces where women make up a disproportionate number of employees, like home care, and those where women are still struggling to break into the sector, like construction work. Whether women predominate or are still gaining a foothold, the ability to act together to improve their

working lives and to hold their employers responsible for violations of their rights is paramount to the ability of women to work safely and succeed at work.

In today's economy, more and more corporations in lower-wage industries outsource to labor contractors and use labor intermediaries such as staffing firms, and this can result in degraded working conditions and no employer exercising appropriate responsibility for the treatment of workers.[1] Companies that elect to outsource their labor must share responsibility for any violations of the FLSA that occur under these arrangements, including the law's protections around child labor, wage theft, equal pay, overtime, and break time for nursing mothers. When operating correctly, joint employment results in meaningful protections for workers and ensures fair competition among businesses. Yet, under the proposed rule, using a four-factor balancing test, an employer may be found to be a joint employer where the employer actually exercises the power to 1) hire or fire the employee; 2) supervise and control the employee's work schedules or conditions of employment; 3) determine the employee's rate and method of payment; and 4) maintain the employee's employment records.

The standard laid out in the NPRM has been heralded by attorneys who represent employers as "the best possible outcome"[2] for employers because it is the "most restrictive joint employer standard… [a] restrictive interpretation of the most restrictive standard that any of the federal circuits apply." Even the NPRM itself contemplates that this standard will result in fewer joint employer findings.[3] If adopted, this standard will hurt working people by making it more difficult to hold employers who abuse workers responsible for their illegal behavior.

The proposed rule threatens to further undermine the quality of temporary and contracted jobs, especially for women.

The number of workers employed by temporary staffing agencies has increased in recent years. There are currently more than 3 million workers employed through temporary staffing agencies, and the aggregate number of hours and total number of jobs (part-time and full-time) has grown faster than work overall.[4] Women make up close to half of temporary help services workers.[5]

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[1] Nat'l Emp't Law Project (NELP), *America's Nonstandard Workforce Faces Wage, Benefit Penalties, According to U.S. Data* (June 7, 2018), https://www.nelp.org/news-releases/americas-nonstandard-workforce-faces-wage-benefit-penalties according-us-data/.

[2] Vin Gurrieri, *DOL Joint Employer Push Has Worker Advocates Up In Arms,* LAW360 (Apr. 1, 2019), https://www.law360.com/articles/1144976/dol-joint-employer-push-has-worker-advocates-up-in-arms.

[3] Joint Employer Status Under the Fair Labor Standards Act, 84 Fed. Reg. 14043 (proposed Apr. 9, 2019) (to be codified at 29 CFR 791) at 14053 ("This proposed standard would not change the amount of wages the employee is due under the FLSA, *but could reduce, in some cases, the number of persons who are liable for payment of those wages"* (emphasis added)), https://www.govinfo.gov/content/pkg/FR-2019-04-09/pdf/2019-06500.pdf.

[4] NELP analysis of U.S. Dep't of Labor, Bureau of Labor Statistics (BLS), Current Employment Statistics (CES), NAICS 561320, https://www.bls.gov/ces/data.htm.

[5] According to the CES, as of August 2018, 1.43 million of the approximately 3.04 million workers employed by temporary staffing agencies were women. Nat'l Women's Law Ctr. (NWLC) calculations based on *id*. *See also* U.S. Dep't of Labor, Bureau of Labor Statistics, Contingent and Alternative Employment Arrangements, May 2017 (June 2018) at Table 5: Employed workers with alternative and traditional work arrangements by selected characteristics, May 2017, https://www.bls.gov/news.release/conemp.t05.htm (showing women are 48 percent of an estimated 1.4

Workers employed through intermediaries like temporary and staffing agencies earn less money and endure worse working conditions than permanent, direct-hires. The most recent Contingent Worker Supplement (CWS) data from the Bureau of Labor Statistics show, for example, that full-time staffing and temporary help agency workers earn 41 percent less than do workers in standard work arrangements.[6] Women—who are broadly overrepresented in low-wage jobs[7] and experience a significant gender wage gap across occupations[8]—typically earn even less than men in temporary staff positions.[9] Women workers provided by contract firms in full-time jobs typically earn 17 percent less than women in traditional employment arrangements and *42 percent less* than full-time male workers provided by contract firms.[10]

Workers employed through intermediaries like temporary and staffing agencies also experience large benefit penalties relative to their counterparts in standard work arrangements.[11] In addition, staffing and temporary agency workers typically work in more hazardous jobs than permanent workers, and yet they often receive insufficient safety training and are more vulnerable to

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million temporary help agency workers). Note that the Contingent Worker Supplement (CWS) almost certainly undercounts the number of people who work for contract firms and temporary help agencies, in part because workers self-report what kind of firm they work for and may erroneously report that they work for the company where they are doing their work instead of for the contract firm or temporary help agency that placed them at that site—in contrast to establishment surveys like the CES, where the firm, not the worker, does the reporting. The higher total numbers reported in the CES is thus likely to be more accurate, but gender patterns are similar across the two surveys—and for the workforce in contract firms, the CWS is the only available data source. *See* ECON. POLICY INST. (EPI), EPI COMMENTS REGARDING THE STANDARD FOR DETERMINING JOINT-EMPLOYER STATUS 4 (Dec. 10, 2018), https://www.epi.org/files/pdf/158948.pdf.

[6] NELP, *America's Nonstandard Workforce Faces Wage, Benefit Penalties, According to U.S. Data*, (June 7, 2018), https://www.nelp.org/news-releases/americas-nonstandard-workforce-faces-wage-benefit-penalties-according-us-data/.

[7] In 2016, women made up nearly two-thirds of the nearly 24 million workers in low-wage jobs (defined as jobs that typically pay $11.50 per hour or less), though they make up slightly less than half (47 percent) of the workforce as a whole. Women of color are particularly overrepresented in these jobs. Median hourly wages for occupations were determined using U.S. Dep't of Labor, Bureau of Labor Statistics (BLS), May 2017 National Occupational Employment and Wage Estimates (OES), https://www.bls.gov/oes/current/oes_ nat.htm (last visited May 25, 2018). Workforce and other occupational data are NWLC calculations based on 2016 American Community Survey, one-year estimates using Steven Ruggles et al., Integrated Public Use Microdata Series: Version 7.0 [dataset], Minneapolis: University of Minnesota (2017). Figures are for employed workers.

[8] In 2016, a woman working full time, year-round was typically paid just 80 cents for every dollar paid to a man working full time, year-round. NWLC calculations based on U.S. Census Bureau, Current Population Survey, 2018 Annual Social and Economic Supplement [hereinafter CPS, 2018 ASEC], Table PINC-05, https://www.census.gov/data/tables/time-series/demo/income-poverty/cps-pinc/ pinc-05.html (last visited Sept. 21, 2018). Women working full time, year-round had median annual earnings of $41,997 in 2017. Men working full time, year-round had median annual earnings of $52,146 in 2017. *See also* NAT'L WOMEN'S LAW CTR., THE WAGE GAP: THE WHO, HOW, WHY, AND WHAT TO DO (Oct. 2018), https://nwlc.org/resources/the-wage-gap-the-who-how-why-and-what-to-do/.

[9] U.S. Dep't of Labor, BLS, Contingent and Alternative Employment Arrangements—May 2017 (June 2018), Table 13: Median usual weekly earnings of full- and part-time contingent and noncontingent wage and salary workers and those with alternative work arrangements by sex, race, and Hispanic or Latino ethnicity, May 2017, https://www.bls.gov/news.release/conemp.t13.htm.

[10] *Id.*

[11] REBECCA SMITH & CLAIRE MCKENNA, TEMPED OUT: HOW THE DOMESTIC OUTSOURCING OF BLUE-COLLAR JOBS HARMS AMERICA'S WORKERS 11 (June 10, 2014), https://s27147.pcdn.co/wp-content/uploads/2015/02/Temped-Out.pdf. *Id.*

retaliation for reporting injuries than workers in traditional employment relationships.[12] And across industries where subcontracting is prevalent, workers experience problems that have outsized effects for women. For example, in female-dominated industries like home care, women are subjected to low wages and a lack of benefits, making it hard for them to care for their own families. In traditionally male-dominated industries like construction and trades work, women continue to struggle to gain equal access to jobs—and when a woman can get work on a construction site, she is often the only woman on the jobsite and is acutely vulnerable to harassment and other forms of discrimination and abuse, as well as retaliation for reporting.

When jobs are subcontracted, and employers no longer feel responsible for the people working on their behalf, work conditions are more likely to deteriorate: pay declines, wage theft increases, and workplace injuries rise.[13] And outsourced jobs pay less. In today's economy, we should be looking for ways to increase workers' pay and economic security, and employers' accountability for meeting basic labor standards, not laying the groundwork for employers to escape liability.

The DOL's proposed joint employer standard would weaken key protections for women at work

While most commonly associated with minimum wages and overtime pay, the Fair Labor Standards Act also contains provisions which are centered on ensuring that women are treated equally at work, including employer obligations to accommodate breastfeeding workers and protections against pay discrimination. Because both these protections are a part of the FLSA, eviscerating the FLSA's joint employer standard through this NPRM threatens to make it significantly more difficult to enforce these provisions of the FLSA against all employers responsible for illegal abuses.

Under the FLSA, "Employers are required to provide 'reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child's birth each time such employee has need to express the milk.'" Employers are also required to provide "a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk."[14] Millions of women every year benefit from this protection, and yet breastfeeding discrimination is still widespread.[15] Without access to a clean, private and safe place to express breastmilk, women can face painful infections and illness, as well as a diminished milk supply, while their babies can suffer from reduced access to breastmilk and be forced to wean earlier than is recommended by doctors.[16]

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[12] *Id.*
[13] *See, e.g.*, David Weil, *How to Make Employment Fair in an Age of Contracting and Temp Work*, HARVARD BUSINESS REVIEW (Mar. 24, 2017), https://hbr.org/2017/03/making-employment-a-fair-deal-in-the-age-of-contracting-subcontracting-and-temp-work.
[14] U.S. DEP'T OF LABOR, WAGE AND HOUR DIV., FACT SHEET #73: BREAK TIME FOR NURSING MOTHERS UNDER THE FLSA (Apr. 2018), https://www.dol.gov/whd/regs/compliance/whdfs73.htm.
[15] MORRIS, ET AL., CENTER FOR WORKLIFE LAW, EXPOSED: DISCRIMINATION AGAINST BREASTFEEDING WORKERS 4 (2019), https://www.pregnantatwork.org/wp-content/uploads/WLL-Breastfeeding-Discrimination-Report.pdf.
[16] *Id.*

The proposed NPRM would make it more difficult for breastfeeding workers to enforce their right to break time to pump at all the locations where they may work. For instance, many temporary or subcontracted workers are sent to work at remote job locations where the worksite is controlled by a contracting entity. For those workers, access to adequate time and a safe space to pump is controlled by the contracting employer. If the new NPRM goes into effect, breastfeeding workers working at locations controlled by entities other than their hiring employer or temp and staffing agency may be forced to make an impossible choice that pits their job against the health of themselves and their babies. The contracting entity should not be relieved of its obligations to provide space and time to pump, simply because it did not, for example, maintain the employee's employment records.

The Equal Pay Act of 1963 (EPA), which is part of the FLSA and is administered and enforced by the EEOC, makes it illegal for employers to pay unequal wages to men and women who perform substantially equal work in the same establishment.[17] Although the EPA has been in place for more than 50 years, women still face significant pay disparities. Today, women typically make only 80 cents for every dollar made by men, and the gaps are significantly worse for women of color.[18] Black women working full time, year-round typically make only 61 cents for every dollar paid to their white, non-Hispanic male counterparts.[19] For Latinas this figure is only 53 cents, for Native Hawaiian and Pacific Islander women it is 62 cents, and for Native women it is 58 cents.[20] While Asian women working full time, year round are typically paid only 85 cents for every dollar paid to their white, non-Hispanic male counterparts, the wage gap is substantially larger for some subgroups of Asian women.[21] Pay discrimination between men and women doing equal work is a significant driver of these gaps.[22]

The NPRM would make it more difficult for subcontracted workers or workers contracted through a temp or staffing agency to hold all of their employers responsible for pay discrimination by raising the bar to prove joint employer status, thus giving management-side lawyers added ammunition in their attempts to help their clients escape liability for discrimination[23].

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[17] The Equal Pay Act of 1963, 88 P.L. 38, https://www.eeoc.gov/laws/statutes/epa.cfm.
[18] NAT'L WOMEN'S LAW CTR., THE WAGE GAP, *supra* note 8.
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] FRANCINE D. BLAU & LAWRENCE M. KAHN, NAT'L BUREAU OF ECON. RESEARCH, THE GENDER WAGE GAP: EXTENT, TRENDS AND EXPLANATIONS (Jan. 2016), http://www.nber.org/papers/w21913.pdf.
[23] Although the EPA is a part of the Fair Labor Standards Act, many EPA claims are brought in conjunction with claims alleging other employment law violations, such as discrimination under Title VII. As such, courts evaluating these claims determine whether a joint employment relationship exists for the purposes of all claims brought, and thus may conflate the various joint employer tests or only engage in a joint employer analysis under one statute, *e.g., Sandoval v. City of Boulder, Colo.*, 388 F.3d 1312, 1323 (10th Cir. 2004) (only engaging in the Title VII joint employer analysis where plaintiff brought both Title VII and EPA claims). While the courts have taken various approaches to determining joint employer status in EPA claims, making it more difficult to prove joint employment under the FLSA raises a significant risk of hindering victims of pay discrimination in their efforts to hold all of their employers accountable for violations of the EPA.

While an employee's hiring employer may be the entity to set the wages of the employee on paper, many subcontractors or temp agencies are operating under immense pressure to slash wages or conform to the demands of the contracting entity in such a way that may result in pay discrimination.

And insofar as the contracting employer is wholly responsible for setting the wage rates for subcontracted or temporary employees, for instance, and sets the wage rate for female employees lower than the wage rate for male employees – that employer could escape liability if it so happened that it did not also hire or fire the employee or maintain the employee's employment records. Making it more difficult to prove an entity is an employer under the Act will only make it more difficult to hold discriminatory employers accountable in subcontracting relationships.

Without the ability to hold all an employees' employers responsible for workplace abuses, women will continue to suffer pay discrimination – but with less recourse to justice.

The proposed rule is contrary to the FLSA's broad "suffer or permit" standard, Supreme Court authority, and the statutory intent of the Fair Labor Standards Act.

Labor and employment laws, including the FLSA, have long held that more than one employer can be the employer of a worker. When employers are held jointly responsible for complying with workplace laws, companies provide better oversight of working conditions, to ensure that wage and hour laws as well as those restricting child labor, requiring equal pay, and protecting break time for nursing mothers are followed. The FLSA's definitions of covered employment and employers have not changed since the Act was enacted, and companies have been operating under these rules for over 80 years.

The FLSA is a uniquely broad statute not constrained by common-law employment relationships. The proposed rule's narrow definition of who is responsible as an employer is contrary to the plain language of the statute's definition of "employ" contained in Section 203(g) of the Act. It is also contrary to U.S. Supreme Court precedent that has said the definition of "employ" is not based in common law concepts and has applied Section 203(g) to determine that multiple entities are the employers of a group of employees.[24] And it runs afoul of the majority of federal Circuit courts that have considered the scope of covered employers.[25] Finally, it is

[24] *Nationwide Mutual Insurance Co. v. Darden,* 503 U.S. 318 (1992); *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947).

[25] *See, e.g., Salinas v. Commercial Interiors, Inc*., 848 F. 3d 125, 137 (4th Cir. 2017) (We agree that *Bonnette*'s reliance on common-law agency principles does not square with Congress's intent that the FLSA's definition of "employee" encompass a broader swath of workers than would constitute employees at common law. *See Darden*, 503 U.S. at 326, 112 S. Ct. 1344"); *Garcia-Celestino v. Ruiz Harvesting, Inc*., 843 F.3d 1276, 1287 (11th Cir. 2016) ("As noted above, the 'suffer or permit to work' standard has been recognized as one of the broadest definitions of "employ" possible"); *Reyes, et al., v. Remington Hybrid Seed Co*., 495 F.3d 403, 408 (7th Cir. 2007) ("Let us go back to the statute, which says that " '[e]mploy' includes to suffer or permit to work." This is "the broadest definition ... ever included in any one act.")(internal citations omitted); *Zheng v. Liberty Apparel Company, Inc*., 355 F. 3d 61, 69 (2nd Cir. 2003) ("We did not hold, nor under *Rutherford* could we have held, that a positive finding on those four factors is *necessary* to establish an employment relationship"); *Torres-Lopez v. May*, 111 F.3d 633, 639 (9th Cir. 1997) ("This court has recognized that the concept of joint employment should be defined expansively under the FLSA…"); *Hodgson v. Griffin & Brand of McAllen, Inc*., 471 F.2d 237 (5th Cir. 1973) ("Whether appellant is an employer of the harvest workers does not depend on technical or "isolated factors but rather on the

contrary to the intent of the FLSA, because it will enable employers to insert labor intermediaries between their company and their workers and then walk away from any accountability for the violations that may occur. This will further degrade fair pay standards across multiple industries and will likely have outsized effects on women, who are overrepresented in low-wage jobs.[26]

The common-law employment test is narrower than the FLSA test.[27] The common-law test for employment and joint employment does not require control to be exercised, direct, and immediate; only that the proposed joint employer have the right to control how the work is done.[28] Even when viewed in light of a more restrictive common law employment test, the DOL's proposal is too narrow: it fails to consider the *right to* control, a cornerstone of common law employment determinations under long-standing Supreme Court and FLSA law; it fails to consider instances where two companies share control over important terms and conditions of work; and it states that it does not consider the "suffer or permit to work" definition of "employ" that is the cornerstone definition in the statute upon which the employment coverage definitions rely.

The incredibly narrow proposed test leaves out many work relationships that are well within the long-understood scope of the FLSA's employment relationship and is thus impermissibly contrary to law and the Act. For these reasons, the proposed rule is arbitrary and capricious, lacks a rationale based in the statute, and will permit employers of low-wage workers and others to skirt their responsibilities under law.

Conclusion

Recognizing that more than one employer can employ a worker can improve employer compliance by ensuring that corporations do not simply outsource responsibility for the those working for the enterprise. A strong joint employer standard incentivizes all employers to follow the law fully with regard to everyone working on their behalf.

Corporations that engage low-road subcontractors and then look the other way gain an unfair advantage over companies that play by the rules, resulting in a race to the bottom that rewards cheaters. It's one reason why the quality of what were formerly middle-class jobs in America is suffering today.

Rather than making our workplaces safer and more secure for all workers—and especially for

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circumstances of the whole activity.")(internal citations omitted).

[26] NWLC data, supra note 7; DAVID COOPER & TERESA KROEGER, ECONOMIC POLICY INSTITUTE, EMPLOYERS STEAL BILLIONS FROM WORKERS' PAYCHECKS EACH YEAR 3 (May 10, 2017), https://www.epi.org/publication/employers-steal-billions-from-workers-paychecks-each-year-survey-data-show-millions-of-workers-are-paid-less-than-the-minimum-wage-at-significant-cost-to-taxpayers-and-state-economies/#epi-toc-18. ("Young workers, women, people of color, and immigrant workers are more likely than other workers to report being paid less than the minimum wage, but this is primarily because they are also more likely than other workers to be in low-wage jobs.")

[27] *See Community for Creative Non–Violence v. Reid,* 490 U.S. 730 751-52 (1989) ("under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished").

[28] *Garcia-Celestino, et al., v. Ruiz Harvesting and Consolidated Citrus* No. 17-12866 (Aug. 2, 2018 11th Cir.) (applying common law employer test in case involving workers employed under the H-2A program).

working women—this proposed rule will let employers hide behind a subcontract to allow abuse to go unchecked.

For these reasons, the National Women's Law Center opposes the proposed rule. We urge the DOL to maintain the current joint-employer standard, and to reject any attempt to institute a standard that deprives working people of their rights under the FLSA.

Sincerely,

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