available at the addresses specified in paragraphs (k)(3) and (4) of this AD.

(k) Material Incorporated by Reference

(1) The Director of the Federal Register approved the incorporation by reference (IBR) of the service information listed in this paragraph under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) You must use this service information as applicable to do the actions required by this AD, unless this AD specifies otherwise.

(i) MHI RJ Service Bulletin 670BA–53–060, Revision A, dated September 17, 2020.

(ii) [Reserved]

(3) For service information identified in this AD, contact MHI RJ Aviation ULC, 12655 Henri-Fabre Blvd., Mirabel, Québec J7N 1E1 Canada; Widebody Customer Response Center North America toll-free telephone +1–844–272–2720 or direct-dial telephone +1–514–855–8500; fax +1–514–855–8501; email *thd.crj@mhirj.com;* internet *https://mhirj.com.*

(4) You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195.

(5) You may view this service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, email *fedreg.legal@nara.gov,* or go to: *https://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued on June 10, 2021.

Ross Landes,

Deputy Director for Regulatory Operations, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2021–16238 Filed 7–29–21; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF LABOR

Wage and Hour Division

29 CFR Part 791

RIN 1235–AA37

Rescission of Joint Employer Status Under the Fair Labor Standards Act Rule

AGENCY: Wage and Hour Division (WHD), Department of Labor (DOL).

ACTION: Final rule; rescission.

SUMMARY: This action finalizes the Department's proposal to rescind the final rule titled ''Joint Employer Status Under the Fair Labor Standards Act,'' which published on January 16, 2020, and took effect on March 16, 2020. This rescission removes the regulations established by that rule.

DATES: This final rule is effective on September 28, 2021.

FOR FURTHER INFORMATION CONTACT: Amy DeBisschop, 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; telephone: (202) 693–0406 (this is not a toll-free number). Copies of this final rule may be obtained in alternative formats (Large Print, Braille, Audio Tape or Disc), upon request, by calling (202) 693–0675 (this is not a toll-free number). TTY/TDD callers may dial toll-free 1–877–889–5627 to obtain information or request materials in alternative formats.

Questions of interpretation and/or enforcement of the agency's regulations may be directed to the nearest WHD district office. Locate the nearest office by calling WHD's toll-free help line at (866) 4US–WAGE ((866) 487–9243) between 8 a.m. and 5 p.m. in your local time zone, or logging onto WHD's website for a nationwide listing of WHD district and area offices at *http://www.dol.gov/whd/america2.htm.*

SUPPLEMENTARY INFORMATION:

I. Background

The Fair Labor Standards Act (FLSA or Act) requires all covered employers to pay nonexempt employees at least the Federal minimum wage for every hour worked in a non-overtime workweek.[1] In an overtime workweek, for all hours worked in excess of 40 in a workweek, covered employers must pay a nonexempt employee at least one and one-half times the employee's regular rate.[2] The FLSA also requires covered employers to make, keep, and preserve certain records regarding employees.[3]

The FLSA does not define ''joint employer'' or ''joint employment.'' However, section 3(d) of the Act defines ''employer'' to ''include[ ] any person acting directly or indirectly in the interest of an employer in relation to an employee.'' [4] Section 3(e) generally defines ''employee'' to mean ''any individual employed by an employer'' [5] and identifies certain specific groups of workers who are not ''employees'' for purposes of the Act.[6] Section 3(g) defines ''employ'' to ''include[ ] to suffer or permit to work.'' [7]

A. Prior Guidance Regarding FLSA Joint Employment

In 1939, a year after the FLSA's enactment, the Department's Wage and Hour Division (WHD) issued Interpretative Bulletin No. 13, addressing, among other topics, whether two or more companies may be jointly and severally liable for a single employee's hours worked under the FLSA.[8] WHD recognized in the Bulletin that there is joint employment liability under the FLSA and provided examples of situations where two companies would or would not be joint employers of an employee.[9] For situations where an employee works hours for one company and works separate hours for another company in the same workweek, WHD focused on whether the two companies ''are acting entirely independently of each other with respect to the employment of the particular employee'' (in which case they would not be joint employers) or, ''on the other hand, the employment by [the one company] is not completely disassociated from the employment by [the other company]'' (in which case they would be joint employers and the hours worked for both would be aggregated for purposes of the Act).[10] WHD stated in the Bulletin that it ''will scrutinize all cases involving more than one employment and, at least in the following situations, an employer will be considered as acting in the interest of another employer in relation to an employee: If the employers make an arrangement for the interchange of employees or if one company controls, is controlled by, or is under common control with, directly or indirectly, the other company.'' [11]

In 1958, the Department published a rule introducing 29 CFR part 791, titled ''Joint Employment Relationship under Fair Labor Standards Act of 1938.'' [12] Section 791.2(a) reiterated that there is joint employment liability under the Act and stated that the determination ''depends upon all the facts in the particular case.'' [13] It further stated that two or more employers that ''are acting entirely independently of each other and are completely disassociated'' with respect to the employee's employment are not joint employers, but joint employment exists if ''employment by one employer is not completely disassociated from employment by the

[1] *See* 29 U.S.C. 206(a).

[2] *See* 29 U.S.C. 207(a).

[3] *See* 29 U.S.C. 211(c).

[4] 29 U.S.C. 203(d).

[5] 29 U.S.C. 203(e)(1).

[6] *See* 29 U.S.C. 203(e)(2)–(5).

[7] 29 U.S.C. 203(g).

[8] *See* Interpretative Bulletin No. 13, ''Hours Worked: Determination of Hours for Which Employees are Entitled to Compensation Under the Fair Labor Standards Act of 1938,'' ¶¶ 16–17. In October 1939 and October 1940, WHD revised other portions of the Bulletin that are not pertinent here.

[9] *See id.*

[10] *Id.* ¶ 17.

[11] *Id.*

[12] *See* 23 FR 5905 (Aug. 5, 1958).

[13] 29 CFR 791.2(a) (1958).

other employer(s).'' [14] Section 791.2(b) explained that, ''[w]here the employee performs work which simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek, a joint employment relationship generally will be considered to exist in situations such as:

(1) Where there is an arrangement between the employers to share the employee's services, as, for example, to interchange employees; or

(2) Where one employer is acting directly or indirectly in the interest of the other employer (or employers) in relation to the employee; or

(3) Where the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer.'' [15]

In 1961, the Department amended a footnote in § 791.2(a) to clarify that a joint employer is also jointly liable for overtime pay.[16] Over the next several decades, WHD issued various guidance documents including Fact Sheets, opinion letters, as well as legal briefs reiterating the Department's position concerning joint employment. *See, e.g.,* WHD Opinion Letter FLSA2005–15, 2005 WL 2086804 (Apr. 11, 2005) (addressing joint employment in a health care system comprised of hospitals, nursing homes, and parent holding company); WHD Opinion Letter, 1999 WL 1788146 (Aug. 24, 1999) (advising that private duty nurses were jointly employed by a hospital and individual patients); WHD Opinion Letter, 1998 WL 852621 (Jan. 27, 1998) (addressing the joint employment of grocery vendor employees stocking grocery shelves); WHD Opinion Letter FLSA–1089, 1989 WL 1632931 (Aug. 9, 1989) (advising that workers participating in an enclave program would be jointly employed by a participating business and a supervising workshop).

In 2014, WHD issued an Administrator's Interpretation (Home Care AI) addressing how joint employment under the FLSA applies to certain home care workers.[17] The Home Care AI explained that the FLSA's definitions of ''employer,'' ''employee,'' and ''employ,'' ''and therefore the scope of employment relationships the Act covers, are exceedingly broad.'' [18] The Home Care AI discussed application of 29 CFR 791.2 and stated that its ''focus . . . is the degree to which the two possible joint employers share control with respect to the employee and the degree to which the employee is economically dependent on the purported joint employers.'' [19] WHD recognized that, ''when making joint employment determinations in FLSA cases, the exact factors applied may vary,'' but also stated that ''a set of factors that addresses only control is not consistent with the breadth of employment under the FLSA'' because an analysis based solely on the potential employer's joint control '' 'cannot be reconciled with [FLSA section 3(g)'s ''suffer or permit'' language], which necessarily reaches beyond traditional agency law.' '' [20] Accordingly, the Home Care AI applied a non-exclusive set of ''economic realities factors'' relating to the potential joint employer's control and other aspects of the relationship to provide guidance regarding the possibility of joint employment in numerous hypothetical scenarios specific to the home care industry.[21] WHD withdrew the Home Care AI on March 10, 2020.

In 2016, WHD issued an Administrator's Interpretation (Joint Employment AI) addressing joint employment generally under the FLSA and the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), which uses the same definition of ''employ'' as the FLSA.[22] Relying on the text and history of FLSA section 3(g) and case law interpreting it, the Joint Employment AI explained that joint employment, like employment generally, is expansive under the FLSA and ''notably broader than the common law concepts of employment and joint employment.'' [23] The Joint Employment AI further explained that ''the expansive definition of 'employ' as including 'to suffer or permit to work' rejected the common law control standard and ensures that the scope of employment relationships and joint employment under the FLSA and MSPA is as broad as possible.'' [24] The AI described how ''suffer or permit'' or ''similar phrasing was commonly used in state laws regulating child labor and was 'designed to reach businesses that used middlemen to illegally hire and supervise children.' '' [25] The AI thus concluded that ''the 'suffer or permit to work' standard was designed to expand child labor laws' coverage beyond those who controlled the child laborer,'' ''prevent employers from using 'middlemen' to evade the laws' requirements,'' and ensure joint liability in a type of vertical joint employment situation (explained below).[26]

The Joint Employment AI described and discussed two types of joint employment. It discussed horizontal joint employment, which exists where an employee is separately employed by, and works separate hours in a workweek for, more than one employer, and the employers ''are sufficiently associated with or related to each other with respect to the employee'' such that they are joint employers.[27] The Joint Employment AI explained that ''the focus of a horizontal joint employment analysis is the relationship between the two (or more) employers'' and that 29 CFR 791.2 provided guidance on analyzing that type of joint employment, and the AI provided some additional guidance on applying § 791.2.[28] The Joint Employment AI also discussed vertical joint employment, which exists where an ''employee has an employment relationship with one employer (typically a staffing agency, subcontractor, labor provider, or other intermediary employer),'' another employer is ''receiv[ing] the benefit of the employee's labor,'' and ''the economic realities show that [the employee] is economically dependent on, and thus employed by,'' the other employer.[29] The Joint Employment AI explained that the vertical joint employment analysis does not focus on examining the relationship between the two employers but instead ''examines the economic realities'' of the relationship between the employee and the other employer that is benefitting

[14] *Id.*

[15] 29 CFR 791.2(b) (1958) (footnotes omitted).

[16] *See* 26 FR 7730, 7732 (Aug. 18, 1961).

[17] *See* Administrator's Interpretation No. 2014–2, ''Joint Employment of Home Care Workers in Consumer-Directed, Medicaid-Funded Programs by Public Entities under the Fair Labor Standards Act'' (June 19, 2014), *available at* 2014 WL 2816951.

[18] *Id.* at *2.

[19] *Id.* at *2 n.4.

[20] *Id.* at *2 n.5 (quoting *Zheng* v. *Liberty Apparel Co.,* 355 F.3d 61, 69 (2d Cir. 2003)).

[21] *See id.* at *7–14; *see also id.* at *3 (''[A]ny assessment of whether a public entity is a joint employer necessarily involves a weighing of all the facts and circumstances, and there is no single factor that is determinative[.]'') (citing *Rutherford Food Corp.* v. *McComb,* 331 U.S. 722, 730 (1947)).

[22] *See* Administrator's Interpretation No. 2016–1, ''Joint Employment Under the Fair Labor Standards Act and Migrant and Seasonal Agricultural Worker Protection Act'' (Jan. 20, 2016), *available at* 2016 WL 284582; *see also* 29 U.S.C. 1802(5) (''The term 'employ' [under MSPA] has the meaning given such term under section 3(g) of the [FLSA].'').

[23] *Id.* at *3 (citing, *inter alia, Torres-Lopez* v. *May,* 111 F.3d 633, 639 (9th Cir. 1997); *Antenor* v. *D & S Farms,* 88 F.3d 925, 929 (11th Cir. 1996)).

[24] *Id.*

[25] *Id.* (quoting *Antenor,* 88 F.3d at 929 n.5).

[26] *Id.*

[27] *Id.* at *4.

[28] *Id.* at *4–8.

[29] *Id.* at *2.

from the worker's labor.[30] The AI noted that ''several Circuit Courts of Appeals have also adopted an economic realities analysis for evaluating vertical joint employment under the FLSA,'' and that, ''[r]egardless of the exact factors, the FLSA and MSPA require application of the broader economic realities analysis, not a common law control analysis, in determining vertical joint employment.'' [31] The AI advised that, ''because of the shared definition of employment and the coextensive scope of joint employment between the FLSA and MSPA,'' the non-exclusive, multi-factor economic realities analysis set forth by the Department in its MSPA joint employment regulation should be applied in FLSA vertical joint employment cases to analyze the relationship between the employee and the other employer, and that doing so ''is consistent with both statutes and regulations.'' [32] The AI provided additional guidance on applying the analysis.[33] WHD withdrew the Joint Employment AI on June 7, 2017.[34]

B. 2020 Joint Employer Rule

In January 2020, the Department published a final rule titled ''Joint Employer Status Under the Fair Labor Standards Act,'' which became effective on March 16, 2020 (Joint Employer Rule or Rule).[35] The Joint Employer Rule revised 29 CFR part 791 so that: § 791.1 contained an introductory statement; § 791.2 contained the substance of the Rule and addressed both vertical joint employment (which it referred to as ''the first joint employer scenario'') and horizontal joint employment (which it referred to as ''the second joint employer scenario''); and § 791.3 contained a severability provision.[36]

1. Joint Employer Rule's Vertical Joint Employment Standard

For vertical joint employment, § 791.2(a)(1) stated that ''[t]he other person [that is benefitting from the employee's labor] is the employee's joint employer *only* if that person is acting directly or indirectly in the interest of the employer in relation to the employee,'' and then cited FLSA section 3(d)'s definition of ''employer.'' [37] The Joint Employer Rule provided that section 3(d) is the sole statutory provision in the FLSA for determining ''joint employer status'' under the Act—to the exclusion of sections 3(e) and 3(g).[38] The Joint Employer Rule further provided that the definitions of ''employee'' and ''employ'' in sections 3(e) and 3(g) ''determine whether an individual worker is an employee under the Act.'' [39] Citing section 3(d)'s definition of ''employer'' as including ''any person acting directly or indirectly in the interest of an employer in relation to an employee,'' the Rule stated that ''only this language from section 3(d) contemplates the possibility of a person in addition to the employer who is also an employer and therefore jointly liable for the employee's hours worked.'' [40] The Rule concluded that this language from section 3(d), ''by its plain terms, contemplates an employment relationship between an employer and an employee, as well as another person who may be an employer too—which exactly fits the [vertical] joint employer scenario under the Act.'' [41] The Rule relied on the Supreme Court's decision in *Falk* v. *Brennan* [42] and the Court of Appeals for the Ninth Circuit's decision in *Bonnette* v. *California Health & Welfare Agency* [43] to ''support focusing on section 3(d) as determining joint employer status.'' [44]

Section 791.2(a)(1) of the Joint Employer Rule stated that ''four factors are relevant to the determination'' of whether the other employer is a joint employer in the vertical joint employment situation.[45] Those four factors were whether the other employer: (1) Hires or fires the employee; (2) supervises and controls the employee's work schedule or conditions of employment to a substantial degree; (3) determines the employee's rate and method of payment; and (4) maintains the employee's employment records.[46] The Joint Employer Rule stated that its four-factor test was ''derived from'' *Bonnette.*[47] In *Bonnette,* the Ninth Circuit affirmed a finding of vertical joint employment after considering whether the other employer: (1) Had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records.[48]

The Joint Employer Rule's four-factor analysis deviated from the analysis in *Bonnette* in several ways. First, the Rule articulated the first factor as whether the other employer ''[h]ires or fires the employee'' as opposed to whether it had ''the power'' to hire and fire.[49] Section 791.2(a)(3)(i) stated that the ''potential joint employer must actually exercise . . . one or more of these indicia of control to be jointly liable under the Act,'' and that ''[t]he potential joint employer's ability, power, or reserved right to act in relation to the employee may be relevant for determining joint employer status, but such ability, power, or right alone does not demonstrate joint employer status without some actual exercise of control.'' [50] Second, the Joint Employer Rule modified the *Bonnette* factor requiring consideration of whether the potential joint employer supervises and controls work schedules or conditions of employment by adding the phrase ''to a substantial degree.'' This phrase was absent from the test articulated in *Bonnette* (although *Bonnette* found that, on the factual record before it, the potential joint employers ''exercised considerable control'' in that area).[51] Third, § 791.2(a)(2) stated that ''[s]atisfaction of the maintenance of employment records factor alone will not lead to a finding of joint employer status,'' however, *Bonnette* did not include this limitation to a finding of joint employer status.[52] Finally, § 791.2(b) stated that ''[a]dditional factors may be relevant for determining joint employer status in this scenario, but only if they are indicia of whether

[30] *Id.* at *4.

[31] *Id.*

[32] *Id.* at *5 (citing WHD's multi-factor economic realities analysis for joint employment under MSPA set forth at 29 CFR 500.20(h)(5)). The Department issued its current MSPA joint employment regulation in 1997 via a final rule following notice-and-comment rulemaking. *See* 62 FR 11734 (Mar. 12, 1997).

[33] *See* 2016 WL 284582, at *8–12.

[34] *See* News Release 17–0807–NAT, ''US Secretary of Labor Withdraws Joint Employment, Independent Contractor Informal Guidance'' (June 7, 2017), *available at https://www.dol.gov/newsroom/releases/opa/opa20170607.*

[35] *See* 85 FR 2820 (Jan. 16, 2020). The Department had published a notice of proposed rulemaking (NPRM) requesting comments on a proposed rule. *See* 84 FR 14043 (Apr. 9, 2019). The final rule adopted ''the analyses set forth in the NPRM largely as proposed.'' 85 FR 2820.

[36] *See* 29 CFR 791.1, 791.2, and 791.3 (2020).

[37] 29 CFR 791.2(a)(1) (2020) (citing 29 U.S.C. 203(d)) (emphasis added).

[38] *See generally* 85 FR 2825–28.

[39] *Id.* at 2827.

[40] *Id.* (citing 29 U.S.C. 203(d)); *see also id.* (''This language from section 3(d) makes sense only if there is an employer and employee with an existing employment relationship and the issue is whether another person is an employer.'').

[41] *Id.*

[42] 414 U.S. 190 (1973).

[43] 704 F.2d 1465 (9th Cir. 1983), *abrogated on other grounds, Garcia* v. *San Antonio Metro. Transit Auth.,* 469 U.S. 528 (1985).

[44] 85 FR 2827.

[45] 29 CFR 791.2(a)(1) (2020).

[46] *See* 29 CFR 791.2(a)(1)(i)–(iv) (2020).

[47] 85 FR 2830.

[48] *See* 704 F.2d at 1469–1470.

[49] *Compare* 29 CFR 791.2(a)(1)(i) (2020) *with Bonnette,* 704 F.2d at 1469–1470.

[50] 29 CFR 791.2(a)(3)(i) (2020) (citing 29 U.S.C. 203(d)).

[51] *Compare* 29 CFR 791.2(a)(1)(ii) (2020) *with Bonnette,* 704 F.2d at 1469–1470.

[52] *Compare* 29 CFR 791.2(a)(2) (2020) *with Bonnette,* 704 F.2d at 1469–1470.

the potential joint employer exercises significant control over the terms and conditions of the employee's work.'' [53] *Bonnette,* however, stated that its four factors ''provide a useful framework for analysis in this case,'' but ''are not etched in stone and will not be blindly applied,'' and that ''[t]he ultimate determination must be based 'upon the circumstances of the whole activity.' '' [54]

In addition to generally excluding factors that are not indicative of the potential joint employer's control over the employee's work, the Joint Employer Rule specifically excluded any consideration of the employee's economic dependence on the potential joint employer.[55] The Rule asserted that ''[e]conomic dependence is relevant when applying section 3(g) and determining whether a worker is an employee under the Act; however, determining whether a worker who is an employee under the Act has a joint employer for his or her work is a different analysis that is based on section 3(d).'' [56] The Rule further asserted that, ''[b]ecause evaluating control of the employment relationship by the potential joint employer over the employee is the purpose of the Department's four-factor balancing test, it is sensible to limit the consideration of additional factors to those that indicate control.'' [57]

2. Joint Employer Rule's Horizontal Joint Employment Standard

To determine horizontal joint employment, the Joint Employer Rule adopted the longstanding standard articulated in the prior version of 29 CFR 791.2 with ''non-substantive revisions.'' [58] Section 791.2(e)(2) stated that, in this ''second joint employer scenario,'' ''if the employers are acting independently of each other and are disassociated with respect to the employment of the employee,'' they are not joint employers.[59] It further stated that, ''if the employers are sufficiently associated with respect to the employment of the employee, they are joint employers and must aggregate the hours worked for each for purposes of determining compliance with the Act.'' [60] It identified the same three general examples of horizontal joint employment provided in the prior version of 29 CFR 791.2.[61]

3. Joint Employer Rule's Additional Provisions

The Joint Employer Rule adopted additional provisions that apply to both vertical and horizontal joint employment. Section 791.2(f) addresses the consequences of joint employment and provided that ''[f]or each workweek that a person is a joint employer of an employee, that joint employer is jointly and severally liable with the employer and any other joint employers for compliance'' with the Act.[62] Section 791.2(g) provided 11 ''illustrative examples'' of how the Rule may apply to specific factual situations implicating both vertical and horizontal joint employment.[63]

C. Decision Vacating Most of the Joint Employer Rule

In February 2020, 17 States and the District of Columbia (the States) filed a lawsuit in the United States District Court for the Southern District of New York against the Department asserting that the Joint Employer Rule violated the Administrative Procedure Act (APA).[64] The Department moved to dismiss the lawsuit on the grounds that the States did not have standing. The district court denied that motion on June 1, 2020.[65] The district court issued an order on June 29, 2020, permitting the International Franchise Association, the Chamber of Commerce of the United States of America, the National Retail Federation, the Associated Builders and Contractors, and the American Hotel and Lodging Association (Intervenors) to intervene as defendants in the case.[66] The parties filed cross-motions for summary judgment, which the district court decided on September 8, 2020.[67]

The district court vacated the Joint Employer Rule's ''novel standard for vertical joint employer liability'' because its ''revisions to that scenario are flawed in just about every respect.'' [68] The district court found that the Rule violated the APA because it was contrary to the law—specifically, it conflicted with the FLSA.[69] The district court identified three conflicts: The Rule's reliance on the FLSA's definition of ''employer'' in section 3(d) as the sole textual basis for joint employment liability; its adoption of a control-based test for determining vertical joint employer liability; and its prohibition against considering additional factors beyond control, such as economic dependence.[70] In addition, the district court found that the Rule was ''arbitrary and capricious'' in violation of the APA for three reasons: The Rule did not adequately explain why it departed from the Department's prior interpretations; the Rule did not consider the conflict between it and the Department's MSPA joint employment regulations; and the Rule did not adequately consider its cost to workers.[71]

The district court concluded that the Joint Employer Rule's ''novel interpretation for vertical joint employer liability'' was unlawful under the APA and vacated all of § 791.2 except for § 791.2(e).[72] The court determined that, because the Rule's ''non-substantive revisions to horizontal joint employer liability are severable,'' § 791.2(e) ''remains in effect.'' [73]

In November 2020, the Department and the Intervenors appealed the district court's decision vacating most of the Joint Employer Rule, and the appeal remains pending before the Court of Appeals for the Second Circuit, as discussed further below.[74]

D. Proposal To Rescind the Joint Employer Rule

On March 12, 2021, the Department issued a notice of proposed rulemaking (NPRM) proposing to rescind the Joint Employer Rule.[75] The NPRM explained that the Department was considering rescinding the Joint Employer Rule for several reasons.[76] The Department decided to further consider the concerns raised by the district court in *New York* v. *Scalia* that the Rule's reliance on section 3(d) alone among the FLSA's provisions may be contrary to the FLSA's text and Congressional intent, particularly as the Department had never previously excluded FLSA sections 3(e) and (g) from the joint employment analysis and had instead

[53] 29 CFR 791.2(b) (2020).

[54] 704 F.2d at 1470 (quoting *Rutherford Food,* 331 U.S. at 730).

[55] 29 CFR 791.2(c) (2020) (''[T]o determine joint employer status, no factors should be used to assess economic dependence.'').

[56] 85 FR 2821.

[57] *Id.* at 2836.

[58] *Id.* at 2823; *see also id.* at 2844–45.

[59] 29 CFR 791.2(e)(1)–(2) (2020).

[60] 29 CFR 791.2(e)(2) (2020).

[61] *Compare* 29 CFR 791.2(e)(2)(i)–(iii) (2020) *with* 29 CFR 791.2(b)(1)–(3) (1958).

[62] 29 CFR 791.2(f) (2020).

[63] 29 CFR 791.2(g) (2020).

[64] *See New York* v. *Scalia,* No. 1:20–cv–01689 (S.D.N.Y. filed Feb. 26, 2020). The APA requires courts to hold unlawful and set aside agency actions that are ''arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'' 5 U.S.C. 706(2)(A).

[65] *See* 464 F. Supp. 3d 528.

[66] *See* 2020 WL 3498755.

[67] *See* 490 F. Supp. 3d 748.

[68] *Id.* at 795.

[69] *See id.* at 774.

[70] *See id.* at 774–92.

[71] *See id.* at 792–95.

[72] *Id.* at 795–96.

[73] *Id.*

[74] *See New York* v. *Scalia,* 490 F. Supp. 3d 748, *appeal docketed,* No. 20–3806 (2d Cir. Nov. 6, 2020).

[75] *See* 86 FR 14038.

[76] *See* 86 FR 14042–46.

applied an economic realities framework that included the definitions of ''employ'' or ''employee'' when determining joint employer liability, consistent with the approach taken by courts.[77] The Department was similarly concerned that the Rule's use of section 3(d) alone as the statutory basis for joint employment might not ''easily encompass all scenarios in which joint employment may arise; multiple employers may 'suffer or permit' an employee to work and could thus be joint employers under section 3(g) without one [employer] working 'in the interest of an employer' under section 3(d).'' [78]

The Department also believed that it should consider and address the district court's conclusion that the Joint Employer Rule ''unlawfully limits the factors the Department will consider in the joint employer inquiry'' by focusing on a control-based test to the exclusion of economic dependence generally, certain economic dependence factors, and certain other considerations, as this approach is not consistent with the totality-of-the-circumstances economic realities standard that has generally been used by the courts.[79] The Rule's approach was also different than the Department's prior guidance on joint employment, and the Department acknowledged in the NPRM the district court's concerns that the Rule did not adequately explain the reasons for the significant departure.[80] Relatedly, the Department recognized in the NPRM that courts have generally declined to adopt the Rule's vertical joint employment analysis as a replacement for their existing analyses, indicating that the Rule had not provided the intended clarity and that rescinding the Rule would not be disruptive to stakeholders.[81] Finally, the Department was concerned that the Rule may not have sufficiently considered the negative effect that it would have on employees by reducing the number of businesses who were FLSA joint employers from which employees may be able to collect back wages due to them under the FLSA.[82] For all of these reasons, the Department proposed in the NPRM to rescind the entire Joint Employer Rule.[83]

[77] *See* 86 FR 14042–43.

[78] *See* 86 FR 14043.

[79] *See* 86 FR 14043–44 (quoting *Scalia,* 490 F. Supp. 3d at 790).

[80] *See* 86 FR 14044.

[81] *See* 86 FR 14044–45.

[82] *See* 86 FR 14045.

[83] *See* 86 FR 14045–46.

E. Status of Pending Appeal of Decision Vacating Most of the Joint Employer Rule

Although its filing deadline was not until February 19, 2021, the Department filed an opening brief in support of the Rule on January 15, 2021. The Intervenors filed their opening brief on the same day. On March 31, 2021, the Department filed a motion seeking to hold the appeal in abeyance in light of the published NPRM proposing to rescind the Joint Employer Rule. The Second Circuit denied the motion without explanation. The States filed their response brief on April 16, 2021. The Intervenors filed their reply brief on May 7, 2021. On May 28, 2021, the Department filed a reply brief. In its reply brief, the Department explained that the rulemaking proposing to rescind the Joint Employer Rule may moot the States' challenge to the Rule, making any resolution of the appeal unnecessary. The Department took no position on the merits of the Rule in its reply brief. The Department argued that if the Second Circuit resolves the appeal, it should reverse the district court's decision on the grounds that the States had no standing to challenge the Rule.

II. Comments and Decision

The Department received over 290 comments in response to the NPRM. State officials, members of Congress, labor unions, social justice organizations, worker advocacy groups, and individual commenters wrote in support of the Department's proposal to rescind the Joint Employer Rule, including a number of commenters who submitted comments with similar template language. These commenters supported rescission of the Rule predominantly on the basis that, in their view, the Rule improperly narrowed the test for joint employer status and conflicted with decades of Department interpretation, the text of the FLSA, and Congressional intent. Some suggested that the Rule did not align with the Supreme Court's observation that the FLSA's conception of employment is of ''striking breadth.'' [84] Commenters also noted detrimental effects of the Rule on vulnerable workers employed by contractors. Others pointed out that a court had vacated the Rule's vertical joint employment analysis and asserted that the horizontal joint employment test was intertwined with the vacated vertical joint employment provisions. Commenters also raised numerous other legal and policy criticisms of the Rule, discussed in greater detail below.

Various trade associations, business advocacy organizations, law firms, and individual commenters submitted comments opposing the Department's proposal to rescind the Joint Employer Rule. These commenters generally supported the Rule for, in their view, providing a clearer, common-sense standard for determining joint employer status. Several expressed the view that the Department was relying too much on a district court decision which the commenters believe to be erroneous, and encouraged the Department to stay this rulemaking pending the outcome of the appeal to the Second Circuit. They raised numerous other legal and policy arguments in defense of the Rule (or in objection to the proposed rescission), discussed in greater detail below.[85]

Having considered the comments submitted in response to the NPRM, the Department has decided to finalize the rescission of the Joint Employer Rule. The Rule was inconsistent with the FLSA's text and purpose. The Rule's vertical joint employment analysis had never before been applied by WHD, was different from the analyses applied by every court to have considered the issue prior to the Rule's issuance, and has generally not been adopted by courts. The Rule's horizontal joint employment analysis, although consistent with prior guidance, was intertwined with the vertical joint employment analysis, and thus the Department is rescinding the entire Rule as explained below. The Department's response to commenter feedback on specific aspects of the proposed rescission is also provided below.

A. Statutory Analysis and Control-Based Test for Vertical Joint Employment

The NPRM observed that the statutory analysis and control-based test for vertical joint employment set forth in the Joint Employer Rule was different, to varying degrees, from the analyses and tests applied by every court to have considered joint employer questions

[84] *Nationwide Mut. Ins. Co.* v. *Darden,* 503 U.S. 318, 326 (1992).

[85] In addition, some commenters provided political or ideological statements that did not specifically support or oppose the proposed rescission. For example, some comments were limited to offering support for working people without suggesting how best to do so in the context of this rulemaking. A few other commenters appeared to confuse the proposed rescission of the Joint Employer Rule with the proposed withdrawal of the Department's rule related to independent contractors. *See* 86 FR 14027 (Mar. 12, 2021) (proposing withdrawal of the final rule, ''Independent Contractor Status under the Fair Labor Standards Act,'' previously published on January 7, 2021 at 86 FR 1168). The Department finalized withdrawal of the Independent Contractor Rule on May 6, 2021. *See* 86 FR 24303.

prior to the Rule's issuance, as well as WHD's previous enforcement approach. The NPRM further noted that the Rule may have been impermissibly narrow due to its exclusive focus on control.

1. The Rule's Reliance on Section 3(d) as the Sole Textual Basis for Determining Joint Employer Status

In the Rule, the Department stated that section 3(d) of the FLSA, which contains the definition of employer, is the sole statutory basis for determining joint employer status under the Act, and asserted that sections 3(e) and 3(g), which define ''employee'' and ''employ,'' respectively, are not relevant to determining joint employer status.[86] In the NPRM, the Department explained its concern that, upon further consideration, the text of section 3(d) alone may not easily encompass all scenarios in which joint employment may arise under the Act.[87]

Multiple commenters representing employees agreed that by limiting the statutory basis of the vertical joint employment analysis to section 3(d) and ignoring the ''suffer or permit'' language of section 3(g)'s definition of ''employ,'' the Joint Employer Rule's test for vertical joint employment was unduly narrow and contrary to law and the Act. *See, e.g.,* National Employment Lawyers Association. The North Carolina Justice Center, for example, stated that the ''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.'' The International Brotherhood of Teamsters noted that the Rule impermissibly ignored the statutory definitions of ''employ'' and ''employee,'' which they asserted ''are integral to the 'employer' definition.'' The Northwest Workers' Justice Project commented on the Rule's ''novel'' interpretation and asserted that ''the Secretary is unable to point to a single authority for its unusual assertion that this section [3(d)] is the sole source of joint employment.'' The Project's comment further criticized the Rule's statutory interpretation, observing that ''[t]he word 'joint' does not appear in § 203(d)'' and opining that ''the word 'includes' in 29 U.S.C. 203(d) would suggest that there are other types of employers under the FLSA than those that meet the statutory definition of § 203(d).'' Texas RioGrande Legal Aid noted that the Rule ''grew from the belief that section 3(d) of the FLSA 'is the touchstone for joint employer status' '' [88] but section 3(d) ''is circular and provides little or no guidance as to the extent of employer-employee relationships.'' A coalition of State Attorneys General (State AGs) commented that the Rule's vertical joint employment test ''conflicted with the statutory text of the FLSA'' because its ''narrow interpretation of the term 'employer' and its assertion that the definition of 'employer' is the sole textual basis to determine joint employment were not faithful to the Act's definitions and Congress' intent in enacting them.''

Employers and trade associations generally commented that the Joint Employer Rule was consistent with the FLSA and case law and should be upheld. *See, e.g.,* U.S. Chamber of Commerce, Littler Workplace Policy Institute (WPI). The Associated Builders and Contractors, for example, stated that it ''strongly supports the [D]epartment's clarification [in the Rule] that only the definition of an 'employer' in section 3(d) of the FLSA, 29 U.S.C. 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 U.S.C. 203(e)(1), (g).'' This commenter further stated that ''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.'' The Society for Human Resource Management (SHRM) supported the Rule's statutory analysis, and commented that ''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.'' Similarly, the Center for Workplace Compliance stated that ''[w]hile sections 3(e)(1) and 3(g) would be relevant for determining whether an individual was an employee or independent contractor, they do not appear to be relevant to [the] determination of whether a second employer should be jointly liable under the FLSA.'' The U.S. Chamber of Commerce supported the focus on section 3(d) and stated that ''[u]nlike the broad definition of 'employ', the definition of 'employer' contains an active requirement that an entity be '*acting* directly or indirectly in the interest of an employer in relation to an employee.' ''

Having reviewed the comments and considered the issue further, the Department has concluded that the Rule's interpretation that section 3(d) is the ''sole'' textual basis for determining joint employer status in vertical joint employment scenarios [89] potentially excluded important aspects of joint employment arrangements.

As an initial matter, the statutory language of section 3(d) itself raises concerns as to whether relying on that provision as the sole textual basis encompasses all scenarios in which joint employment may arise. Section 3(d) uses the word ''includes'' rather than the word ''means.'' [90] Under the Act, an ''employer'' ''*includes* any person acting directly or indirectly in the interest of an employer in relation to an employee,'' ''*includes* a public agency,'' but ''*does not include* any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.'' [91] Thus, by its own terms, section 3(d) is not exhaustive. Throughout section 3—the ''definitions'' section of the FLSA—Congress chose to vary its language for each definition between ''means'' and ''includes,'' and its use of ''includes'' when defining ''employer'' indicates that the definition that follows ''includes'' is not an exhaustive definition of ''employer.'' [92]

Furthermore, the Joint Employer Rule limited joint employment in the vertical context to persons ''acting directly or indirectly in the interest of *the* employer in relation to the employee,'' confining joint employment to persons acting in the interest of a single employer.[93] In other words, the Rule assumed that an employee had one employer and that any other person that was liable was a

[86] 85 FR 2825, 2827–28.

[87] 86 FR 14042.

[88] Quoting 85 FR 2857.

[89] 85 FR 2825.

[90] 29 U.S.C. 203(d).

[91] *Id.* (emphases added).

[92] Compare, for example, sections 203(a), 203(b), and 203(e), which use the word ''means'' to define ''person,'' ''commerce,'' and ''employee,'' respectively, with sections 203(d) and 203(g), which use the word ''includes'' to define ''employer'' and ''employ,'' respectively. ''It is a well-established canon of statutory interpretation that the use of different words or terms within a statute demonstrates that Congress intended to convey a different meaning for those words.'' *SEC* v. *McCarthy,* 322 F.3d 650, 656 (9th Cir. 2003); *see also Race Tires Am., Inc.* v. *Hoosier Racing Tire Corp.,* 674 F.3d 158, 165 (3d Cir. 2012) (''If possible, we must give effect to every clause and word of a statute, . . . and be reluctant to treat statutory terms as surplusage.'') (internal quotation marks omitted).

[93] 29 CFR 791.2(a)(1) (2020) (citing 29 U.S.C. 203(d)) (emphasis added).

joint employer. However, section 3(d) of the Act specifically defines a person ''acting directly or indirectly in the interest of *an* employer in relation to the employee'' as an ''employer'' itself.[94] Thus, while the Rule allowed only a single employer—''the employer''—to ''suffer[ ], permit[ ], or otherwise employ[ ] the employee to work'' in the vertical scenario,[95] section 3(d) itself provides for any number of other employers that can suffer, permit, or otherwise employ employees.[96] In light of this, the Joint Employer Rule did not even adhere to the statutory text—section 3(d)—which was its cited basis.

Additionally, there is case law indicating that section 3(d) was intended for the purpose of imposing responsibility upon the agents of employers, rather than to provide an exhaustive definition of joint employers under the Act.[97] The Rule acknowledged commenter arguments regarding this distinction within the Act's ''definitions'' section, as well as the import of section 3(d)'s ''includes'' language,[98] but did not address these arguments. Confining the analysis to only the Act's definition of ''employer'' resulted in an incomplete analysis of some potential joint employment scenarios.

The Department has also evaluated the Rule's singular focus on section 3(d) against the backdrop of the history and purpose of the ''suffer or permit'' language in section 3(g). As the Rule acknowledged, the Act's definition of ''employ'' was a rejection of the common law standard for determining who is an employee under the Act in favor of a broader scope of coverage. *See Nationwide Mut. Ins. Co.* v. *Darden,* 503 U.S. 318, 326 (1992) (''[T]he FLSA . . . defines the verb 'employ' expansively to mean 'suffer or permit to work.' This . . . definition, whose striking breadth we have previously noted, stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles.'') (citations omitted); *Walling* v. *Portland Terminal Co.,* 330 U.S. 148, 150–51 (1947) (''But in determining who are 'employees' under the Act, common law employee categories or employer-employee classifications under other statutes are not of controlling significance. This Act contains its own definitions, comprehensive enough to require its application to many persons and working relationships, which prior to this Act, were not deemed to fall within an employer-employee category.'') (citations omitted).

Section 3(g)'s ''suffer or permit'' language was intended to include as employers entities that used intermediaries to shield themselves from liability.[99] Rather than being derived from the common law of agency, the FLSA's definition of ''employ'' and its ''suffer or permit'' language originally came from state laws regulating child labor.[100] This language was ''designed to reach businesses that used middlemen to illegally hire and supervise children.'' *Antenor* v. *D & S Farms,* 88 F.3d 925, 929 n.5 (11th Cir. 1996). This standard was intended to expand coverage beyond employers who control the means and manner of performance to include entities who ''suffer'' or ''permit'' work.[101] Accordingly, the Rule's reliance solely on section 3(d), to the exclusion of section 3(g), was in tension with Congress' well-understood intent in enacting those provisions.

Moreover, the Joint Employer Rule's textual analysis needlessly bifurcated the statutory terms ''employ'' and ''employer'' in the vertical context. Specifically, it interpreted section 3(g) as defining who is an ''employer'' (person A is an employer of person B because person A suffers, permits, or otherwise employs person B to work), and section 3(d) as defining someone who is a ''joint employer'' (person C is a joint employer of employee B because person C acts directly or indirectly in the interest of employer A in relation to employee B). The Rule thus applied a different analytical framework to different employers. This bifurcated approach has not been used by any court nor is this stratification of employers supported by the text of the Act. Instead, all employers under the Act—joint employers or otherwise—are jointly and severally liable for wages owed. If anything, the Rule's section 3(d) analysis was backwards to the extent that it inquired whether entities which are higher in the ''vertical'' structure of a particular industry (such as a general contractor or staffing agency client) are ''acting . . . in the interests of'' acknowledged employers which are lower in the structure (such as a subcontractor or staffing agency). This bifurcation also makes it unclear which standard—''suffer or permit'' under section 3(g) or the control-based standard under section 3(d)—should apply to which entity if, for example, both potential employers deny any employment relationship with a worker.

The Joint Employer Rule discussed the Supreme Court's decision in *Falk* v. *Brennan* [102] at length, relying on it to buttress its statutory interpretation argument. Upon further consideration, while the Court did address a joint employment situation in *Falk* v. *Brennan,* the Department now believes that the case's utility is limited. In its four-sentence discussion of joint employment, the Court explicitly noted the Act's definitions in both section 3(d) (''employer'') and section 3(e) (''employee''), and based its conclusion that a management company was a joint employer ''[i]n view of the expansiveness of the Act's definition of 'employer' and the extent of the [purported joint employer's] managerial

[94] 29 U.S.C. 203(d) (emphasis added).

[95] 29 CFR 791.2(a)(1) (2020). The Joint Employer Rule preamble acknowledged the possibility that ''multiple employers [may] suffer, permit, or otherwise employ an employee to work,'' but only in the horizontal scenario involving ''separate sets of hours.'' 85 FR 2823.

[96] 29 U.S.C. 203(d).

[97] *See Greenberg* v. *Arsenal Bldg. Corp.,* 144 F.2d 292, 294 (2d Cir. 1944) (explaining that ''the section would have little meaning or effect if such were not the case''). The Supreme Court reversed an unrelated part of the Second Circuit's holding in *Greenberg. See* 324 U.S. 697, 714–16 (1945). *Greenberg* is not alone in concluding that section 3(d)'s ''includes'' language was intended to impose liability on an employer's agents. *See, e.g., Donovan* v. *Agnew,* 712 F.2d 1509, 1513 (1st Cir. 1983) (noting that section 3(d) was ''intended to prevent employers from shielding themselves from responsibility for the acts of their agents''); *Dole* v. *Elliott Travel & Tours, Inc.,* 942 F.2d 962, 965–66 (6th Cir. 1991) (relying on section 3(d) to hold individually liable the owner/officer who exercised operational control of the employer); *Arias* v. *Raimondo,* 860 F.3d 1185, 1191–92 (9th Cir. 2017) (observing that section 3(d) ''clearly means to extend [the FLSA's] reach beyond actual employers.), *cert. denied,* 138 S. Ct. 673 (2018); *see also Thompson* v. *Real Estate Mortg. Network,* 748 F.3d 142, 153–54 (3d Cir. 2014) (holding that ''a company's owners, officers, or supervisory personnel may also constitute 'joint employers' '' with the company under 3(d)).

[98] 85 FR 2826.

[99] *See Rutherford Food,* 331 U.S. at 728; *Salinas* v. *Commercial Interiors, Inc.,* 848 F.3d 125, 136–140 (4th Cir. 2017). When Congress enacted the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. 1801 *et. seq.,* it provided that ''[t]he term 'employ' has the meaning given such term under section 3(g) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(g)) for the purposes of implementing the requirements of that Act.'' 29 U.S.C. 1802(5). The committee report provides that ''the Committee's use of [section 3(g)] was deliberate and done with the clear intent of adopting the 'joint employer' doctrine as a central foundation of this new statute.'' H.R. Rep. No. 97–885, at 6 (1982).

[100] *See Rutherford Food,* 331 U.S. at 728 & n.7.

[101] *See generally People ex rel. Price* v. *Sheffield Farms-Slawson-Decker Co.,* 225 N.Y. 25, 29–31 (1918).

[102] Notably, the district court in *New York* v. *Scalia* concluded that ''*Falk* cuts against the Department's argument that section 3(d) is the sole textual basis for joint employer liability'' because *Falk* cited to the statutory definition of ''employee'' as well as ''employer'' and observed that the FLSA's definition of employer is expansive. *See* 490 F. Supp. 3d at 783–84.

responsibilities at each of the buildings, which gave it substantial control of the terms and conditions of the work of these employees.'' [103] Moreover, *Falk* was an affirmance of a Fourth Circuit case, which noted that the Act's definitions (both 3(d) and 3(g)) were ''very broadly cast'' and that ''courts have accordingly found an employment relationship for purposes of the Act far more readily than would be dictated by common law doctrines.'' [104] The Court commented favorably on the Fourth Circuit's holding, stating that ''the Court of Appeals was unquestionably correct in holding that [the management company] is also an employer . . . . '' [105] The Department's brief before the Supreme Court in *Falk* v. *Brennan* also argued that the petitioner building management company was a joint employer of the building's maintenance workers based on both section 3(d) and section 3(g).[106] The brief further stated that ''[s]ince petitioners do the hiring and firing, they 'employ' the workers within the plain meaning of this statutory definition.'' [107] The Department's brief thus concluded that it is preferable to read the relevant statutory provisions of section 3(d) and section 3(g) together because, among other reasons, section 3(g) defined ''employ'' as it did with the intent of including as an employer entities that used intermediaries that employed workers but disclaimed that they themselves were employers of the workers.[108]

Similarly, all of the circuit courts of appeals to have considered joint employment under the FLSA have looked to the economic realities test as the proper framework, and none have explicitly identified section 3(d) as the sole textual basis for joint employment. In particular, the case law heavily relied upon in the Joint Employer Rule from the First, Third, and Fifth Circuits, as well as the *Bonnette* decision itself, all apply an economic realities analysis when determining joint employment under the FLSA.[109] The Rule's approach also represented a significant shift from WHD's longstanding analysis; WHD had never excluded sections 3(e) and (g) from the joint employment analysis and had instead consistently applied an economic realities framework that did not exclude the definitions of ''employ'' or ''employee'' when determining joint employer liability, as discussed above.

In view of the foregoing, limiting the statutory basis for joint employment analyses solely to section 3(d), to the exclusion of the other highly relevant definitions of ''employee'' in section 3(e) and ''employ'' in section 3(g), was problematic and inhibited compliance with the Act.

2. The Vertical Joint Employment Test's Singular Emphasis on Control

For vertical joint employment scenarios, the Joint Employer Rule adopted a four-factor test focused on the actual exercise of control. Generally, it excluded factors that were not indicative of a potential joint employer's control, directed that additional factors may be considered ''only if they are indicia of whether the potential joint employer exercises significant control over the terms and conditions of the employee's work,'' and specifically excluded any consideration of the employee's economic dependence on the potential joint employer.[110] The NPRM questioned whether the four-factor test's emphasis on control was unduly narrow.[111] While recognizing that the tests for vertical joint employment differ among the circuit courts of appeals, the NPRM observed that ''all courts consistently use a totality-of-the-circumstances economic realities approach to determine the scope of joint employment under the FLSA, rather than limiting the focus exclusively to control.'' [112]

Organizations representing employee interests generally opposed the four-factor test's emphasis on control and, in particular, criticized the Joint Employer Rule's requirement that actual control be exercised. The Shriver Center, for example, commented that ''[e]ven under the more restrictive common-law employment test, the [Department]'s rule 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.'' *See also* Workplace Justice Project. The Construction Employers of America stated that the Rule's analysis ''replaced the historic focus on economic dependence for determining joint employment with a four-factor test for assessing the level of control the potential joint employer has over the workers at issue.'' The Northwest Workers' Justice Project noted that there is case law that presents a broader analysis than solely control, stating, ''[o]f course, both *Real* [*v. Driscoll Strawberry Assocs.,* 603 F.2d 748 (9th Cir. 1979)] and *Rutherford* [*Food Corp.* v. *McComb,* 331 U.S. 722 (1947)] articulate broader factors beyond control to be considered in determining employment under the FLSA.'' The State AGs also commented that the control-based test for vertical joint employment set forth by the Rule was ''contrary to the FLSA's text and case law'' and that requiring the exercise of actual control was ''inconsistent with the 'suffer or permit' language of the statute.''

Organizations representing employers generally supported the Joint Employer Rule's four-factor test, and specifically commented that the requirement for an actual exercise of control would provide much-needed clarity for employers. The National Association of Home Builders, for instance, stated that the Rule ''provides a clearer methodology for determining joint employer status with the focus on the actual exercise of power.'' The U.S. Chamber of Commerce also supported the test's emphasis on the exercise of control, explaining that ''contractual reservations of control are not probative of the relationship between the employer and the putative employee—the touchstone of the joint employer analysis—if the putative employer never exercises such control.'' The National Restaurant Association and Restaurant Law Center also praised the test for similar reasons, commenting that the Rule ''created a more appropriate and reliable standard using a multifactor balancing test that focuses on the economic realities of the potential joint employer's exercise of control over the employee's terms and conditions of employment. Because this test focuses on the actual and direct control over the employee's terms and conditions of employment, there is greater predictability and uniformity in the joint employment analysis.'' *See also* Associated Builders and Contractors (''ABC therefore supports the

[103] 414 U.S. at 195.

[104] *Shultz* v. *Falk,* 439 F.2d 340, 344 (4th Cir. 1971).

[105] 414 U.S. at 195.

[106] Brief for Respondent Secretary of Labor, *Falk* v. *Brennan,* 414 U.S. 190 (1973) (No. 72–844), 1973 WL 173856, at *10 (''The Act clearly defines an 'employer' to include 'any person acting directly or indirectly in the interest of an employer in relation to an employee * * *' (Section 3(d)), a description plainly applicable to petitioners in their relation to the building personnel. The definition of the term 'employ' in Section 3(g) as including 'to suffer or permit to work' confirms this conclusion, since it is petitioners, not the building owners, who have control over the hiring, job assignments, and discharge of the building workers.'').

[107] *Id.* at *26.

[108] *Id.; see Rutherford Food,* 331 U.S. at 728; *Salinas,* 848 F.3d at 136–140.

[109] *See, e.g., Baystate Alternative Staffing, Inc.* v. *Herman,* 163 F.3d 668, 675 (1st Cir. 1998); *In re Enterprise Rent-A-Car Wage & Hour Emp't Practices Litig.,* 683 F.3d 462, 469–470 (3d Cir. 2012); *Gray* v. *Powers,* 673 F.3d 352, 357 (5th Cir. 2012); *Bonnette,* 704 F.2d at 1469.

[110] 29 CFR 791.2(b) and (c) (2020).

[111] 86 FR 14043.

[112] *Id.*

[D]epartment'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.' ''); SHRM (''Ultimately, by ensuring that the inquiry is directed [at] a putative joint employer's actual control over critical terms of employment, the [Joint Employer Rule] stands on solid ground statutorily, and is consistent with the relevant Supreme Court authority.'').

Upon consideration of the comments received, the Department has concluded that the four-factor test's exclusive focus on control—and specifically, its mandate for an actual exercise of control—was not the most appropriate standard for vertical joint employment scenarios in view of the Act and case law. It is well-settled that in enacting the FLSA, Congress rejected the common law control standard for employment. In *Darden,* the Supreme Court stated that the FLSA defines ''employ'' ''expansively'' and with ''striking breadth'' and ''stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles.'' [113]

Although the specific factors may vary, all courts consistently use a totality-of-the-circumstances economic realities approach to determine the scope of joint employment under the FLSA. In addition to *Bonnette,* upon which the Rule heavily relied, multiple other circuit court decisions relied upon by the Rule also ground their joint employment analyses in the overarching totality-of-the-circumstances economic realities standard.[114] Court decisions that have not applied the *Bonnette* factors generally ground their joint employment analyses in the totality-of-the-circumstances economic realities standard as well.[115] Although some courts have applied an analysis that addresses only, or primarily, the potential joint employer's control,[116] these cases have nonetheless recognized that the control factors considered ''*do not constitute an exhaustive list* of all potentially relevant facts'' and ''should not be 'blindly applied' ''; rather, a joint employment determination must consider the employment situation in totality, including the economic realities of the working relationship.[117] In contrast, the Rule provided that ''[a]dditional factors may be relevant for determining joint employer status in this scenario, *but only if they are indicia of whether the potential joint employer exercises significant control* over the terms and conditions of the employee's work.'' [118] While the exercise of ''significant control'' may certainly establish joint employment under the Act, no court has set this standard as the requirement for a finding of joint employment.

Especially problematic was the Rule's requirement for the actual exercise of control, a standard adopted by no court. The Rule stated that it was ''not the Department's intent'' to promulgate a rule narrower than the common law.[119] However, the Rule also plainly required an actual exercise of control, stating that ''the regulation now makes clear that an actual exercise of control, directly or indirectly, is required for at least one of the factors and is the clearer indication of joint employer status.'' [120] Under the common law standard, the mere right to control indicates a common law employment relationship; in contrast, the Rule required an actual exercise of control for at least one factor.[121] For this reason too, the Rule's test for vertical joint employment was in tension with the economic realities analysis used by courts across the country, which was intended to be more comprehensive than the common law standard.[122]

The Department appreciates employers' desire for clarity and certainty regarding compliance under the Act. The Rule's narrowing of the analysis of control, however, was contrary to the Act and longstanding case law and thus did not guarantee enhanced clarity. Because the Rule's test (including the requirement for the actual exercise of control) conflicted with the tests used from every circuit, there likely was more uncertainty under this new interpretation.

B. Taking Into Account Prior WHD Guidance

The Department's NPRM noted that the Joint Employer Rule's vertical joint employment analysis, in addition to having never before been applied by a court, had never before been applied by WHD.[123] The Department indicated that it tentatively shared the concern that the Rule did not sufficiently take into account and explain departures from WHD's prior joint employment guidance, including its MSPA joint employment regulation and the withdrawn Home Care AI and Joint Employment AI.[124] The Department further indicated that this concern provided additional support for rescinding the Rule.[125]

Texas RioGrande Legal Aid commented that the Joint Employer Rule conflicted with the MSPA joint employment regulation and that, ''under the Rule, many agricultural employers could have been deemed joint employers under the MSPA but not under the FLSA,'' causing ''immense confusion'' in its view ''among the regulated community in the agricultural sector.'' The State AGs stated that the Joint Employer Rule ''departed from decades of agency interpretation of and guidance on [the] joint employer analysis,'' including the Department 's vertical joint employment standard in its MSPA regulation, its Home Care AI, and its Joint Employment AI. According to the AGs, WHD's prior guidance had ''rejected a 'control-based test' like the one adopted by the Rule,'' and the Rule did not adequately explain its departure from WHD's prior interpretations. The National Women's Law Center added that the Rule ''set forth a new joint employment standard'' that was different from WHD's previous enforcement approach and ''departed from longstanding . . . [WHD] interpretations of covered employment and employer under the FLSA.''

[113] 503 U.S. at 326.

[114] *See, e.g., Baystate,* 163 F.3d at 675; *Enterprise,* 683 F.3d at 469; *Gray,* 673 F.3d at 354–55.

[115] *See, e.g., Zheng,* 355 F.3d at 69–75; *Salinas,* 848 F.3d at 142–43; *Torres-Lopez,* 111 F.3d at 639–644 (noting that an economic realities analysis applies when determining joint employment and that the concept of joint employment, like employment generally, ''should be defined expansively'' under the FLSA).

[116] *See Baystate,* 163 F.3d at 675; *Enterprise,* 683 F.3d at 468–69.

[117] *Enterprise,* 683 F.3d at 469 (emphasis in original) (quoting *Bonnette,* 704 F.2d at 1469–1470).

[118] 29 CFR 791.2(b) (emphasis added).

[119] 85 FR 2834.

[120] *Id.*

[121] *See, e.g., Zheng,* 355 F.3d at 69 (''Measured against the expansive language of the FLSA, the four-part test [based on *Bonnette*] employed by the District Court is unduly narrow, as it focuses solely on the formal right to control the physical performance of another's work. That right is central to the common-law employment relationship, *see* Restatement of Agency section 220(1) (1933) ('A servant is a person employed to perform service for another in his affairs and who, with respect to his physical conduct in the performance of the service, is subject to the other's control or right to control.')'').

[122] *See Falk,* 439 F.2d at 344 (observing that courts find employment under the FLSA ''far more readily than would be dictated by common law doctrines''); *Portland Terminal Co.,* 330 U.S. at 150–51 (noting that the FLSA's definitions are ''comprehensive enough to require its application'' to many working relationships which, under the common law control standard, may not be employer-employee relationships); *Darden,* 503 U.S. at 326 (stating that the FLSA's ''suffer or permit'' standard for employment ''stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles'').

[123] *See* 86 FR 14044.

[124] *See id.*

[125] *See id.*

Other commenters disputed the concerns raised by the Department in the NPRM. The Texas Public Policy Foundation, for example, asserted that it was ''arbitrary for WHD to point to 'inconsistencies' between the old agency guidance and the new agency guidance and assert that those inconsistencies, by themselves, justify rescission'' because ''[o]therwise, an agency would never be able to offer new or updated regulatory guidance.'' Noting that the Department had described its concern as tentative in the NPRM, this commenter added that ''[i]t is impermissible for WHD to withdraw the Joint Employer Rule based on WHD's 'tentative' concern.''

Some commenters contrasted the Department's brief before the Second Circuit with the NPRM. The National Association of Home Builders commented that the Department's ''rationale [in the NPRM] is contrary to the arguments'' that the Department made in its opening brief to the Second Circuit in the appeal of the district court's decision vacating most of the Rule. Associated Builders and Contractors stated that the NPRM's reliance on the district court's decision ''is arbitrary in light of the fact that, less than three months ago, the [D]epartment 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.'' It added that, ''[i]n 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.'' The International Franchise Association agreed, stating that ''[n]otwithstanding the [Department's] own pending appeal from the district court's decision, the [Department] has proposed to rescind its [Joint Employer] Rule by relying on the same district court's opinion that it seeks to challenge on appeal at the Second Circuit.'' It added that the Department's proposal to withdraw the Rule ''should be withdrawn, or at the very least, held in abeyance until a final ruling in the pending Second Circuit appeal.'' WPI also agreed, stating that ''[e]ach aspect of the district court decision on which [the Department] now relies in proposing to rescind the [R]ule is refuted by [the Department]'s own brief to the Second Circuit.'' It asserted that it was ''arbitrary and capricious for [the Department] to rely on a court decision which it has only recently declared to be wrong, while that decision remains pending on appeal'' and suggested that the Department ''hold its NPRM in abeyance pending the appeal's outcome.'' [126]

In response, the Department agrees that ''[a]gencies are free to change their existing policies as long as they provide a reasoned explanation for the change.'' [127] When an agency changes its position, ''it need not demonstrate . . . that the reasons for the new policy are *better* than the reasons for the old one.'' [128] ''But the agency must at least 'display awareness that it is changing position.' '' [129] The agency's explanation is sufficient if ''the new policy is permissible under the statute, . . . there are good reasons for it, and . . . the agency *believes* it to be better, which the conscious change of course adequately indicates.'' [130] When explaining a changed position, ''an agency must also be cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken into account.' '' [131] In such cases, the policy change itself does not need ''further justification,'' but ''a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.'' [132] For these reasons, '' 'an unexplained inconsistency' in agency policy is 'a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.' '' [133]

Having considered the comments and reviewed the issue further, the Department believes that the Joint Employer Rule did not provide a reasoned explanation for the new FLSA vertical joint employment standard that it adopted. As explained above in Section II.A.1., there was not a reasonable basis for relying exclusively on section 3(d) and completely excluding sections 3(e) and (g) when interpreting who is a joint employer under the FLSA. As further explained in Section II.A.2., there was not a reasonable basis for adopting a narrow standard limited to control for determining who is a joint employer under the FLSA. The Rule's stated desire to provide a uniform vertical joint employment standard may have been valid,[134] and the Department recognizes that there may be more than one permissible interpretive vertical joint employment standard under the FLSA; however, the standard that the Rule adopted was not permissible under the FLSA.

The Department also believes that the Joint Employer Rule did not sufficiently take into account prior WHD guidance. The Department's MSPA joint employment regulation [135] and its 1997 final rule [136] implementing it have been in effect for about 24 years. In keeping with MSPA and its legislative history,[137] the MSPA regulation expressly ties its joint employment analysis to the FLSA. The MSPA regulation provides that ''[j]oint employment under the Fair Labor Standards Act is joint employment under the MSPA'' [138] and sets forth a multi-factor analysis for determining vertical joint employment that is different than the Rule's analysis.[139] The Joint Employer Rule, however, did not address or account for any differences between its new regulatory standard and MSPA's existing regulatory standard or any effects that it may have on joint employment under MSPA. In addition, the Department's interpretive guidance in the Home Care AI and the Joint Employment AI rejected a joint employment analysis that was limited to control, and those AIs relied on FLSA sections 3(e) and (g) in addition to section 3(d).[140] Although the Home Care AI and the Joint Employment AI were withdrawn before the effective date of the Joint Employer Rule, the Department did not address or sufficiently account for its departures

[126] The International Franchise Association described the ''30-day window for public comment'' on the NPRM proposing to withdraw the Joint Employer Rule as ''insufficient.'' WPI agreed, stating that ''30 days is insufficient time to comment on the proposal.'' The comment period was 31 days and was, in any event, a similar duration as the comment periods for some other recent Department rulemakings. *See, e.g.,* 85 FR 60600 (Sept. 25, 2020); 86 FR 14027. Additionally, because the NPRM was published only a little over one year after the Rule was published, interested stakeholders should have been familiar with the Rule that was proposed for rescission as well as the implications of any rescission.

[127] *Encino Motorcars, LLC* v. *Navarro,* 136 S. Ct. 2117, 2125 (2016) (citing *Nat'l Cable & Telecomm. Ass'n* v. *Brand X internet Servs.,* 545 U.S. 967, 981–82 (2005); *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U.S. 837, 863–64 (1984)).

[128] *FCC* v. *Fox Television Stations, Inc.,* 556 U.S. 502, 515 (2009).

[129] *Encino,* 136 S. Ct. at 2126 (quoting *Fox Television,* 556 U.S. at 515, and removing emphasis).

[130] *Fox Television,* 556 U.S. at 515.

[131] *Encino,* 136 S. Ct. at 2126 (quoting *Fox Television,* 556 U.S. at 515).

[132] *Fox Television,* 556 U.S. at 515–16.

[133] *Encino,* 136 S. Ct. at 2126 (quoting *Brand X,* 545 U.S. at 981).

[134] *See Scalia,* 490 F. Supp. 3d at 795 (making clear that its decision to vacate most of the Rule did ''not imply that the Department cannot engage in rulemaking to try to harmonize joint employer standards'').

[135] *See* 29 CFR 500.20(h)(5).

[136] *See* 62 FR 11745–46.

[137] *See* note 99, *supra.*

[138] *See* 29 CFR 500.20(h)(5)(i).

[139] *See* 29 CFR 500.20(h)(5)(iv).

[140] *See* 2016 WL 284582, at *2–4 & 9; 2014 WL 2816951, at *2 & n.5.

from their analyses in the Rule. In summary, the Department was and is allowed to change its interpretation of joint employment under the FLSA; however, the Rule failed to account for and address inconsistences with WHD's prior and existing guidance, which is an additional reason to rescind the Rule.

In response to comments asserting an inconsistency between the Department's opening brief to the Second Circuit in the appeal of the district court's decision vacating most of the Joint Employer Rule and its NPRM proposing to rescind the Rule, the Department's filings with the Second Circuit have been consistent with the status of this rescission rulemaking. The Department filed its opening brief with the Second Circuit on January 15, 2021—prior to any reconsideration of the Rule and well before the deadline for filing the brief. Following the Department's NPRM in March proposing to rescind the Rule, the Department requested that the Second Circuit hold the appeal in abeyance while this rulemaking progressed. Although the Second Circuit denied the request, asking it to hold the appeal in abeyance was consistent with this rulemaking.

In addition, the Department filed a reply brief with the Second Circuit on May 28, 2021, in which it took ''no position'' regarding ''the merits of the Joint Employer Rule'' in light of this pending rulemaking. In the reply brief, the Department noted that completion of this rulemaking may moot the States' challenge to the Rule and requested that the Second Circuit, if it resolves the appeal at all, reverse the district court's decision solely on the grounds that the States lacked standing to challenge the Rule. Accordingly, the Department's position in the pending Second Circuit appeal has been consistent with the status of this rescission rulemaking; the Department stopped defending the merits of the Rule before the Second Circuit consistent with its concerns with the Rule as set forth in the NPRM proposing to rescind the Rule. Finally, issuing this final rule now rather than waiting for the Second Circuit to resolve the appeal is consistent with the Department's position in its reply brief. Although the district court's decision vacating the Rule's vertical joint employment analysis was a primary consideration for proposing rescission as noted in the NPRM, the Department's decision to rescind the Rule as set forth herein is independent from the district court's decision and represents its reasoned interpretation of the FLSA as supported by case law, regardless of the Second Circuit's ultimate resolution of the appeal.

C. The Joint Employer Rule's Vertical Joint Employment Analysis Did Not Significantly Impact Judicial Analysis of FLSA Cases

The NPRM stated that courts have generally declined to adopt the Joint Employer Rule's vertical joint employment analysis since its promulgation.[141] The NPRM further stated that, in light of this judicial landscape, rescinding the Joint Employer Rule would not be disruptive.[142] The NPRM added that WHD does not believe that it would be difficult or burdensome to educate and reorient its enforcement staff if the Rule is rescinded.[143]

The State AGs agreed in their comment that, ''based on the judicial landscape,'' rescinding the Joint Employer Rule ''would not be disruptive.'' They added that it was ''not surprising'' that only two district court decisions had adopted the Rule's vertical joint employment analysis given that, in their view, the Rule's analysis ''runs counter to Supreme Court precedent'' and ''conflicts with numerous court of appeals decisions interpreting joint employment.'' Texas RioGrande Legal Aid added that, ''aware of the Rule's mismatch with the FLSA's text and purpose, courts would have been likely to continue to eschew the Rule's framing in favor of their established formulations of the multi-factor analysis.''

Having considered the comments and reviewed the issue further, the Department believes that courts' general non-adoption of the Joint Employer Rule's vertical joint employment analysis provides additional support for rescinding the Rule. As a general matter, courts have declined to adopt the Joint Employer Rule's analysis. In addition to the Southern District of New York's decision to vacate the Rule's vertical joint employment analysis, other courts have declined to adopt the Rule's analysis for similar reasons.[144] The Department is aware of two FLSA cases in which a court has adopted and applied the Rule's vertical joint employment analysis.[145] Both cases were district court decisions from the Tenth Circuit, which has not issued a definitive decision regarding the analysis to apply in FLSA vertical joint employment cases. Neither case applied the rule in a uniform manner, relying on additional factors or stating them differently.

Moreover, as the Joint Employer Rule acknowledged, a number of circuit courts of appeals had previously established analytical frameworks for vertical joint employment cases, and all of these analyses are different from the analysis in the Joint Employer Rule.[146] Notwithstanding the Rule, district courts in those circuits have generally continued to apply binding precedent from their circuit courts of appeals when deciding FLSA vertical joint employment issues—often with little, if any, meaningful discussion of the Rule's analysis.[147] In sum, despite the Joint

[141] *See* 86 FR 14044–45 (citing cases, including two exceptions).

[142] *See* 86 FR 14045.

[143] *See id.*

[144] *See Reyes-Trujillo* v. *Four Star Greenhouse, Inc.,* No. 20–11692, — F. Supp. 3d —, 2021 WL 103636, at *6–9 (E.D. Mich. Jan. 12, 2021) (agreeing that the Joint Employer Rule's exclusive focus on the potential joint employer's control runs counter to the FLSA's expansive definition of ''employer'' and thus declining to adopt the Rule's analysis); *Elsayed* v. *Family Fare LLC,* No. 1:18–cv–1045, 2020 WL 4586788, at *4 (M.D.N.C. Aug. 10, 2020) (finding ''it unnecessary to wade into whether the DOL's [Joint Employer] Rule is entitled to *Brand X* deference or whether the [Rule] is lawful under the APA'' and instead ''rely[ing] on established Fourth Circuit precedent'' regarding joint employment).

[145] *See Clyde* v. *My Buddy The Plumber Heating & Air, LLC,* No. 2:19–cv–00756–JNP–CMR, 2021 WL 778532 (D. Utah Mar. 1, 2021); *Sanders* v. *Glendale Rest. Concepts, LP,* No. 19–cv–01850–NYW, 2020 WL 5569786 (D. Colo. Sept. 17, 2020). In *Clyde,* the district court found it ''appropriate to rely upon the factors listed in the federal regulations interpreting the FLSA for guidance.'' 2021 WL 778532, at *2 (citing *Skidmore* v. *Swift & Co.,* 323 U.S. 134, 139–40 (1944)). It also relied on additional joint employment factors from the Fourth Circuit's decision in *Salinas. See id.* at *3. In *Sanders,* the district court actually articulated the four factors as *Bonnette* did but applied them as a result of the Joint Employer Rule and the parties' agreement that those four factors applied instead of the factors from the Fourth Circuit's decision in *Salinas,* which some of the courts in that district ''favored.'' 2020 WL 5569786, at *3–4. In addition to these two district court decisions, there is the Sixth Circuit's decision in *Rhea* v. *West Tennessee Violent Crime & Drug Task Force,* 825 F. App'x 272 (6th Cir. 2020). In that case, the Sixth Circuit, after applying the *Bonnette* factors to determine that one defendant was not the employee's employer under the FLSA, listed the Rule's vertical joint employment factors in a footnote, asserted that the Rule's factors ''focus[] on the same factors as that of determining employer status,'' and stated that ''[n]either would [the defendant] be a 'joint employer' under the FLSA.'' *Id.* at 275–77 & n.4. However, the Sixth Circuit did not engage in any substantial analysis of the Rule's factors or meaningfully apply them. *See id.* at 277 n.4.

[146] *See* 85 FR 2831 (comparing the Rule's four-factor analysis to the various analyses adopted by circuit courts of appeals).

[147] *See, e.g., Hamm* v. *Acadia Healthcare Co.,* No. 20–1515, 2021 WL 1212539, at *5–6 (E.D. La. Mar. 31, 2021) (reciting Fifth Circuit's vertical joint employment analysis); *Zhao* v. *Ke Zhang Inc.,* No. 18–CV–6452 (EK) (VMS), 2021 WL 1210369, at *4–6 (E.D.N.Y. Mar. 31, 2021) (applying Second Circuit's vertical joint employment analysis); *Gil* v. *Pizzarotti LLC,* No. 1:19-cv-03497–MKV, 2021 WL 1178027, at *4–13 & n.2 (S.D.N.Y. Mar. 29, 2021) (applying Second Circuit's vertical joint employment analysis although noting in footnote in response to employer's argument that it would have reached the same result had it applied the Rule's analysis); *Blan* v. *Classic Limousine Transp., LLC,*

Continued

Employer Rule's stated purpose of ''promot[ing] greater uniformity in court decisions,'' [148] there has been no widespread adoption of the Rule's vertical joint employment analysis, and the Rule has not significantly affected judicial analysis of FLSA joint employment cases.

Additionally, rescinding the Joint Employer Rule would not be disruptive for WHD. WHD has not issued subregulatory guidance that would need to be withdrawn or modified as a result of the rescission. For all of these reasons, rescission of the Rule will have little effect on courts' and WHD's analyses in FLSA vertical joint employment cases.

D. Effects on Employees of the Vertical Joint Employment Analysis

The Joint Employer Rule acknowledged that, although it would not change the wages due an employee under the FLSA in the vertical joint employment scenario, ''it may reduce the number of businesses currently found to be joint employers from which employees may be able to collect back wages due to them under the Act.'' [149] The Rule further acknowledged that, ''[t]his, in turn, may reduce the amount of back wages that employees are able to collect when their employer does not comply with the Act and, for example, their employer is or becomes insolvent.'' [150] One commenter, the Economic Policy Institute (EPI), submitted a quantitative analysis of the monetary amount that it estimated would transfer from employees to employers as a result of the Rule.[151] In response, the Rule stated that, although it ''appreciates EPI's quantitative analysis,'' it ''does not believe there are data to accurately quantify the impact of this [R]ule.'' [152] The Rule added that it ''lacks data on the current number of businesses that are in a joint employment relationship, or to estimate the financial capabilities (or lack thereof) of these businesses and therefore is unable to estimate the magnitude of a decrease in the number of employers liable as joint employers.'' [153] The Rule discussed in a qualitative manner some potential benefits to employees, such as ''promot[ing] innovation and certainty in business relationships'' and encouraging businesses to engage in certain practices with an employer that ''could benefit the employer's employees.'' [154] The Rule did not otherwise consider any potential costs to workers.

Many commenters expressed concerns that the Joint Employer Rule would incentivize companies to expand their use of temporary staffing agencies, contractors, and subcontractors rather than employing workers directly, which is a concern that the Department shares. Congressman Bobby Scott and 78 other Members of Congress wrote that the Rule ''promotes business models that rely on subcontracting with businesses that pay lower wages to cut costs or with thinly capitalized lower level businesses that cut corners on FLSA compliance.'' As several commenters stated in comments that used template language, the number of workers employed through temporary staffing agencies ''has increased dramatically in recent years,'' especially in ''low-wage, 'blue-collar' occupations.'' The National Employment Law Project (NELP) stated that ''[t]emporary and staffing agency work hours have grown 3.9 times faster than overall work hours, and temporary and staffing agency jobs have grown 4.3 times faster than jobs overall.'' Several commenters identified particular industries that have experienced especially high growth in outsourcing and subcontracting, including janitorial services, construction, agriculture, manufacturing, warehousing and logistics, hospitality, and waste management. In particular, NELP noted that outsourcing of janitorial services ''has grown dramatically over the past two decades, resulting in an estimated 37 percent of janitorial workers hired through labor contractors rather than directly by the company at which they work.'' NELP also reported that 58 percent of security guard positions are outsourced.

Several commenters asserted that the increase in temporary, staffing agency, and subcontracting jobs is detrimental to workers, because on average, ''temporary help agency workers earn 41 percent less'' than workers in ''standard work arrangements,'' they ''experience large benefit penalties relative to their counterparts in standard work arrangements,'' and although their jobs tend to be more hazardous than those of ''permanent, direct hires,'' ''they often receive insufficient safety training and are more vulnerable to retaliation for reporting injuries than workers in traditional employment relationships.'' Some commenters, including the Public Justice Center and NELP, noted that temporary staffing agencies must compete with each other ''on the one major cost they can control—labor costs,'' and this ''competitive pressure drives down wages and incentivizes cutting corners through violating labor standards like minimum wage and health and safety laws.'' NELP also stated that ''[t]emporary staffing agencies consistently rank among the worst large industries for the rate of wage and hour violations.'' The Public Justice Center described the industry's frequent use of a ''triangular employment relationship through which the staffing agency acts as temp workers' employer even though the worksite company determines the assignments and working conditions,'' thus allowing the worksite company to gain the benefits of employing workers while avoiding many of the legal responsibilities. In addition, several commenters, including the Communications Workers of America, the Kentucky Equal Justice Center, and the Workplace Justice Project, stated that individuals who work for staffing agencies or subcontractors often have trouble identifying their actual employer when a dispute over payment or working conditions arises. Other commenters, such as the National Employment Lawyers Association, wrote that holding a company responsible as a joint employer incentivizes that company to ''provide better oversight of working conditions, to ensure that child labor, minimum wage and overtime rules are followed.''

Many commenters also stated that the increased use of temporary staffing agencies disproportionately impacts people of color and women. NELP, the Public Justice Center, and the State AGs reported that Black workers comprise 12.1 percent of the overall workforce, but 25.9 percent of temporary help agency workers, while Latino workers make up 16.6 percent of the total

No. 19–807, 2021 WL 1176063, at *8 (W.D. Pa. Mar. 29, 2021) (applying Third Circuit's vertical joint employment analysis); *Yela* v. *Trending Media Grp., Inc.,* No. 19–21712–CIV, 2020 WL 6271047, at *5–7 (S.D. Fla. Sept. 18, 2020) (applying Eleventh Circuit's vertical joint employment analysis); *Tombros* v. *Cycloware, LLC,* No. 8:19-cv-03548–PX, 2020 WL 4748458, at *2–3 (D. Md. Aug. 17, 2020); *Williams* v. *Bob Evans Restaurants, LLC,* No. 2:18-cv-01353, 2020 WL 4692504, at *4–6 (W.D. Pa. Aug. 13, 2020) (applying Third Circuit's vertical joint employment analysis); *Elsayed,* 2020 WL 4586788, at *4–8 (applying Fourth Circuit's vertical joint employment analysis). *Cf. Pontones* v. *Los Tres Magueyes, Inc.,* No. 5:18–CV–87–FL, 2021 WL 1430793, at *3–10 (E.D.N.C. Apr. 15, 2021) (applying Fourth Circuit's vertical joint employment analysis and then the Rule's analysis in the alternative); *id.* at *8 n.18 (noting that because both analyses reached the same result and the Department had issued a proposal to rescind the Rule, ''the court does not definitively resolve here the level of deference merited for the interpretative guidance in the [Joint Employer Rule]'').

[148] 85 FR 2823.

[149] 85 FR 2853.

[150] *Id.*

[151] *See id.*

[152] *Id.*

[153] *Id.*

[154] *Id.*

workforce, but 25.4 percent of temporary help agency workers. NELP and the Public Justice Center explained that, because temporary workers ''are especially vulnerable to illegal conduct such as wage theft, unsafe working conditions, and discrimination,'' an increase in temporary work can ''exacerbate occupational segregation, income inequality, and the wealth gap for people of color.'' In addition, the National Women's Law Center commented that women are ''broadly overrepresented in low-paid jobs,'' and noted that women working for ''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.'' In addition, Congressman Bobby Scott and 78 other members of Congress noted that ''because the Equal Pay Act of 1963 shares the FLSA's definitions of employment, the [Joint Employer Rule] would make it harder for women to hold all responsible employers accountable when bringing equal pay claims.'' The National Women's Law Center also pointed out that the FLSA requires employers to provide breastfeeding workers with adequate time and safe space to pump at work, but in the case of temporary or subcontracted workers, the worksite is often controlled by a contracting entity, thus creating a potential barrier to the worker's ability to pump.

Numerous organizations that provide legal representation to workers shared accounts of particular cases where, in their view, their clients would not have been able to recover back wages owed but for the fact that courts applied broader joint employer liability principles than those set forth in the Joint Employer Rule. For example, the Equal Justice Center represented approximately 30 individuals who worked for a small cleaning company to provide janitorial services at outlets of a big-box store in the Austin area. The workers sued for unpaid wages and overtime premiums, but the cleaning company went out of business. However, the workers succeeded in establishing that the big-box store was a joint employer based on the economic realities test derived from *Rutherford* and defined by the Fifth Circuit in *Wirtz* v. *Dr. Pepper Bottling Co.*[155] According to the commenter, the workers successfully asserted that because they ''consistently and exclusively cleaned the [big box] company's stores, at hours dictated by the stores' schedules and according to standards set by the company's management, the [big box] company could be a joint employer under the FLSA.'' In contrast, the commenter believed that the big box store likely would not have been a joint employer under the Joint Employer Rule. In another case, the North Carolina Justice Center represented ''hundreds of janitorial workers'' who cleaned public school buildings through a subcontractor that went bankrupt, failing to pay several weeks of wages. According to the Center, the workers were able to recover back wages from the school district and the contractor as joint employers. The Center asserted that under the Joint Employer Rule, however, ''it is highly unlikely either the contractor or the district would be liable for the failure to pay minimum wage and overtime.'' In addition, NELP discussed a case involving warehouses owned by Wal-Mart, which contracted with Schneider Logistics to operate the warehouses, which in turn contracted with two staffing companies to provide labor. After the warehouse workers sued for violations of the FLSA, Wal-Mart moved for summary judgment that it was not a joint employer. The district court, applying the *Bonnette* and *Torres-Lopez* factors, determined that several factors in addition to Wal-Mart's control over the plaintiffs' working conditions suggested that Wal-Mart could be found to be a joint employer, including that the plaintiffs performed piecework that did not require initiative, judgment, or foresight; there was permanence in the plaintiffs' work for Wal-Mart; and the service performed by the plaintiffs was an integral part of Wal-Mart's business.[156] Thus, the court denied Wal-Mart's motion.[157] According to NELP, the case eventually settled, but the staffing companies could afford to pay only 7.5 percent of the settlement amount. However, ''because the court took into account the realities of the workers' relationship with Schneider and Wal-Mart, the workers were able to obtain damages from these parties.''

Other commenters also emphasized the importance that joint employment liability plays in the recovery of back wages. For example, the Northwest Workers' Justice Project described a case in which workers who were employed by a contractor to cut, bag, and stock fruit at H–E–B grocery stores in Texas and who sued for minimum wage and overtime violations. According to the Project, the workers, mostly immigrants and women, worked on location only at H–E–B stores, often for 50 hours or more per week, and were paid per bag of produce sold, which never amounted to minimum wage. The case was apparently brought in the U.S. District Court for the District of Texas, which applies the Fifth Circuit's ''economic realities'' test requiring the consideration of several factors to determine joint employer liability.[158] H–E–B initially denied responsibility as a joint employer, but ultimately settled, which the Project reported would not have been possible ''[w]ithout joint employment.'' In addition, Justice at Work (Massachusetts), the Legal Aid Society, the Public Justice Center, the United Brotherhood of Carpenters and Joiners, and the Worker Justice Center of New York reported that they have brought or observed numerous cases in the construction industry where a subcontractor labor broker disappears or refuses to pay, and the next tier contractor denies responsibility, leaving workers without pay.

Some organizations that provide legal assistance to agricultural workers commented that joint employment is particularly important in the agricultural industry. Texas RioGrande Legal Aid reported that ''[j]oint employer issues arise frequently in the agricultural sector because the sector is riddled with middlemen: Undercapitalized farm labor contractors who pay the workers while furnishing their labor to fixed-site farm operators.'' The organization has found that ''farmworkers' attempts to seek unpaid wages from farm labor contractors, as opposed to fixed-site agricultural employers, are frequently futile,'' in part because ''[f]arm labor contractors are often undercapitalized and unable to meet their wage obligations because of disadvantageous deals made with growers.'' NELP pointed to a study conducted by EPI that found that from 2005 to 2019, farm labor contractors accounted for 14 percent of agricultural jobs, but 24 percent of all employment law violations in agriculture. Texas RioGrande Legal Aid noted that DOL's H–2A regulations require farm labor contractors petitioning for temporary labor certification to post bonds as a

[155] *See Rutherford,* 331 U.S. at 726; *Wirtz* v. *Dr. Pepper Bottling Co.,* 374 F.2d 5, 8 (5th Cir. 1967).

[156] *Carrillo* v. *Schneider Logistics Trans-Loading & Distrib., Inc.,* No. 2:11–CV–8557–CAS, 2014 WL 183956, at *6–15 (C.D. Cal. Jan. 14, 2014) (applying *Bonnette,* 704 F.2d at 1470 and *Torres-Lopez,* 111 F.3d at 639–40). The court rejected Wal-Mart's attempt to analogize the case to decisions applying only the *Bonnette* factors, explaining that ''the *Torres-Lopez* factors form an important component of the joint employer analysis.'' *Id.* at *10.

[157] *Id.* at *6, 16.

[158] The case appears to be *Silva* v. *Pastranas Produce Inc.,* No. 4:12–CV–00470 (S.D. Tex. filed Feb. 16, 2012); *see also Gray,* 673 F.3d at 354–55; *Wirtz* v. *Lone Star Steel Co.,* 405 F.2d 668, 669–70 (5th Cir. 1968).

'' 'necessary compliance mechanism' to ensure that the labor contractor pays the H–2A workers their wages,'' because many of these contractors are unreliable. In addition, the Centro de los Derechos del Migrante explained that, while MSPA ''protects many farmworkers above and beyond the FLSA floor, nearly half a million migrant agricultural workers in the H–2A program are excluded from'' the protections of MSPA, ''and rely instead on the FLSA.'' The organization asserted, however, that ''[b]y opening loopholes in the FLSA not found in [MSPA], the 2020 Rule would incentivize employers to sidestep . . . [MSPA]'s protections by hiring workers to whom only the FLSA applies, driving down standards across the entire agricultural industry.'' It further noted the history of diminished legal protections for agricultural workers, which was ''born of a dark history of racial discrimination,'' and argued that reducing protections for these workers would perpetuate that legacy, as 92 percent of H–2A workers are Mexican.

In contrast, several commenters who oppose rescinding the Joint Employer Rule asserted that the Rule promotes job growth. WPI stated that, ''[d]uring the 'period in which [the Department] consistently applied the 'right of control' factors identified with the *Bonnette* test of the Ninth Circuit, significant job growth took place in the industries represented by WPI,'' including temporary staffing, construction, retail, and hospitality. It is not clear what period of time WPI is referring to, as all of the statistics cited by WPI predate the effective date of the Joint Employer Rule. Moreover, the Joint Employer Rule was in effect for only a brief period of time, and WPI did not present any direct evidence that job growth during that short window of time was driven, in whole or in part, by the adoption of the Rule. Given data limitations, it would not be possible to determine whether job growth in these industries was related to the Joint Employer Rule. Further, as the comments discussed above indicate, to the extent that jobs with temporary staffing agencies or thinly capitalized subcontractors have replaced standard employment arrangements, such a trend is disadvantageous to workers in many respects, and could have a particularly negative effect on people of color and women. The Washington Legal Foundation also generally asserted that the Joint Employer Rule fosters job growth, and contended that logically, allowing the Rule to remain in place would result in increased job creation, higher salaries, and no wage theft. However, the Department does not believe that allowing the Rule to remain in effect would have clearly lead to the creation of more, higher-paying jobs free of wage theft, for the reasons discussed by the commenters above. Instead, the Department agrees with the commenters who stated that the Rule would have further incentivized companies to source labor through temporary staffing firms or subcontractors, rather than hiring employees directly, which tends to result in lower pay and fewer benefits, and can leave employees without recourse for unpaid wages when the staffing firm or subcontractor is unable or unwilling to pay.

Upon consideration of the comments, the Department concludes that the Joint Employer Rule did not satisfactorily consider the costs to employees. This conclusion is premised in part on WHD's role as the agency responsible for enforcing the FLSA and for collecting back wages due to employees when it finds violations, as well as a recent Presidential Memorandum instructing the Director of the Office of Management and Budget to recommend new procedures for regulatory review that better ''take into account the distributional consequences of regulations.'' [159] As noted in the economic analysis, rescinding the Joint Employer Rule could help protect the well-being and economic security of workers in low-wage industries, many of whom are immigrants, people of color, and women, because FLSA violations are more severe and widespread in low-wage labor markets.[160] The Department believes that the Joint Employer Rule would have made it more difficult for workers to collect back wages owed and incentivized workplace fissuring,[161] which are serious concerns that may have a disproportionate impact on low-wage and vulnerable workers. The Rule's failure to weigh these concerns is an additional reason for its rescission.

[159] Modernizing Regulatory Review: Memorandum for the Heads of Executive Departments and Agencies (Jan. 20, 2021), published at 86 FR 7223 (Jan. 26, 2021).

[160] Annette Bernhardt et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities* (2009), *available at https://www.nelp.org/wp-content/uploads/2015/03/BrokenLawsReport2009.pdf.*

[161] The Joint Employer Rule described workplace fissuring as the ''increased reliance by employers on subcontractors, temporary help agencies, and labor brokers rather than hiring employees directly.'' 85 FR 2853 n.100.

E. Effects on Other Stakeholders of the Vertical Joint Employment Analysis

In addition to discussing the issues identified in the NPRM, commenters also noted other ways in which rescission of the Joint Employer Rule would affect various stakeholders. In particular, most commenters opposed to rescission of the Rule emphasized the importance of clarity and predictability to the business community. However, the Department generally believes that the impact of rescission on the business community and other stakeholders will not be substantial because the Rule has not been widely adopted by the courts. Furthermore, for the reasons set forth above, the Department believes that the Rule should be rescinded because it was inconsistent with the text and purpose of the FLSA.

Many commenters asserted that the Joint Employer Rule provided clarity and predictability to the regulated community, and argued that rescinding the Rule would lead to confusion and uncertainty. The U.S. Chamber of Commerce stated that the Rule ''brought needed clarity and consistency to a key issue that had long vexed employers and the WHD.'' The FreedomWorks Foundation wrote that a ''lack of clarity surrounding issues of joint employment [is] especially harmful to small businesses, which employ almost half of Americans and often do not have the resources to secure top-notch legal advice,'' a concern echoed by the National Federation of Independent Businesses (NFIB). However, the Department does not agree that leaving the Joint Employer Rule in place would have provided increased clarity and certainty to the regulated community. As discussed above, the Rule conflicted with the text and purposes of the FLSA and was not widely adopted by the courts.[162] Thus, even if the Second Circuit Court of Appeals were to reverse the district court decision vacating the Rule on standing grounds, it is likely that many courts would still reject the Rule and continue to rely on prior precedent. As such, leaving the Joint Employer Rule in place would not have established a uniform standard consistently applied by all courts across the country. Because it conflicted with

[162] *See, e.g., Reyes-Trujillo,* 2021 WL 103636, at *6–9 (agreeing that the Joint Employer Rule's exclusive focus on the potential joint employer's control runs counter to the FLSA's expansive definition of ''employer'' and thus declining to adopt the Rule's analysis); *Elsayed,* 2020 WL 4586788, at *4 (finding ''it unnecessary to wade into whether the DOL's [Joint Employer] Rule is entitled to *Brand X* deference or whether the [Rule] is lawful under the APA'' and instead ''rely[ing] on established Fourth Circuit precedent'' regarding joint employment).

established precedent in the circuits, the Rule presented employers with the difficult choice of conducting their business in a manner consistent with circuit precedent or with the Rule. Furthermore, because employers had to consider circuit precedent as no circuit had adopted the Rule, the Rule likely provided little clarity. Accordingly, the Department does not agree that rescinding the Rule will result in significantly less clarity and uncertainty for the regulated community. More fundamentally, because the regulation conflicted with the text and purpose of the FLSA, it should be rescinded.

Other commenters expressed concerns that rescinding the Joint Employer Rule could impose additional costs on businesses. The Texas Public Policy Foundation asserted generally that rescission would ''result in more employers being deemed to be joint employers, raising operating expenses for those employers.'' Again, because the Rule was not widely adopted by courts, the Department does not expect that the Rule's rescission will substantially increase prospective joint employers' costs. In addition, the Department believes that the Rule's rescission will continue to incentivize businesses at the top of a vertical industry structure to ensure that labor suppliers and other potential joint employers comply with the FLSA; as long as they do so, businesses at the top will not incur the additional cost of paying the joint employer's employees. Other commenters, such as the National Retail Federation, expressed concern that rescinding the Rule would discourage businesses ''from entering into beneficial contractual relationships with third-party business parties, inhibiting business-to-business collaboration.'' Commenters like the National Restaurant Association and Restaurant Law Center stated that rescinding the Rule could negatively impact businesses that use a franchising model. But the vast majority of these businesses operate in jurisdictions that have not adopted the Joint Employer Rule, so their calculation of potential liability will not change. Furthermore, the current law governing joint employment allows businesses to enter into beneficial relationships without creating joint employment liability. In fact, as commenters both supporting and opposing rescission noted, the growth of temporary staffing, independent contractors, and franchise relationships outpaced standard employment in many respects in the years before the Joint Employer Rule was introduced. *See, e.g.,* International Franchise Association (asserting that after the financial crisis, from 2009–12, ''employment in the franchise sector grew 7.4%, versus 1.8% growth in total U.S. employment''); NELP (asserting that since 2009, ''[t]emporary and staffing agency work hours have grown 3.9 times faster than overall work hours, and temporary and staffing agency jobs have grown 4.3 times faster than jobs overall;'' and noting that ''staffing and temporary help services provided 11.3 percent of all manufacturing employment in 2015, up from just 2.3 percent in 1989''). This indicates that the prior legal landscape did not pose a significant hindrance to the formation of these types of relationships.[163]

Commenters who support the Rule also asserted that rescinding the Rule would make companies less likely to offer assistance to related companies, such as a franchisor offering sexual harassment training materials to a franchisee, for fear of becoming a joint employer. These commenters pointed out that this type of assistance can benefit workers by, for example, reducing sexual harassment in the workplace or improving workplace safety.[164] However, the commenters did not cite any court decision finding that a company is a joint employer primarily on this basis, while at least some courts have not regarded the provision of training assistance as strong evidence of a joint employer relationship.[165] Furthermore, to the extent that a court might consider this type of assistance as part of the joint employer analysis, it would be merely one aspect of one factor among many that the courts use to assess whether a joint employer relationship exists, and no one factor is dispositive. Moreover, as the comments discussed above noted, the prospect of joint employer liability can incentivize a company to ''provide better oversight of working conditions, to ensure that child labor, minimum wage and overtime rules are followed.'' *See, e.g.,* National Employment Lawyers Association. The Department agrees with this assessment.

Some commenters expressed particular concern as to how rescinding the Joint Employer Rule would affect the construction industry. The Associated Builders and Contractors wrote that the construction industry consists ''primarily of specialized, separate employers who come together [to work] on specific construction projects,'' and ''standard construction methods require project owners and/or prime contractors to exercise routine control over the [work] site in ways that indirectly affect many employees' terms and conditions of employment,'' thus potentially leading to joint employer liability. The National Association of Home Builders asserted that the uncertainty faced by home builders due to their reliance on subcontractors could make costs less predictable, which could increase the cost of new homes. However, as noted previously, because the Joint Employer Rule was not adopted in most jurisdictions, the Department does not expect that the Rule's rescission will significantly increase uncertainty or impose substantial new costs, including in the construction industry. In addition, current court precedent requires consideration of a variety of factors before a company can be held liable as a joint employer; a single factor standing alone, like supervision of a work site, would likely not be enough to establish joint employer liability. Furthermore, as discussed above, many commenters have noted that subcontractors' failure to pay wages owed is a particular problem in the construction industry; rescinding the Joint Employer Rule will further incentivize project managers to select and monitor subcontractors with an emphasis on ensuring compliance with the FLSA. Such a result is

[163] Other commenters expressed concerns about the imposition of additional costs on particular industries in the wake of the COVID–19 pandemic. For example, the American Hotel and Lodging Association stated that ''[l]eisure and hospitality account for 37% of all jobs lost since the onset of the pandemic,'' and ''hotels are not projected to return to pre-pandemic levels until 2024 at the earliest,'' and asserted that rescinding the Rule would impose new costs that are particularly unwelcome now. However, for the reasons discussed in this paragraph, the Department does not believe that rescission of the Rule will impose substantial new costs on businesses. Moreover, workers in industries experiencing financial stress (as a result of the pandemic or otherwise) are particularly at risk of losing the wages they are owed to the extent that liability is confined to smaller businesses at the bottom of the industry.

[164] Commenters provided various examples of the types of assistance that a company might offer a related company. The U.S. Chamber of Commerce discussed model handbooks, apprenticeship programs, and association health plans. The Washington Legal Foundation and the American Hotel and Lodging Association cited training employees to detect human trafficking. SHRM mentioned the provision of face coverings and protective personal equipment during the COVID–19 pandemic. The discussion of whether companies will be more or less likely to assist other companies after the Rule is rescinded applies equally to the various types of assistance noted by the commenters.

[165] *See, e.g., Moreau* v. *Air France,* 356 F.3d 942, 950–53 (9th Cir. 2004) (holding that Air France was not joint employer with ground service operations companies, even though it provided some training to those companies' employees, in an FMLA case applying FLSA case law); *Martin* v. *Sprint United Mgmt. Co.,* 273 F. Supp. 3d 404, 427, 434 (S.D.N.Y. 2017) (finding that Sprint was not joint employer with subcontractor despite the fact that it trained subcontractor's employees).

beneficial to workers and promotes compliance with the FLSA, helping to ensure a level playing field for responsible employers.

F. Horizontal Joint Employment Analysis

As described in the NPRM, horizontal joint employment may be present where one employer employs an employee for one set of hours in a workweek, and one or more other employers employs the same employee for separate hours in the same workweek. If the two (or more) employers jointly employ the employee, the hours worked by that employee for all of the employers must be aggregated for the workweek and all of the employers are jointly and severally liable.[166]

For horizontal joint employment, the Joint Employer Rule adopted the standard in the prior version of 29 CFR 791.2 with non-substantive revisions and set forth that standard in 29 CFR 791.2(e).[167] The Joint Employer Rule's horizontal joint employment standard focused on the degree of the employers' association with respect to the employment of the employee, reflected the Department's historical approach to the issue, and was consistent with the relevant case law. The NPRM stated that the Department was not considering revising its longstanding horizontal joint employment standard but proposed to rescind the entire Joint Employer Rule (including 29 CFR 791.2(e)) because the structure of the Joint Employer Rule made it impractical for the horizontal joint employment provisions to stand on their own.[168]

Few commenters addressed horizontal joint employment. The U.S. Chamber of Commerce noted that horizontal joint employment ''relationships do not create the same level of uncertainty, or present the same level of exposure, as vertical joint employment relationships, and the provisions in the [Joint Employer Rule] addressing horizontal joint employment relationships have not been questioned.'' The Washington Legal Foundation stated that, although the Joint Employer Rule made only non-substantive revisions to the horizontal joint employment standard, ''it was still important to issue the Final Rule about horizontal joint employment'' because, in its view, the Department ''provided regulatory certainty by codifying long-standing practices.'' It further stated that if the Department rescinds the Joint Employer Rule, the Department ''will inject uncertainty,'' and ''[i]n these trying times the regulated community needs certainty,'' which ''[e]xperts say . . . is important to economic growth.'' The State AGs commented that the Joint Employer Rule's ''provisions relating to the horizontal joint employment test should be rescinded because they are inextricably intertwined with the now-vacated vertical joint employment provisions.'' They further commented that ''[r]escinding the provisions relating to horizontal joint employment makes practical sense,'' ''the horizontal joint employment standard has long been established,'' and thus ''stakeholders can easily refer to DOL's earlier interpretations and relevant case law to understand their obligations.''

Having considered the comments and the issue further, the Department is rescinding the Joint Employer Rule in its entirety (*i.e.,* all of 29 CFR part 791, including the horizontal joint employment standard in § 791.2(e)). The Joint Employer Rule intertwined the horizontal joint employment provisions with the vertical joint employment provisions in 29 CFR 791.2. For example, § 791.2(f) addressed the consequences of joint employment for both the vertical and horizontal scenarios, and § 791.2(g) provided 11 ''illustrative examples'' of how the Rule may apply to specific factual situations implicating both vertical and horizontal joint employment.[169] Accordingly, it would be difficult and impractical for § 791.2(e) to remain alone. In addition, § 791.2(e) would lack context alone and potentially be confusing as its references to the ''second'' joint employment scenario would not make sense without the rest of § 791.2 and the discussion of the ''first'' joint employment scenario therein.

Although the Department is rescinding the Joint Employer Rule in its entirety, it did not reconsider the substance of its longstanding horizontal joint employment analysis. The focus of a horizontal joint employment analysis will continue to be the degree of association between the potential joint employers, as it was in the Joint Employer Rule and the prior version of part 791.[170] As has been the Department's position for decades, the association will be sufficient to demonstrate joint employment in the following situations, among others: (1) There is an arrangement between the employers to share the employee's services; (2) one employer is acting directly or indirectly in the interest of the other employer in relation to the employee; or (3) the employers share control of the employee, directly or indirectly, because one employer controls, is controlled by, or is under common control with the other employer.[171]

G. Effect of Rescission

The NPRM stated that, if the Joint Employer Rule is rescinded as proposed, part 791 of title 29 of the Code of Federal Regulations would be removed in its entirety and reserved.[172] The NPRM also noted that the Department was not proposing regulatory guidance to replace the guidance located in part 791.[173] Because this final rule adopts and finalizes the rescission of the Joint Employer Rule, part 791 is removed in its entirety and reserved. As stated in the NPRM, the Department will continue to consider legal and policy issues relating to FLSA joint employment before determining whether alternative regulatory or subregulatory guidance is appropriate.[174]

III. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.,* and its attendant regulations, 5 CFR part 1320, require the Department to consider the agency's need for its information collections, their practical utility, as well as the impact of paperwork and other information collection burdens imposed on the public, and how to minimize those burdens. This final rule does not contain a collection of information subject to Office of Management and Budget (OMB) approval under the Paperwork Reduction Act.

IV. Executive Order 12866, Regulatory Planning and Review; and Executive Order 13563, Improved Regulation and Regulatory Review

A. Introduction

Under Executive Order 12866, OMB's Office of Information and Regulatory Affairs (OIRA) determines whether a regulatory action is significant and, therefore, subject to the requirements of the Executive Order and OMB review.[175] Section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as a regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the

[166] *See* 86 FR 14045.

[167] *See* 85 FR 2844–45.

[168] *See* 86 FR 14045–46.

[169] *See* 85 FR 2860–62 (29 CFR 791.2(f), (g)) (2020)).

[170] *See* 85 FR 2859–60 (29 CFR 791.2(e) (2020)); 23 FR 5906 (29 CFR 791.2) (1958).

[171] 23 FR 5906 (29 CFR 791.2) (1958).

[172] *See* 86 FR 14046.

[173] *See id.*

[174] *See id.*

[175] *See* 58 FR 51735, 51741 (Oct. 4, 1993).

economy of $100 million or more, or adversely affect in a material way a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local or tribal governments or communities (also referred to as economically significant); (2) create serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive order. OIRA has determined that this rescission is economically significant under section 3(f) of Executive Order 12866. Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), OIRA has also designated this rule as a major rule, as defined by 5 U.S.C. 804(2).

Executive Order 13563 directs agencies to, among other things, propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; that it is tailored to impose the least burden on society, consistent with obtaining the regulatory objectives; and that, in choosing among alternative regulatory approaches, the agency has selected those approaches that maximize net benefits. Executive Order 13563 recognizes that some costs and benefits are difficult to quantify and provides that, when appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts. The analysis below outlines the impacts that the Department anticipates may result from this rescission and was prepared pursuant to the above-mentioned Executive orders.

B. Costs

1. Rule Familiarization Costs

Rescinding the Joint Employer Rule will impose direct costs on businesses that will need to review the rescission. To estimate these regulatory familiarization costs, the Department determined: (1) The number of potentially affected entities, (2) the average hourly wage rate of the employees reviewing the rescission, and (3) the amount of time required to review the rescission. It is uncertain whether these entities would incur regulatory familiarization costs at the firm or the establishment level. For example, in smaller businesses there might be just one specialist reviewing the rescission, while larger businesses might review it at corporate headquarters and determine policy for all establishments owned by the business. To avoid underestimating the costs of this rescission, the Department uses both the number of establishments and the number of firms to estimate a potential range for regulatory familiarization costs. The lower bound of the range is calculated assuming that one specialist per firm will review the rescission, and the upper bound of the range assumes one specialist per establishment.

The most recent data on private sector entities at the time this final rule was drafted are from the 2017 Statistics of U.S. Businesses (SUSB), which reports 5,996,900 private firms and 7,860,674 private establishments with paid employees.[176] Because the Department is unable to determine how many of these businesses have workers with one or more joint employers, this analysis assumes all businesses will undertake review.

The Department believes ten minutes per entity, on average, to be an appropriate review time here. This rulemaking is a rescission and will not set forth any new regulations or guidance regarding joint employment. Additionally, as it believed when it issued the Joint Employer Rule, the Department believes that many entities are not joint employers and thus would not spend any time reviewing the rescission. Therefore, the ten-minute review time represents an average of no time for the majority of entities that are not joint employers, and potentially more than ten minutes for review by some entities that might be joint employers.

The Department's analysis assumes that the rescission would be reviewed by Compensation, Benefits, and Job Analysis Specialists (SOC 13–1141) or employees of similar status and comparable pay. The median hourly wage for these workers was $32.30 per hour in 2020, the most recent year of data available.[177] The Department also assumes that benefits are paid at a rate of 46 percent [178] and overhead costs are paid at a rate of 17 percent of the base wage, resulting in a fully loaded hourly rate of $52.65.

The Department estimates that the lower bound of regulatory familiarization cost range would be $52,728,043 (5,996,900 firms × $52.65 × 0.167 hours), and the upper bound, $69,115,369 (7,860,674 establishments × $52.65 × 0.167 hours). The Department estimates that all regulatory familiarization costs would occur in Year 1.

Additionally, the Department estimated average annualized costs of regulatory familiarization with this rescission over 10 years. Over 10 years, it would have an average annual cost of $7.0 million to $9.2 million, calculated at a 7 percent discount rate ($5.8 million to $7.6 million calculated at a 3 percent discount rate). All costs are in 2020 dollars.

2. Other Costs

As discussed above, some commenters asserted that there may be other potential costs to the regulated community, such as reduced clarity from the lack of the Rule's regulatory guidance. Because it lacks data on the number of businesses that are in a joint employment relationship or those that changed their policies as a result of the Joint Employer Rule, the Department has not quantified these potential costs, which are expected to be de minimis. Although the rescission removes the regulations at 29 CFR part 791, the Department believes that this will not result in substantial costs or decreased clarity for the regulated community because, as discussed above, most courts apply a vertical joint employment analysis different from the analysis in the Joint Employer Rule and have not adopted the Rule's analysis. The State AGs agree with this assertion in their comment. Texas RioGrande Legal Aid asserts that the Joint Employer Rule would not have created clarity for the agricultural sector, because employers would face conflicting obligations under the different regulatory regimes of FLSA and MSPA.

WPI asserted that using an ''expanded'' joint employment standard instead of the standard put forth in the Joint Employer Rule would result in a loss of output of $17.2 billion to $33.3 billion annually for the franchise business sector. WPI cites a comment provided by the International Franchise Association to the 2019 Joint Employer NPRM. In this comment, the International Franchise Association discusses a study by Dr. Ron Bird, looking at the effects of the National Labor Relations Board's re-articulation of its joint employer standard in the *Browning-Ferris* case. The National Labor Relations Board is responsible for

[176] Census Bureau, *Statistics of U.S. Businesses* (2017), *https://www.census.gov/data/tables/2017/econ/susb/2017-susb-annual.html,* 2016 SUSB Annual Data Tables by Establishment Industry.

[177] Bureau of Labor Statistics, *Occupational Employment and Wages* (May 2020), *https://www.bls.gov/oes/current/oes131141.htm.*

[178] The benefits-earnings ratio is derived from the Bureau of Labor Statistics' Employer Costs for Employee Compensation data using variables CMU1020000000000D and CMU1030000000000D.

enforcing the National Labor Relations Act (NLRA), which differs from the FLSA. The commenters, however, do not provide any data or information connecting this output loss to rescission of the Joint Employer Rule.

C. Transfers

In the Joint Employer Rule's regulatory impact analysis, the Department acknowledged that the Rule could limit the ability of workers to collect wages due to them under the FLSA because when there is only one employer liable, there are fewer employers from which to collect those wages and no other options if that sole employer lacks sufficient assets to pay.[179] Because the Joint Employer Rule provided new criteria for determining joint employer status under the FLSA and given the specifics of those criteria, it potentially reduced the number of businesses found to be joint employers from which employees may be able to collect back wages due to them under the Act. This, in turn, potentially reduced the amount of back wages that employees were able to collect when an employer did not comply with the Act and, for example, was or became insolvent.

Like the Joint Employer Rule, this rescission will not change the amount of wages due any employee under the FLSA. However, rescinding the Joint Employer Rule could result in a transfer from employers to employees in the form of back wages owed that employees would thereafter be able to collect. The Department lacks data on the current number of businesses that are in a joint employment relationship, or to estimate the financial capabilities (or lack thereof) of these businesses and therefore is unable to estimate the magnitude of an increase in the number of employers liable as joint employers.

Although the Rule would not have changed the amount of wages due to an employee, the narrower standard for joint employment in the Rule could have incentivized ''workplace fissuring.'' Research has shown that this type of domestic outsourcing can suppress workers' wages, especially for low-wage occupations.[180] The State AGs asserted, ''[f]issured workplaces result in lower wages, greater wage theft, and less job security, especially for immigrants or people of color who make up a disproportionate share of low-wage workers in nonstandard work arrangements.''

In 2019, the Economic Policy Institute (EPI) submitted a comment in response to the Joint Employer NPRM in which they calculated that the Rule would result in transfers from employees to employers of over $1 billion.[181] They again referenced this analysis in their comment on the proposed rescission. EPI explained that these transfers would result from both an increase in workplace ''fissuring'' as well as from an increase in wage theft by employers. Rescinding this standard could help mitigate any increased workplace fissuring and wage theft that would have resulted. The Department is unable to determine to what extent these transfers occurred while the Joint Employer Rule was in effect, and therefore has not provided a quantitative estimate of transfers from employers to employees because of this rescission. The Department is also unable to estimate the increase in back wages that employees will be able to collect because of this change.

This rescission could also benefit some small businesses, because the Joint Employer Rule's narrowing of the joint employment standard could have made them solely liable and responsible for complying with the FLSA without relying on the resources of a larger business in certain situations.

The Texas Public Policy Foundation commented on the Department's economic analysis, saying that the Department did not make any specific findings of the Rule's effect on workers. The Department still believes that due to lack of data on the number of joint employment relationships, as well as how these relationships would have changed under the Joint Employer Rule, it is not possible to quantify the magnitude of transfers associated with the Rule or with its rescission. Likewise, the commenter does not provide any data or information about the impact of this rescission on workers.

D. Benefits

The Department believes that rescinding the Joint Employer Rule will result in benefits to workers and will strengthen wage and hour protections for vulnerable workers. Removing a standard for joint employment that is narrower than the standard applied by courts and WHD's prior standards may enable more workers to collect back wages to which they would already be entitled under the FLSA. This could particularly improve the well-being and economic security of workers in low-wage industries, many of whom are immigrants and people of color, because FLSA violations are more severe and widespread in low-wage labor markets.[182]

V. Regulatory Flexibility Act (RFA) Analysis

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121 (1996), requires Federal agencies engaged in rulemaking to consider the impact of their proposals on small entities, consider alternatives to minimize that impact, and solicit public comment on their analyses. The RFA requires the assessment of the impact of a regulation on a wide range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions. Accordingly, the Department examined this rescission to determine whether it would have a significant economic impact on a substantial number of small entities. The most recent data on private sector entities at the time this final rule was drafted are from the 2017 Statistics of U.S. Businesses (SUSB), which reports 5,996,900 private firms and 7,860,674 private establishments with paid employees.[183] Of these, 5,976,761 firms and 6,512,802 establishments have fewer than 500 employees. Because the Department is unable to determine how many of these businesses have workers with one or more joint employers, this analysis assumes all businesses will undertake review.

The per-entity cost for small business employers is the regulatory familiarization cost of $8.79, or the fully loaded mean hourly wage of a Compensation, Benefits, and Job Analysis Specialist ($52.65) multiplied by ⅙ hour (ten minutes). Because this cost is minimal for small business entities, and well below one percent of their gross annual revenues, which is typically at least $100,000 per year for the smallest businesses, the Department certifies that this rescission will not have a significant economic impact on a substantial number of small entities.

[179] *See* 85 FR 2853.

[180] Arindrajit Dube & Ethan Kaplan, *Does Outsourcing Reduce Wages in the Low-Wage Service Occupations? Evidence from Janitors and Guards,* ILR Review 63, no. 2, 287–306 (2010).

[181] Celine McNicholas & Heidi Shierholz, *EPI comments regarding the Department of Labor's proposed joint-employer standard,* June 25, 2019, *available at https://www.epi.org/publication/epi-comments-regarding-the-department-of-labors-proposed-joint-employer-standard/.*

[182] Annette Bernhardt et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities* (2009), *available at https://www.nelp.org/wp-content/uploads/2015/03/BrokenLawsReport2009.pdf.*

[183] Census Bureau, *Statistics of U.S. Businesses* (2017), *https://www.census.gov/data/tables/2017/econ/susb/2017-susb-annual.html,* 2016 SUSB Annual Data Tables by Establishment Industry.

VI. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (UMRA) [184] requires agencies to prepare a written statement for rules with a Federal mandate that may result in increased expenditures by state, local, and tribal governments, in the aggregate, or by the private sector, of $165 million ($100 million in 1995 dollars adjusted for inflation) or more in at least one year.[185] This statement must: (1) Identify the authorizing legislation; (2) present the estimated costs and benefits of the rule and, to the extent that such estimates are feasible and relevant, its estimated effects on the national economy; (3) summarize and evaluate state, local, and tribal government input; and (4) identify reasonable alternatives and select, or explain the non-selection, of the least costly, most cost-effective, or least burdensome alternative.

Authorizing Legislation

This final rule is issued pursuant to the Fair Labor Standards Act of 1938, 29 U.S.C. 201–219.

Assessment of Costs and Benefits

For purposes of UMRA, this rescission is not expected to result in increased expenditures by the private sector or by state, local, and tribal governments of $165 million or more in at least one year. As discussed earlier, the Department believes that the rescission will not result in substantial costs for the regulated community because most courts apply a vertical joint employment analysis different from the analysis in the Joint Employer Rule and have not adopted the Rule's analysis. More detailed analysis of impacts appears above.

UMRA requires agencies to estimate the effect of a regulation on the national economy if such estimates are reasonably feasible and the effect is relevant and material.[186] However, OMB guidance on this requirement notes that such macroeconomic effects tend to be measurable in nationwide econometric models only if the economic effect of the regulation reaches 0.25 percent to 0.5 percent of Gross Domestic Product (GDP), or in the range of $52.3 billion to $104.7 billion (using 2020 GDP).[187] A regulation with a smaller aggregate effect is not likely to have a measurable effect in macroeconomic terms, unless it is highly focused on a particular geographic region or economic sector, which is not the case with this rule. Given OMB's guidance, the Department has determined that a full macroeconomic analysis is not likely to show that these costs would have any measurable effect.

VII. Executive Order 13132, Federalism

The Department has (1) reviewed this rescission in accordance with Executive Order 13132 regarding federalism and (2) determined that it does not have federalism implications. The rescission would not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government.

VIII. Executive Order 13175, Indian Tribal Governments

This rescission would not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

List of Subjects in 29 CFR Part 791

Wages.

PART 791—[REMOVED AND RESERVED]

■ For the reasons set forth in the preamble, and under the authority of the FLSA, 29 U.S.C. 201–219, the Department removes and reserves 29 CFR part 791.

Jessica Looman,

Principal Deputy Administrator, Wage and Hour Division.

[FR Doc. 2021–15316 Filed 7–29–21; 8:45 am]

BILLING CODE 4510–27–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2020–0034]

RIN 1625–AA09

Drawbridge Operation Regulation; Chicago River, Chicago, IL

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: The Coast Guard is revising the operating schedule that governs the Amtrak Railroad Bridge, mile 3.77, across the South Branch of the Chicago River, at Chicago, Illinois to be operated remotely and establish an intermediate opening position.

DATES: This rule is effective August 30, 2021.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov.* Type USCG–2020–0034 in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rule.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Mr. Lee D. Soule, Bridge Management Specialist, Ninth Coast Guard District; telephone 216–902–6085, email *Lee.D.Soule@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
DHS Department of Homeland Security
FR Federal Register
IGLD85 International Great Lakes Datum of 1985
LWD Low Water Datum based on IGLD85
NPRM Notice of Proposed Rulemaking (Advance, Supplemental)
OMB Office of Management and Budget
§ Section
TD Temporary Deviation with Request for comments
U.S.C. United States Code

II. Background Information and Regulatory History

On April 8, 2020 the Coast Guard published a TD in the **Federal Register** (85 FR 19659) to test the proposed rule and allow mariners to provide comments from June 1, 2020 through September 1, 2020. We received one unrelated comment.

On May 4, 2021, the Coast Guard published a NPRM in the **Federal Register** (86 FR 23639). There we stated why we issued the NPRM, and invited comments on proposed regulatory action. During the comment period that ended on June 3, 2021, we received zero (0) comments.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority 33 U.S.C. 499.

The Amtrak Railroad Bridge, mile 3.77, over the South Branch of the Chicago River provides a vertical clearance of 10 feet in the down position and 65 feet in the open position above LWD and a horizontal clearance of 156 feet. The bridge crosses the river on a slight skew on an ''S'' curve in the

---

[184] *See* 2 U.S.C. 1501.

[185] Calculated using growth in the Gross Domestic Product deflator from 1995 to 2019. Bureau of Economic Analysis. Table 1.1.9. Implicit Price Deflators for Gross Domestic Product.

[186] *See* 2 U.S.C. 1532(a)(4).

[187] According to the Bureau of Economic Analysis, 2020 GDP was $20.9 trillion. *https://www.bea.gov/sites/default/files/2021-04/gdp1q21_adv.pdf.*