U.S. SMALL BUSINESS ADMINISTRATION
OFFICE OF ADVOCACY
REGULATION • RESEARCH • OUTREACH

June 22, 2026

VIA ELECTRONIC SUBMISSION

The Honorable Keith E. Sonderling
Acting Secretary
U.S. Department of Labor
Frances Perkins Building
200 Constitution Avenue
Washington, DC 20210

Daniel Navarrete
Director
Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor
Frances Perkins Building
200 Constitution Avenue NW
Washington, DC 20210

RE: Joint Employer Status Under the Fair Labor Standards Act (FLSA), Family and Medical Leave Act (FMLA), and Migrant and Seasonal Agricultural Worker Protection Act (MSPA)

Dear Acting Secretary Sonderling and Mr. Navarrete:

On April 23, 2026, the U.S. Department of Labor (DOL) issued a proposed rule addressing joint employer status under the Fair Labor Standards Act (FLSA).[1] This letter constitutes the Office of Advocacy's (Advocacy) public comments on the proposed rule.

Advocacy commends the DOL for adopting a uniform federal standard for joint employer definition because it provides clarity, uniformity, and predictability to the employment process. Advocacy convened a roundtable of small business stakeholders across multiple industries to gather input on this rule. The following comments reflect the concerns and recommendations raised by those small entity participants.

[1] 91 Fed. Reg. 21878 (Apr. 23, 2026).

I. Background

A. The Office of Advocacy

Congress established the Office of Advocacy under Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress.

Advocacy is a voice within the executive branch that seeks to ensure small business concerns are heard in the federal regulatory process. Advocacy also works to ensure that regulations do not unduly inhibit the ability of small entities to compete, innovate, or comply with federal laws. The views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration.

The Regulatory Flexibility Act (RFA),[2] as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),[3] gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, the RFA requires federal agencies to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.[4] If a rule is not expected to have a significant economic impact on a substantial number of small entities, agencies may certify it as such and submit a statement of the factual basis for such a determination that adequately supports its certification.[5]

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.[6] The agency must include a response to these written comments in any explanation or discussion accompanying the final rule's publication in the Federal Register, unless the agency certifies that the public interest is not served by doing so.[7]

Advocacy's comments are consistent with congressional intent underlying the RFA, that "[w]hen adopting regulations to protect the health, safety, and economic welfare of the nation, federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public."[8]

B. DOL's Joint Employer Rule

The Department of Labor (DOL) is reviewing the current standards for joint employer liability. When an individual works for two or more companies simultaneously, this proposed rule determines which employer is responsible for complying with federal labor laws. If an employer is found to be a joint employer, they may be responsible for the following labor requirements:

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[2] Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612).
[3] Pub. L. No. 104-121, tit. II, 110 Stat. 857 (1996) (codified in scattered sections of 5 U.S.C. §§601-612).
[4] 5 U.S.C. § 603.
[5] *Id.* § 605(b).
[6] Small Business Jobs Act of 2010, Pub. L. No. 111-240, §1601, 214 Stat. 2551 (codified at 5 U.S.C. § 604).
[7] *Id.*
[8] Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612).

FLSA (for minimum wage and overtime), the Family Medical Leave Act (FMLA) (unpaid job protected leave) and the Migrant and Seasonal Agricultural Worker Protection Act (MSPA)(migrant employment rights).[9]

Small businesses utilize joint employment contractual relationships as a part of their business models, including using staffing companies, as well as those in franchisor-franchisee, vendor-supplier, and contractor-subcontracting arrangements.

Under this rule, there are two tests for joint employment: vertical and horizontal joint employment. Vertical employment (which is more common) exists when a worker has a more direct employment relationship with one employer (such as a staffing agency, subcontractor, franchisee restaurant) and an intermediary business contracting with that employer receives benefits from that work (such as a staffing client, prime contractor, franchisor restaurant). Under horizontal employment, two related entities employing the same worker must aggregate hours for overtime (such as two restaurants in a hotel).[10]

In 2020, DOL issued a proposed rule the vertical joint employment scenario, which set out a four-factor test to weigh how much control a business has over the other entity's employees:
(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.[11]

This inquiry examines how much control a franchisor company restaurant (like McDonalds) has over the employees of one of its local franchisees. The rule set out a narrow definition of joint employment, because it stated that a joint employer must actually exercise or have direct control one of these factors to be jointly liable under the FLSA.[12] Standard contracting language reserving the right to act (*e.g.*, hiring or firing an employee) is relevant, but itself was insufficient for demonstrating joint employer status without some actual exercise of control.[13] This rule was invalidated by the Southern District of New York in *New York vs. Scalia,* finding that the FLSA "expressly rejects the common law definition of employment, which is based on limiting concepts of control and supervision."[14]

In 2026, DOL issued a similar vertical joint employment test, composed of four factors that exhibit control and liability for a business.[15] Under this test, a contractual provision reserving the right to act on employment decisions was considered "relevant" in this determination.

[9] 91 Fed. Reg. 21789, 21880 (Apr. 23, 2026).
[10] Id. at 21919.
[11] 85 Fed. Reg. 28588 § 791.2, Determining Joint Employer Status under the FLSA (Jan. 16, 2020).
[12] *Id*. at 2859 § 791.2(3)(i).
[13] *Id.*
[14] *New York v. Scalia*, 490 F. Supp. 3d 748 (S.D.N.Y. Sept. 8, 2020).
[15] 91 Fed. Reg. 21919.

However, an employer's actual exercise of control in their actions is "more relevant" in this determination.[16]

II. Advocacy's Small Business Comments and Recommendations

On May 28, 2026, Advocacy convened a virtual roundtable with DOL officials and nearly one hundred small businesses stakeholders across multiple industries to gather input on this proposed rule. This included representatives from industries such as franchising, government contracting, staffing, hospitality, retail, restaurants, construction, financial services, payment processing, and transportation. The following comments reflect the concerns and recommendations raised by those participants, and in other conversations with small entities.

A. Small Businesses Generally Support the DOL's Clarified Definition of Joint Employment

Small businesses at the roundtable generally supported the DOL's definition of joint employer, which creates a clearer and more uniform federal standard based on the key aspects of a vertical employment relationship. There has not been a federal standard for joint employment under the FLSA since 2021.[17] The National Labor Relations Board (NLRB) has issued decisions and rulemakings oscillating between requiring direct control or reserved/indirect control for joint employment liability, creating regulatory whiplash for employers trying to utilize these third-party contractor arrangements.[18] Small businesses stated that many operations do not have in-house legal staff or human resources staff to understand these personnel definitions that are important in determining minimum wage, overtime, and leave decisions.

Small businesses also appreciate that the proposed rule clarified that certain business models and business practices do not make a joint employer status more or less likely under the FLSA, including: (a) operating a franchisor or brand or supply agreement; (b) contractual agreements requiring the employer to comply with general legal obligations and standards; (c) contractual agreements requiring quality control standards; and (d) adopting a sample employee handbook, health plan, and participating in an apprenticeship program.[19]

Roundtable participants from all industries utilize these types of agreements as part of their third-party contractual relationships; and these should not be an indicator of joint employment. General contractors and construction companies recommend that the final rule should expressly

[16] Id. at 21919, § 791.115, Determining Vertical Joint Employment.
[17] 91 Fed. Reg. 21878 (Apr. 23, 2026). Roundtable participants did not provide input on the horizontal joint employer standard.
[18] Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery, 362 NLRB 1599 (2015)(NLRB found that reserved and direct control are probative of joint employer status); 85 Fed. Reg. 11184 (Feb. 26, 2020) (NLRB final rule that required employers to have substantial direct and immediate control over one or more essential terms and conditions of employment); 87 Fed. Reg. 54621 (Sept. 7, 2022) (NLRB proposed rule that expanded the joint employer standard and allowed direct control and reserved and/or indirect control over employment terms to find liability); Chamber vs. Commerce v. NLRB, 728 F. Supp. 3d 498 (E.D.Tex 2024) (Mar. 2024, a federal court vacated the 2023 NLRB final rule before it went into effect.
[19] 91 Fed. Reg. 21921 § 791.125 Relevance of Certain Business Models and Practices.

address payroll records maintained solely for purposes of enforcing contractual or legal mandates as items that do not make a joint employer status more likely. Third-party payment processors for independent contractors in the transportation industry also seek clarification that the use of dispatch software, GPS, and package tracking technologies do not make a joint employer status more likely.

B. The DOL Should Clarify Indirect and Reserved Control to Reduce Confusion Among Small Entities

Roundtable participants across all industries expressed concern with the continued treatment of reserved or indirect control as a factor in the joint employment analysis. Participants commented that they preferred the joint employer definition in DOL's 2020 rulemaking, which required the potential joint employer to actually exercise control of one or more of the primary factors to be jointly liable under the FLSA.

The DOL's 2026 rule states that reserved and indirect control is "relevant" for determining joint employer status, and that the actual exercise of control is "more relevant" than reserved control. Roundtable participants were concerned that this provision in practice means that reserved or indirect provisions in a contract that are unexercised could subject them have joint employer liability.[20]

Roundtable participants of all industries discussed the various contracts they had that included provisions with reserved control, and these employers may never actually exercise the employment provisions. Franchise agreements routinely contain reserved contractual provisions to protect brand audits, standards manuals, renovation approvals, and termination authority. Construction contracts regularly include provisions on safety, scheduling, prevailing wage compliance, and apprenticeship requirements mandated by project owners, utilities, and federal, state, and local governments; activities that represent responsible project management, not employment.

At the roundtable, representatives of the franchising and hotel sectors recommended that the DOL's final rule should state that indirect and reserved control, standing alone or in combination, are insufficient to establish joint employer status absent actual exercise of control over at least one of the primary factors.[21] The proposed rule has this example where an office park company hires a janitorial services company to clean a building after-hours. Even though the office park reserves the right to supervise the janitorial employees, they do not in fact supervise the workers' performance in any way.[22]

Another small business representative recommended that this provision should be altered to read that a joint employer's contractual authority to supervise, discipline or fire employees is less

[20] Sarah Davies, General Counsel and VP, Int'l Franchise Ass'n and Chirag Shah, General Counsel and EVP, Am. Hotel and Lodging Ass'n., DOL Proposed Joint Employer Rule: SBA Advocacy Roundtable Slides (May 28, 2026) (on file with author).
[21] *Id.*
[22] 91 Fed. Reg. 21920.

relevant if in practice the potential employer rarely or never exercises that authority. For example, a contractor partner could have the reserved authority to supervise the work on a contractor's employees and only exercises that right on a single occasion based on the temporary absence of one of the contractor's on-site supervisors. This isolated exercise of control should not meaningfully impact the joint employment analysis.

C. The DOL Should Exclude Other Joint Employment Factors to Increase Predictability in the Proposed Rule.

Small businesses at Advocacy's roundtable expressed concern that the proposed rule's allowance for consideration of additional, open-ended factors beyond the four enumerated ones undermines the predictability and uniformity that the rule seeks to achieve.[23] Section 791.115 lists four primary factors that make a vertical joint employment decision. The DOL states that if the "four factors indicate joint employment or no joint employment, there is a substantial likelihood that the indicated outcome is correct, and additional factors are highly unlikely to outweigh the combined probative value of the four factors."[24] Small businesses told Advocacy that the DOL should clarify that a person or entity that performs none of these four primary factors cannot be deemed a joint employer.

III. Conclusion

Advocacy commends the DOL for adopting a uniform federal standard for joint employer definition because it provides clarity, uniformity, and predictability to the employment process. Participants at Advocacy's roundtable recommend that the DOL finalize a definition of joint employment that clarifies the reserved/indirect control provisions and limit the joint employer analysis to the four enumerated primary factors.

If you have any questions or require additional information, please contact me or Janis Reyes at (202) 798-5798 or by email at Janis.Reyes@sba.gov.

Sincerely,

/s/
Everett M. Woodel, Jr.
Acting Chief Counsel
Office of Advocacy
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[23] 91 Fed. Reg. 21920 §791.115 (e) Consideration of additional factors (Apr. 23, 2026).
[24] 91 Fed. Reg. 21920 §791.115 (e) (Apr. 23, 2026).

/s/
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Copy to: Mr. Mark Paoletta, Acting Administrator
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