June 22, 2026

Andrew Rodgers, Administrator
Wage and Hour Division
U.S. Department of Labor
Room S-3502
200 Constitution Avenue NW
Washington, DC 20210

RE: Joint Employer Status Under the Fair Labor Standards Act, Family and Medical Leave Act, and Migrant and Seasonal Agricultural Worker Protection Act; Docket No. WHD-2026-0067; RIN 1235-AA48 (91 Fed. Reg. 21878, April 23, 2026)

Dear Administrator Rodgers:

The National Small Business Association (NSBA) submits this comment in response to the Department of Labor's (DOL) proposed rule on 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). NSBA is the nation's oldest small business advocacy organization, representing more than 65,000 members across every state and industry sector. For nearly nine decades, NSBA has served as a nonpartisan voice for the small business community before Congress, the Executive Branch, and federal agencies, supporting efforts that foster the growth, strength, and impact of small businesses.

As small business champions, NSBA supports the administration's efforts to restore a clear, administrable, and uniform standard for determining joint employer status that is grounded in actual control and the practical realities of how businesses contract with one another. At the same time, we urge the Department to consider the cumulative toll that repeated reversals of the joint employer standard have taken on the small business community. The cycle of regulatory whiplash surrounding joint employment has imposed real costs both in terms of dollars spent on compliance, as well as in foregone opportunities for businesses and workers alike. To that end, NSBA strongly encourages the Department to work with Congress to codify the core elements of this Proposed Rule in statute to provide the durable, administration-proof certainty that small businesses deserve, and stands ready to help advance these efforts.

I. Support for the Proposed Rule

NSBA welcomes the Department's decision to restore interpretive guidance on joint employer status in Part 791, where it resided for decades before being rescinded in 2021. Since that rescission, the Department has offered employers, workers, and its own investigators virtually no published guidance on when joint-employer status exists, leaving small businesses to navigate a patchwork of conflicting circuit-court tests with little assurance that today's arrangements will be treated consistently tomorrow. A restored, nationwide standard is a meaningful step toward the predictability that sound business planning requires.

NSBA supports the Proposed Rule's four-factor analysis for vertical joint employment, which is drawn directly from longstanding precedent (Supreme Court's *Falk v. Brennan* and the Ninth

Circuit's *Bonnette v. California Health & Welfare Agency*). By distilling this case law into a small set of clear factors, the Proposed Rule offers small businesses a test they can understand and apply in real time, rather than the eight-, ten-, and twelve-factor analyses designed by and for courts. NSBA also appreciates that the rule retains the longstanding horizontal joint employment analysis, which turns on the degree of association between employers.

NSBA particularly commends the Department's focus on actual rather than theoretical control. The most consequential clarification for small businesses is the Proposed Rule's recognition that ordinary, lawful business arrangements do not, by themselves, give rise to joint employer liability. Operating as a franchisor, providing a franchisee or contractor with form compliance documents or model policies, and requiring vendors and business partners to follow applicable wage, safety, and quality-control standards are routine features of legitimate commerce, not evidence of an employment relationship. Clarifying that these practices do not, standing alone, create joint employer status removes a significant source of risk that has discouraged small franchisors, general contractors, and staffing clients from adopting the very practices that protect workers and consumers.

Finally, NSBA supports the Department's proposal to align the joint employer standards under the FMLA and MSPA with the restored FLSA analysis. Because both statutes incorporate the FLSA's definitions of employment, a single, harmonized standard across all three laws reduces the compliance burden of reconciling divergent tests and advances the uniformity that small businesses, which rarely have the legal resources of larger firms, depend upon.

II. The Cost of Regulatory Whiplash

While NSBA endorses the substance of the Proposed Rule, we believe it is critical for the Department to acknowledge and address the broader pattern of instability that has defined joint employer regulation for more than a decade. Under the FLSA, FMLA, and MSPA, the joint employer standard has now shifted at least six times across three administrations since 2015: (1) the Obama-era 2016 Administrator's Interpretation adopting an expansive, economic-dependence approach; (2) the Trump Administration's 2017 withdrawal of that interpretation; (3) the Trump Administration's 2020 Final Rule implementing a four-factor, actual-control test; (4) the 2020 federal district court decision striking down key parts of that rule; (5) the Biden Administration's 2021 rescission of the 2020 Rule and return to a totality-of-the-circumstances approach; and (6) the present 2026 Proposed Rule, which once again reinstates a four-factor, actual-control test. For small-business owners, this cycle of reversal represents a fundamental threat to the regulatory predictability on which sound business planning depends. We note that this comment addresses only the joint employer standard under the FLSA, FMLA, and MSPA; the separate and equally turbulent history of joint employer rulemaking under the National Labor Relations Act has compounded the uncertainty small businesses face, but lies outside the scope of this rulemaking.

NSBA's own survey data consistently shows that regulatory uncertainty ranks among the top concerns of small-business owners.[1] Critically, only about one-in-ten small businesses have dedicated staff to monitor the regulatory landscape, meaning that each change in the joint employer standard imposes a disproportionate burden on the smallest firms. When the rules

[1] National Small Business Association, *2026 Small Business Economic Report* (March 2026), https://www.nsbaadvocate.org/_files/ugd/fec11a_f6d6cc146d4e4d24aea0aa0b48964857.pdf.

shift every few years, small-business owners must repeatedly invest in legal consultations, restructure or renegotiate contracts with franchisees, subcontractors, and staffing partners, and reassess existing arrangements that were lawful when entered into. These are resources that could otherwise be invested in hiring, wages, and growth.

The consequences of this instability extend well beyond compliance costs. Regulatory whiplash discourages small businesses from entering legitimate, mutually beneficial relationships like franchising, subcontracting, or utilizing staffing agencies, even where those arrangements are clearly lawful under any version of the standard. When business owners cannot be confident that today's compliant relationship will remain compliant, many choose to avoid the risk entirely. This chilling effect limits opportunity for the small firms that rely on these business models to compete, and for the workers those firms would otherwise hire. Moreover, the practical effect of any single DOL rule is inherently limited, underscoring the need for a durable, broadly supported standard rather than one likely to be reversed with each change of administration.

III. Conclusion

NSBA supports the Proposed Rule's return to a clearer, more structured joint employer framework that focuses on actual control, recognizes both vertical and horizontal joint employment, confirms that ordinary business practices do not by themselves create liability, and harmonizes the standard across the FLSA, FMLA, and MSPA. This framework is more administrable, more predictable, and better aligned with both judicial precedent and the practical realities of modern business relationships.

At the same time, NSBA urges the Department to recognize that clarity of substance alone is insufficient if the regulatory framework remains vulnerable to wholesale reversal with each change of administration, and we encourage the Department to take concrete steps to ensure lasting stability. Although legislative fixes to codify a joint employer standard have been introduced in Congress on several occasions, none have been enacted. We therefore encourage the Department to work with Congress to codify the core elements of this standard in statute. A legislatively enacted standard is far more resistant to administrative reversal and can provide the long-term certainty that no single rulemaking can achieve.

We appreciate the opportunity to comment on this important rulemaking and look forward to working with the Department to achieve joint employer standards that protect workers, support small-business growth, and endure across administrations.

Respectfully,

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