Comments of the Regulatory Action Center

Re: Rescission of Joint Employer Status under the Fair Labor Standards Act Rule

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The Regulatory Action Center at FreedomWorks Foundation is dedicated to educating Americans about the impact of government regulations on economic prosperity and individual liberty. FreedomWorks Foundation is committed to lowering the barrier between millions of FreedomWorks citizen activists and the rule-making process of government agencies to which they are entitled to contribute.

On behalf of our activists nationwide, FreedomWorks Foundation appreciates the opportunity to offer these comments regarding the notice and request for comments on the rescission of the Joint Employer rule.

On January 12, 2020, the Department of Labor published a final rule updating the standard for determining joint employer status under the Fair Labor Standards Act (FLSA). When an employee works one set of hours for an employer and that work simultaneously benefits another employer, a joint employment relationship may be created. This would make the putative joint employer equally responsible for paying the employee's wages and overtime. Classic examples of potential joint employer relationships arise in the franchising and subcontracting contexts.

The 2020 rule updated the 1958 standard by which joint employment exists when two employers "are not completely disassociated" from each other. This broad standard, coupled with lack of guidance, resulted in confusion, uncertainty, and different standards in various federal courts. The lack of clarity surrounding issues of joint employment was especially harmful to small businesses, which employ almost half of Americans and often do not have the resources to secure top-notch legal advice.

To determine whether joint employment exists, the updated standard relies on a four-factor balancing test drawn from leading court decisions and focusing on the degree of control a putative joint employer exercises over the employee. The rule was designed to reduce uncertainty for businesses in determining whether they are acting as joint employers, thus reducing compliance costs. It also clarified that a company could require its franchisees or subcontractors to adhere to certain standards (e.g., health and safety, quality) and require certain

trainings (e.g., diversity, anti-harassment) without fear of being deemed a joint employer of the franchisee's or subcontractor's employees.

While a New York federal district court invalidated much of the rule, that decision is now on appeal to the Second Circuit Court of Appeals. Rather than waiting for that decision, however, the Department of Labor proposes rescinding the rule and replacing it with...nothing new. Rescinding this rule would return us to the 1958 vague "not completely disassociated" standard, the dramatic expansion of joint liability in the 2015 National Labor Relations Board ruling, and the 2016 interpretation that DOL adopted without public input (and which the 2020 rule repealed).

Rather than exacerbate the uncertainty surrounding questions of joint employment--and short-circuiting the appeals process--the better course would be for DOL to leave the 2020 rule in place until the Second Circuit rules. Once that decision comes down, DOL can then proceed to eliminate or rewrite the Joint Employment rule through notice and comment. This will reduce costs for employers and ultimately benefit employees and the public when compliance resources are otherwise used for job creation, increasing wages, and enhancing benefits.

Respectfully submitted,

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