
Melissa Smith  
Director of the 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


Dear Ms. Smith:

The HR Policy Association (“the Association”) welcomes the opportunity to provide comments to the U.S. Department of Labor (DOL or “the Department”) regarding the Wage and Hour Division’s proposed rule on Joint Employer Status Under the Fair Labor Standards Act as published in the Federal Register on April 9, 2019.¹

The HR Policy Association represents the most senior human resource executives in more than 390 of the largest companies in the United States. Collectively, these companies employ more than 12 million employees in the United States, nearly ten percent of the private sector workforce, and over 20 million employees worldwide. Reform of the 1938 Fair Labor Standards Act (FLSA) to reflect the 21st century workplace is a long-standing goal of the Association, and all of the HR Policy Association member companies will be directly impacted by the proposed rule.

The proposed regulation provides a long overdue update of the joint employer rules that were published in 1958 and currently do not adequately explain what it means to be “not completely disassociated” in today’s economy.² Businesses struggle with how to comply with the outdated regulatory text and courts wrestle with how to apply it to many contractor agreements. The prevailing uncertainty regarding joint employer risk thwarts corporate efforts to advance employee-friendly standards via contract requirements with vendors, suppliers, and contractors through corporate social responsibility programs. The proposed changes dispel such uncertainty, helping ensure compliance with the Fair Labor Standards Act and allowing employers to expand their corporate social responsibility programs without fear of costly litigation.

The Association applauds the Department for including illustrative examples in the proposed regulation to provide greater clarity to employers and the courts. The guidance as to when and how a business arrangement presents a risk of joint employer status is of critical importance.

¹ 84 Fed. Reg. 14043.
The Department’s proposed rule, and in particular its proposed four-factor test, and related guidance expressly identifying key considerations and factors that are relevant and are not relevant, finally fill in the space where businesses confront joint employer issues today. To assist the Department in preparing the final rule, the Association provides the following comments and additional illustrative examples which would provide greater regulatory certainty to employers.

**Updating the FLSA Joint Employer Standard Is Long Overdue**

The Department’s current joint employer regulation was adopted over 60 years ago and does not address a wide variety of unique business organizations and contractual relationships in today’s economy. Under the current rules, two companies are deemed “joint employers” if “employment by one employer is not completely disassociated from employment by the other employer(s),”\(^3\) and by the same standard, two (or more) employers are not joint employers if they “are acting entirely independently of each other and are completely disassociated with respect to the employment of a particular employee.”\(^4\)

The “not completely disassociated” standard simply does not work in a wide variety of common business arrangements found today. For example, a franchisor enters into a contract with a franchisee, a company contracts certain business functions to a third-party vendor, workers of staffing companies work assignments pursuant to contracts with client companies, and contractors engage subcontractors for specific work performed by the subcontractor’s employees. It is impracticable and illogical to hinge joint employer liability on 100 percent disassociation between two companies based on their mutual business decision to associate (e.g., contract) for business reasons. Applying the existing regulatory standard in such a case essentially imposes automatic joint employer status the moment almost any business-to-business deal is struck.

Not surprisingly, businesses have struggled with how to comply with the outdated regulatory text. Businesses, lacking guidance, are forced to operate amid a virtually unquantifiable of joint employer liability. No matter how thoughtfully structured, every business-to-business arrangement is exposed to such risk. The lack of predictability breeds uncertainty, which can substantially chill a company’s willingness to enter into business arrangements or contracts.

**The Proposed Rule Will Provide a Unified Standard for Joint Employer Liability Under the FLSA**

The courts have also struggled with how to apply the outdated regulatory text. Currently, there are almost as many different legal tests for who is a joint employer under the Fair Labor Standards Act as there are Circuit Courts of Appeal in the United States. Although some federal

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\(^3\) 29 C.F.R. § 791.2(a).

\(^4\) 29 C.F.R. § 791.2(a).
courts have adopted the Ninth Circuit’s four-part test in *Bonnette* or a similar test,\(^5\) others have declined to adopt *Bonnette*. Several courts have either failed to recognize any formal joint employer test, or developed tests with completely different legal and theoretical predicates.\(^6\) This maze of tests used by the federal courts has produced different decisions in cases with similar facts because of the different standards applied in each of the deciding courts,\(^7\) which has created substantial uncertainty for employers with national operations.\(^8\)

The prevailing uncertainty regarding joint employer risk chills businesses’ willingness to engage in contracting arrangements and can thwart corporate efforts to advance desirable societal goals - e.g., environmentally friendly standards - via contract requirements with vendors, suppliers, and contractors through corporate social responsibility programs. The proposed rule will create a unified standard for evaluating joint employer liability under the FLSA and substantially reduce this uncertainty.

**Clear, Understandable Standards Will Improve Certainty for Employers and Employees**

Preliminarily, the proposed rule as reorganized and revised is significantly clearer and easier to understand than the 1958 regulations. The proposed format enables a reader to move directly to the specific subsections applicable to their situation. The series of examples at the end give practical help by illustrating the actual application of the principles explained in the guidance. Unquestionably, these changes “help bring clarity” to joint employer status determinations, as the Department intended.\(^9\)

The Department’s proposed four-factor test and related guidance will be of immense assistance to the business community. The guidance also is significantly clearer and able to be applied than the standards in the 1958 regulation.

The proposed rule eliminates many of the vagaries and much of the unpredictability that plagues the joint employer issue today and will help businesses intelligently monitor their various contractual relationships. They will have standards generally applicable across jurisdictions and this, in turn, will foster business relationships, increase employment opportunities and promote economic growth in an era where, increasingly, businesses rely on contracting for specialized services.

Moreover, understanding “corporate social responsibility” (CSR) initiatives and companies’ incentives for adopting such policies provides important context for appreciating the

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\(^8\) 84 Fed. Reg. 14047.

\(^9\) 84 Fed. Reg. at 14047
Department’s proposed joint employer rule, particularly 791.2(d)(3). Many corporations choose to act as good corporate citizens by adopting ethical standards that exceed their legal obligations. Such policies and practices are generally referred to as CSR initiatives.

A company may adopt a CSR initiative for a number of reasons and the initiatives come in all shapes and sizes. For example, a grocery store might commit to selling fish caught using only sustainable fishing techniques. An apparel manufacturer might decide to make its sweatshirts only in countries with a strong record of fair labor practices and respect for human rights. Or a firm may choose to work only with certain suppliers that provide their employees with a certain number of days of annual paid leave. CSR initiatives may be adopted for altruistic reasons, or to develop a socially conscious brand reputation to appeal to consumers, or to produce healthier workplaces and a more productive supply-chain. Whatever the motivation, in each case the company works to further the social good by adhering to a higher standard than the law requires.

Although companies may differ on the CSR initiatives they choose to adopt, they agree that it is critical to ensure that laws and regulations do not discourage companies from selecting suppliers that share a commitment to the same CSR initiatives that the companies hold themselves.

The Association applauds the Department for creating greater certainty around how the FLSA’s joint employer rules apply to CSR initiatives. The proposed regulations provide that joint employer status will not arise solely due to factors such as a business model or requirements and practices of general application that advance legitimate business interests, not “the interest of an employer in relation to an employee.”10 Thus, under the proposed rule:

• An employer’s contractual agreements with the employer requiring the employer to, for example, set a wage floor, institute sexual harassment policies, establish workplace safety practices, require morality clauses, adopt similar generalized business practices, or otherwise comply with the law, do not make joint employer status more or less likely under the Act.11

• Companies are able to effectively prevent and respond to sexual harassment concerns by requiring that third-party staffing agencies with which they contract promulgate anti-harassment policies as to agency employees assigned to the company sites—standards that benefit all stakeholders and that align with laws in some jurisdictions that will hold the company liable for the sexual harassment acts of such employees.

• Companies can establish basic contract requirements with other companies, whose employees provide services such as delivery or customer home installations or support services, that set forth legally-required minimum levels of automobile insurance and proper licensing, and/or screening such workers to avoid potential personal threat to customers.

11 Proposed § 791.2(d)(3).
• Businesses can require that subcontractors or other business partners compensate their workers, who are providing services pursuant to a business-business contract, in accordance with applicable wage and hour laws.

Certain Revisions and Additional Examples Would Be Helpful in Further Clarifying How to Apply the Proposed Rule

The Association supports the proposed rule and believes the Department can improve the clarity of regulations and the guidance provided to employers with a few changes and additional illustrative examples. Accordingly, the Association recommends the final rule include the following:

• Modify proposed 791.2(a)(1)(ii) to read: “Supervises and controls the employee’s individual work schedule or the employee’s particular, day-to-day tasks” to ensure there is no confusion between proposed (a)(1)(ii) and (b)(1).

• Modify proposed 791.2(d)(3) to provide additional guidance regarding what it means to determine the employee’s rate of pay or exercise significant control over the terms and conditions of the employee’s work as follows (new language italicized):

The potential joint employer’s contractual agreements with the employer establishing minimum standards or requirements, of general applicability to the employer, that are intended to ensure compliance with legal mandates, and/or protection of the public or individuals, e.g., requiring the employer to, for example, set a wage or paid leave floor, institute sexual harassment policies, establish workplace safety or training practices, ensure work is performed by individuals who are properly licensed and/or covered by sufficient insurance coverage when the nature of the work so requires, ensure that work performed within a personal residence or property is performed by individuals who have passed criminal background checks or drug tests, and/or who outwardly display their business-related identity by carrying specific identification cards and/or wearing particular apparel, hats or badges with business insignia, require morality clauses, adopt similar generalized business practices, or otherwise comply with the law, do not make joint employer status more likely under the Act.

• Modify proposed 791.2(g)(1), (g)(2) and (g)(3) to clarify the proposed illustrative examples for employers and the courts as follows (new language italicized):

(g) The following illustrative examples demonstrate the application of the principles described in paragraphs (a)-(f) of this section under the facts presented and are limited to substantially similar factual situations:

(1)(i) Example. An individual works 30 hours per week as a cook at one restaurant establishment, and 15 hours per week as a cook at a different restaurant establishment affiliated with the same nationwide franchise. These establishments are locally owned and managed by different franchisees that do
not coordinate in any way with respect to the employee. Are they joint employers of the cook?

(ii) Application. Under these facts, which implicate the second joint employer scenario because the cook is employed by two different employers, the restaurant establishments are not joint employers of the cook because they are not associated in any meaningful way with respect to the cook’s employment. The similarity of the cook’s work at each restaurant, and the fact that both restaurants are part of the same nationwide franchise, are not relevant to the joint employer analysis, because those facts have no bearing on the question whether the restaurants are acting directly or indirectly in each other's interest in relation to the cook.

(2)(i) Example. An individual works 30 hours per week as a cook at one restaurant establishment, and 15 hours per week as a cook at a different restaurant establishment owned by the same person. Each week, the restaurants coordinate and set the cook’s schedule of hours at each location, and the cook works interchangeably at both restaurants. The restaurants decided together to pay the cook the same hourly rate. Are they joint employers of the cook?

(ii) Application. Under these facts, which implicate the second joint employer scenario because the cook is employed by two different employers, the restaurant establishments are joint employers of the cook. They do not act independently of each other and are not disassociated with respect to the employment of the cook. Specifically, because there is an arrangement between them to share the employee’s services, they share control of the employee by common ownership, jointly deciding the cook’s terms and conditions of employment, including coordinating the cook’s schedule of hours at the restaurants, and jointly deciding the cook’s terms and conditions of employment, such as the pay rate. Because the restaurants are sufficiently associated with respect to the cook’s employment, they must aggregate the cook’s hours worked across the two restaurants for purposes of complying with the Act.

(3)(i) Example. An office park company hires a janitorial services company to clean the office park building after-hours. According to a contractual agreement between the office park and the janitorial company, the office park company agrees to pay the janitorial company a fixed fee for these services and reserves the right to supervise the janitorial company’s employees in their performance of those cleaning services. However, office park personnel do not set the janitorial employees’ pay rates or individual schedules and do not in fact supervise the workers’ performance of their work in any way. Is the office park company a joint employer of the janitorial employees?

(ii) Application. Under these facts, implicate the first joint employer scenario because the janitorial employees have an employer who employs them to work while the office park company (which did not previously employ them) simultaneously benefits from the work of the janitorial employees. Under these
facts, the office park company is not a joint employer of the janitorial employees because it does not actually exercise control over one or more of the indicia of control in the four-part test: It does not hire or fire the employees, supervise and control their work schedule or conditions of employment, or determine their rate and method of payment, and no facts show that it maintains the employees’ employment records, or exercise control over their conditions of employment. The office park’s reserved contractual right to control the employee’s conditions of employment does not demonstrate that it is a joint employer because that control is never actually exercised.

- Add a new illustrative example (791.2(g)(4)) to illustrate facts in which companies may permissibly address the quality of services provided under its business arrangement or contract with another company without actually supervising or controlling the workers’ job performance and without directly or indirectly firing them to illustrate the principle that joint employer status requires the actual exercise of control.

(4)(i) Example. A call center company runs a call center staffed with its own employees who provide customer support services 24 hours per day. The call center hires and trains the employees and sets their rate and method of pay. The call center has only one client, a media company that sells subscriptions to magazines and journals whose subscribers call the call center for customer support. The companies’ contract sets specific customer support standards, e.g., employees must use a pleasant tone of voice at all times and follow a specific protocol to escalate difficult calls to a manager if the caller is upset and cannot be calmed down. The contract does not give authority to the media company to fire or supervise call center employees, but allows a media company “relationship partner” to work on-site to respond to subscription questions and liaise with call center managers. On three occasions, the relationship partner hears Employee A raise his voice and use an exasperated tone on customer calls, which she documents in a laptop file. She learns that he also abruptly hung up on an upset subscriber. She meets with the call center account manager and tells him that some services are failing the required standards, citing Employee A as an example. The manager independently verifies such repeated poor performance by Employee A, and meets with him to address his substandard performance. The manager issues a written reprimand that goes in Employee A’s personnel file. Does the media company jointly employ Employee A?

(ii) Application. These facts implicate the first joint employer scenario. Employee A is employed by the call center to work, and that work simultaneously benefits the media company (which did not previously employ him). Under these facts, the media company does not jointly employ Employee A. It does not actually exercise control over any factor in the four-part test: It did not hire or fire him, control his work schedule, set his method or rate of pay, or maintain his employment records. The relationship partner’s notes about Employee A’s poor service were not employment records, but notes created and kept for her own
reasons related to the contract services. Also, while she met with the account manager and stated that Employee A’s customer interactions were deficient, she did so within the context of addressing the quality of services required by the contract. A business’s communication to a contract party that its services fail contract quality standards is an action taken in the legitimate interest of such business to ensure that such services meet agreed-to standards. Such communication is not an action taken in the interest of an employer relative to an employee.

(iii) Example Related to Example Immediately Above. The facts are the same as in the example set forth immediately above, but the media company relationship partner, when she meets with the control center account manager, states that the media company does not want Employee A assigned to its account. After independently verifying Employee A’s repeated performance deficiencies, the call center terminates his employment based on his poor performance. Does the media company jointly employ Employee A?

(iv) Application: No, the media company does not jointly employ him for the same reasons as discussed above. Joint employer status does not result from a company requiring that the services provided under a contract are no longer assigned to an individual who has demonstrably failed to provide services consistent with the standards set forth in the governing contract. The relationship partner directed communications only to the call center company, and she did not address his employment with the call center. The call center company, and not the media company, exercised control over Employee A’s employment termination. The consequence that Employee A was terminated by the call center company does not transform the media company’s communications regarding contract standards and the quality of services rendered into the actual exercise of control as to the worker at issue.

- Modify proposed 791.2(g)(4), (g)(5), (g)(6) and (g)(7) to clarify the proposed illustrative examples for employers and the courts as follows (new language italicized):

(4)(i) Example. A country club contracts with a landscaping company to maintain the country club’s golf course. The contract does not give the country club authority to hire or fire the landscaping company’s employees or to supervise their work on the country club premises. However, in practice a club official oversees the work of employees of the landscaping company by sporadically assigning them tasks throughout each workweek, providing them with periodic instructions during each workday, and keeping intermittent records of their work. Moreover, at the country club’s direction, the landscaping company agrees to terminate an individual worker for failure to follow the club official’s instructions. Is the country club a joint employer of the landscaping employees?

(ii) Application. Under these facts, which implicate the first joint employer scenario because the janitorial employees have an employer who employs them
to work while the country club (which did not previously employ them) simultaneously benefits from their work, the country club is a joint employer of the landscaping employees. Because the club exercises sufficient control, both direct and indirect, over the terms and conditions of their employment in a manner that is in the interest of their employer relative to the employee. The country club directly supervises and controls the landscaping employees' work and determines their schedules on what amounts to a regular basis, i.e., by giving them weekly work assignments and daily instructions, and it also maintains employment records as to the employees. In addition, this routine actual exercise of indirect control is further established by the fact that the country club directed the landscaping to indirectly fired one of the landscaping employees for not following its directions given by the country club.

(5)(i) Example. A packaging company requests workers on a daily basis from a staffing agency. The packaging company determines each worker's hourly rate of pay, supervises their work, and uses sophisticated analysis of expected customer demand to continuously adjust the number of workers it requests and the specific hours for each worker, sending workers home depending on workload. Is the packaging company a joint employer of the staffing agency's employees?

(ii) Application. Under these facts, implicates the first joint employer scenario because the staffing agency employees have an employer who employs them to work while the packaging company (which did not previously employ them) simultaneously benefits from their work. Under these facts, the packaging company is a joint employer of the staffing agency's employees because it actually exercises sufficient control as to more than one of the factors in the four-factor test, including by controlling their terms and conditions of employment, by setting their rate of pay, supervising their work, and supervising and controlling their work schedules.

(6)(i) Example. An Association, whose the membership of which is subject to certain criteria such as location within a particular geography or type of business, provides optional group health coverage and an optional pension plan to its members to offer to their employees. Employer B and Employer C both meet the Association’s specified criteria, become members, and provide the Association’s optional group health coverage and pension plan to their respective employees. The employees of both B and C choose to opt in to the health and pension plans. Does the participation of B and C in the Association’s health and pension plans make the Association a joint employer of B’s and C’s employees, or B and C joint employers of each other’s employees?

(ii) Application. Under these facts, which implicate neither of the joint employer scenarios under the FLSA, the Association is not a joint employer of B’s or C’s employees, and B and C are not joint employers of each other’s employees. No
person is simultaneously benefitting from work performed by the employees of B or from work performed by the employees of C as required for the first joint employer scenario to arise. Likewise, B does not employ any of its workers for one set of hours in a workweek while C employs the same workers for a separate set of hours in the same workweek as required for the second joint employer scenario to arise. In any event, mere participation in the Association’s optional plans does not make joint employer status more likely, i.e., it does not involve any control by the Association, direct or indirect, over B’s or C’s employees. Each of And while B and C independently qualified for the plans and independently offer the same plans to their respective employees. There is no indication that B and C are coordinating, directly or indirectly, to control the other’s employees, or that one is controlling, controlled by, or under common control with the other. B and C are therefore not acting directly or indirectly in the interest of the other in relation to any employee.

(7)(i) Example. Entity A, a large national company, contracts with multiple other businesses in its supply chain. As a precondition of doing business with A, all contracting businesses must agree to comply with a code of conduct, which includes a minimum hourly wage higher than the federal minimum wage, certain levels of paid leave benefits, as well as a promise to comply with all applicable federal, state, and local laws. Employer B contracts with A and signs the code of conduct. Does A qualify as a joint employer of B’s employees?

(ii) Application. Under these facts, which implicates the first joint employer scenario because the employees have employer B that employs them to work while A (which did not previously employ them) simultaneously benefits from their work under the contract, A is not a joint employer of B’s employees. Entity A is not acting directly or indirectly in the interest of B in relation to B’s employees because it is not actually exercising one of the indicia of control set forth in the four-part test—hiring, firing, maintaining records, or supervising or controlling work schedules or conditions of employment. Nor is A exercising significant control over Employer B’s rate or method of pay. Although A requires B to maintain a wage floor, B retains control over how and how much to pay its employees. Finally, because there is no indication that A’s requirement that B commit to comply with all applicable federal, state, and local law exerts any direct or indirect control over B’s employees, and B is subject to such requirement independent of its contract with A, this requirement has no bearing on the joint employer analysis.

• Add a new illustrative example 791.2(g)(8) to illustrate facts in which companies establish contract requirements and/or engage in general business practices for legitimate purposes to illustrate application of the principle that these factors do not make joint employer status more or less likely under the FLSA, as set forth in the Department’s proposed regulation at 29 C.F.R. § 791.2(d)(3) and (d)(4). Example (g)(8) also is
intended to illustrate the principle that reserved contractual rights are not relevant to deciding joint employer status because they do not bear on the actual exercise of control, as stated in the Department’s proposed regulation at 29 C.F.R. § 791.2(a)(2).

(8)(i) Example. A home alarm systems company hires an installation services company to install equipment and services in the homes of the alarm systems company’s customers. The contract between the two companies states that the alarm systems company pays the installation company a piece rate for the work that is performed by the installation company’s employees, and reserves the right to prohibit such employees from performing work for the company. Because installers work in customer homes, the alarm systems company requires that any installers assigned to its customers’ homes wear shirts reflecting the alarm systems company’s logo, carry special ID badges indicating they are an outside contractor who performs work for the alarm systems company, and place removable stickers on their vehicle indicating the same. Alarm systems company personnel do not set the rates of pay for installers, have any involvement in setting the installer’s hours of work, or supervise the work of individual installers. They do evaluate the quality of the installation services as a whole. Is the alarm systems company a joint employer of the installation employees?

(ii) Application. Under these facts, which implicate the first joint employer scenario, the alarm systems company is not a joint employer of the installation employees because it does not actually exercise sufficient control as to one or more of the factors in the four-factor test. It does not hire or fire the employees, have involvement with their work schedule, determine their rate or method of payment, maintain employment records. Nor does the alarm systems company otherwise exercise control over the employees’ conditions of employment. While it evaluates the quality of the work performed by installers, it does so by reference to the aggregated services provided under the contract, and not by supervising the individual employees’ performance or conditions of employment. The fact that the alarm systems company has certain policies and procedures in place regarding the business-related identification of installers to customers, those measures, designed to ensure customer safety, do not make joint employer status more likely. The alarm systems company’s reserved contractual right to control the employee’s conditions of employment is not relevant to joint employer status.

• Add a new illustrative example 791.2(g)(9) to illustrate facts in which companies establish contract requirements and/or engage in general business practices for legitimate purposes to illustrate application of the principle that these factors do not make joint employer status more or less likely under the FLSA, as set forth in the Department’s proposed regulation at 29 C.F.R. § 791.2(d)(3) and (d)(4).

(9)(i) Example. A retail hardware store contracts with a home repair services company to install cabinetry purchased from the hardware store in the customer’s home. When customers purchased the cabinetry, the hardware store offered the installation services of the home repair company at the point-of-sale as a services
add-on. According to the contractual agreement between the hardware store and the home repair company, the hardware store pays the home repair company a fixed fee to perform the services the customer purchased. The hardware store sets the prices paid by the customer, but the contract determines what the hardware store pays the home repair company. To ensure customer safety, the hardware store requires that any workers employed by the home repair services company who must enter a customer’s home to install cabinets must have satisfied a criminal background check and drug test. For this same reason, the hardware store requires that installers to wear shirts reflecting the hardware store’s logo, carry ID badges indicating they are an outside contractor who performs work for the hardware store, and place removable stickers on their vehicle indicating the same. These requirements are covered in the contract between the hardware store and home repair company. The hardware store is not involved in the home repair company’s pay practices for the workers, does not schedule the installations, does not set the individual workers’ hours of work, does not retain or have access to any of the installers’ payroll records, and does not supervise the workers at the customers’ homes. The hardware store determines whether the home repair company is fulfilling the quality requirements of the companies’ contract through use of customer surveys; it addresses unsatisfactory survey information directly with the home repair services company. Is the hardware store a joint employer of the installation employees?

(ii) Application. Under these facts, which implicate the first joint employer scenario, the hardware store is not a joint employer of the home repair services employees because it does not actually exercise sufficient control as to one or more of the factors in the four-factor test: It does not hire or fire the employees, determine their rate or method of payment, decide their work schedules in any way, or exercise control over other conditions of their employment. While the hardware store does ensure that the work performed by the home repair employees meets the quality requirements established in the contract, it does so by addressing the services with the home repair services company by way of feedback of the services as measured by the contract’s standards, and not by critiquing the work directly with the installers. The requirements related to installers displaying the hardware store’s insignia are established for the purpose of ensuring customer safety; they do not, absent more, amount to control of the terms and conditions of the installers’ work. The hardware store’s reserved contractual right to control the employee’s conditions of employment does not confer joint employer status.

- Modify proposed 791.2(g)(4), (g)(5), (g)(6) and (g)(7) to clarify the proposed illustrative examples for employers and the courts as follows (new language italicized):

  (10)(i) Example. Franchisor A is a global organization representing a hospitality brand with several thousand hotels under franchise agreements. Franchisee B
owns one of these hotels and is a licensee of A’s brand. In addition, A provides B with a sample employment application, a sample employee handbook, and other forms and documents for use in operating the franchise. The licensing agreement is an industry-standard document explaining that B is solely responsible for all day-to-day operations, including hiring and firing of employees, setting the rate and method of pay, maintaining records, and supervising and controlling conditions of employment. Is A a joint employer of B’s employees?

(ii) Application. If they implicate either joint employer scenario, Under these facts, implicate the first scenario because Franchisee B employs the employees to work while Franchisor A (which did not previously employ them) may simultaneously indirectly benefit from such work under the franchise agreement. Under such facts, A is not a joint employer of B’s employees. A does not actually exercise direct or indirect control over B’s employees as to any factor in the four-factor test: It does not hire or fire Franchisee B’s employees, determine their rate or method of payment, decide their work schedules in any way, or maintain their employment records. Providing samples, forms, and documents does not amount to direct or indirect control over B’s employees that would establish joint liability or make it more likely.

(11)(i) Example. A retail company owns and operates a large store. The retail company contracts with a cell phone repair company, allowing the repair company to run its business operations inside the building in an open space near one of the building entrances. As part of the arrangement, the retail company requires the repair company to establish a policy of wearing specific shirts and to provide the shirts to its employees that look substantially similar to the shirts worn by employees of the retail company. Additionally, the contract requires the repair company to institute a code of conduct for its employees stating that the employees must act professionally in their interactions with all customers on the premises. Is the retail company a joint employer of the repair company’s employees?

(ii) Application. If they implicate either joint employer scenario under the Act, Under these facts, implicate the first scenario because the repair company employs its employees to work while the retail company (which did not previously employ them) may simultaneously indirectly benefit from such work, e.g., to the extent that the repair services draw customers, the work generates revenue that helps fund payments to the retail company per the contract, etc. Under such facts, the retail company is not a joint employer of the cell phone repair company’s employees. The retail company’s requirement that the repair company provide specific shirts to its employees and establish a policy that its employees wear those shirts does not, on its own, demonstrate substantial control over the repair company’s employees’ terms and conditions of employment, i.e., does not make joint employer status more likely. Moreover, requiring the repair company to institute a code of conduct or allowing the repair company to operate on its premises does not make joint employer status more
There is no indication that the retail company actually exercises factors in the four-factor test—that it hires or fires the repair company’s employees, controls any other terms and conditions of their employment, determines their rate and method of payment, or maintains their employment records.

**Conclusion**

The proposed rule provides clear, understandable standards that are greatly needed by the regulated business community and courts. They are set forth within an analytical framework that reflects the FLSA’s own text and provisions and Supreme Court precedent, balances the twin Congressional policies declared in the statute’s express language, and organizes and makes sense of the different factors and analyses courts have used to date.

HR Policy appreciates the opportunity to comment on the Wage and Hour Division’s proposed rule on Joint Employer Status Under the Fair Labor Standards Act, and we look forward to working with you in the future. If the Association can be of further assistance, please contact me at 202-315-5575 or mwilson@hrpolicy.org.

Sincerely,

D. Mark Wilson
Vice President, Health & Employment Policy