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By electronic submission: http://www.regulations.gov

Melissa Smith
Director, Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor,
Room S–3502
200 Constitution Avenue NW
Washington, D.C. 20210

RE: RIN 1235-AA26: Notice of Proposed Rulemaking (NPRM): Joint Employer Status Under the Fair Labor Standards Act.

Dear Ms. Smith,

On behalf of the Restaurant Law Center (the "RLC") and its affiliate, the National Restaurant Association ("the Association"), we are pleased to submit these comments to the United States Department of Labor's Wage and Hour Division ("DOL" or "WHD") in response to the Notice of Proposed Rule Making ("NPRM") concerning the regulations addressing Joint Employer Status Under the Fair Labor Standards Act found at 29 CFR Part 791 ("Part 791"). The NPRM was published at 84 Federal Register 14043 on April 9, 2019.

I. INTRODUCTION

A. Interests of the RLC and the Association

The Association was founded in 1919 and is the nation's largest trade association representing and supporting the restaurant and foodservice industry. Its mission is to represent and advocate for industry interests, primarily with national policymakers and in the courts mainly

through the RLC. Members of the restaurant industry, under the leadership of the Association, joined together to form the RLC in 2015 to enhance the restaurant industry's legal advocacy capabilities as well as to provide protection and advancement for the industry. Nationally, the foodservice industry consists of more than one million restaurant and foodservice outlets employing over fourteen million people—about ten percent of the American workforce. Despite being mostly small businesses, the foodservice industry is the nation's second-largest private-sector employer.

Foodservice industry employers face unique legal challenges in the context of joint employment. In particular, many foodservice industry employers have franchising relationships that have long been recognized as falling outside joint employment status, but that recently have come under improper attack. The business services, support and guidance that a foodservice industry franchisor can provide to a franchisee is going to continue to grow and develop as a result of technological advances, and franchisors should not be inhibited in their ability to assist their business partners, strengthen their brands, protect public health, and enhance customer experiences out of fear that this will create joint liability under the FLSA.

In addition, foodservice industry employers contract for a wide range of services that also do not and should not be treated as creating joint employment relationships. These types of outsourced services also continue to develop and expand in the gig economy, and employers in the foodservice industry must be able to embrace these opportunities without facing potential liability as a joint employer under the FLSA.

Accordingly, the RLC and the Association have a significant interest in the development and application of the DOL's joint employer regulations.

B. The RLC and the Association Support a Multi-Factor Balancing Test

The NPRM would eliminate Part 791's vague and unworkable "not completely disassociated" standard for evaluating joint employment in situations where an employee's work for an employer benefits another person. It instead would establish a more reliable standard using a multi-factor 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.

The RLC and the Association agree that a multi-factor balancing test focusing on the actual and direct control over the employee's terms and conditions of employment is appropriate, as it would create greater predictability and uniformity. The RLC and the Association agree that the statutory authority for a determination of joint employer status in this context is the portion of Section 3(d) of the Fair Labor Standards Act ("FLSA") that defines employer to include "any person acting directly or indirectly in the interest of an employer in relation to an employee . . . ." 29 U.S.C. 203(d). As such, the test needs to focus on the economic realities of the alleged joint employer's actions toward the employee within the context of the FLSA.

As is noted in the NPRM, the real question is not whether the alleged joint employer has some level of association with the actual employer, let alone a lack of "disassociation." 84 Fed. Reg. No. 68 at 14044. Rather, the question is whether the alleged joint employer is exercising such a high level of direct control over a specific employee's actual hours and schedule of work, pay rate, pay methodology, and pay practices such that the alleged joint employer should be subject to joint and several liability if the actual employer violates the FLSA's minimum wage and/or overtime requirements.

II. SUMMARY OF COMMENTS

The following points briefly summarize the RLC's and the Association's comments on the NPRM:

1. Rulemaking concerning joint employer status under the FLSA is valuable and necessary. Part 791's existing "not completely disassociated" standard has proven to be unworkable, and the existence of varying tests created by multiple courts has created a lack of uniformity and predictability that needs to be addressed. DOL is to be commended for engaging in this process.
2. The RLC and the Association agree that FLSA Section 3(d) provides the statutory authority for joint employer status, and that a multi-factor balancing test consistent with Section 3(d) is preferable to the not completely disassociated standard.
3. The RLC and the Association agree that a modified *Bonnette* test should be adopted. The RLC and the Association recommend that the fourth factor of the DOL's proposed modified *Bonnette* test be deleted. The RLC and the Association believe that a three-factor test would adequately address the totality of the circumstances such that additional factors would not need to be considered.
4. The RLC and the Association agree that a potential joint employer's business model, contractual agreements, and business practices described in the NPRM do not make joint employer status more or less likely.
5. The RLC and the Association recommend that various clarifications be made when revising the proposed rule and publishing a final rule. These clarifications would include both revisions/additions to the text and to the examples contained in the proposed rule.

Such revisions and additions will provide greater guidance and predictability, both now and in the future.

6. The RLC's and the Association's recommendations are based on the realities of the modern workplace. The RLC's and the Association's comments include various examples of how employers in the foodservice industry operate with respect to franchising relationships and contracting for services. These examples provide context for the RLC's and the Association's recommendations and demonstrate that these recommendations should be incorporated into the final rule.

III. COMMENTS TO THE JOINT EMPLOYER NPRM

A. The RLC and the Association Support the NPRM's Proposal to Adopt a Modified *Bonnette* Test, But With Additional Modifications and Clarifications.

The NPRM proposes using a modified version of the four-factor balancing test articulated in *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983) to evaluate whether a joint employment relationship exists. Pursuant to this modified test, the four factors are whether the alleged joint employer: (1) hires or fires the employee; (2) supervises and controls the employee's work schedules or conditions of employment; (3) determines the employee's rate and method of payment; and (4) maintains the employee's employment records. The four factors identified by the Ninth Circuit initially were the product of the District Court. In agreeing with their use, the Ninth Circuit stated: "In varying combinations, these factors have been considered by other courts for the same purposes." *Bonnette*, 704 F.2d at 1470 (citing *Real v. Driscoll Strawberry Assoc.*, 603 F.2d 748, 756 (9th Cir. 1979); *Hodgson v. Griffin & Brand of McAllen, Inc.*, 471 F.2d 235, 237-38 (5th Cir.), *cert. denied*, 4124 U.S. 819 (1973)); *see also Bonnette v.*

California Health & Welfare Agency, 525 F.Supp. 128, 135 (N.D. Cal. 1981) (identifying the four factors as the most common indicia of an employer-employee relationship under the FLSA).

Although a balancing test can have some weaknesses, such as which factors should be given more or less weight, the RLC and the Association agree that a multi-factor balancing test is appropriate and would provide greater predictability and uniformity. To further this goal, the RLC and the Association recommend that certain modifications be made to the proposed test contained in the NPRM and that additional definitions and/or examples be provided to further clarify how the test should be interpreted and applied.

1. First Factor – Whether the Alleged Joint Employer Hires or Fires the Employee

The first factor, which is whether the alleged joint employer hires or fires the employee, is a modification of the Ninth Circuit's first factor in *Bonnette*, which was whether the alleged joint employer "had the power" to hire and fire the employee. The RLC and the Association agree with this modification, as it is consistent with the requirement of FLSA Section 3(d) that the alleged joint employer must be "acting directly or indirectly in the interest of an employer in relation to an employee." If there is no action by the alleged joint employer, then Section 3(d) does not apply, and there can be no joint employment relationship.

a. <u>Proposed Clarification and/or Example – Collaborative Use of Technology for Job Applicants.</u>

In light of technological developments related to job applications and job postings, the RLC and the Association recommend that the DOL include a clarification and/or example in the final rule stating that the collaborative use of technology to collect and forward job applications, and to post and advertise job openings, has no impact on the first factor and does not make the existence of joint employer status more or less likely.

This clarification is important for foodservice franchisors, as individuals often may access a franchisor's corporate website with the hope of applying for work at a local restaurant. To facilitate this service for franchisees, the franchisor may make its website available as a portal for individuals to apply for jobs with franchisees, and/or it may post information received from franchisees about job openings. In this situation, the franchisor is merely a conduit, and it is the franchisee that makes the hiring decision. In today's society, there are many businesses that provide job posting services, and this does not make them joint employers. The same should be true with respect to franchisors. Although the NPRM states in proposed §791.2(d)(2) that operation as a franchisor does not make joint employer status more or less likely, the NPRM should specifically identify in §791.2(d)(3) that this type of collaborative application arrangement is another example of a practice that does not make joint employer status more or less likely.

b. <u>Proposed Clarification and/or Example - Customer Preferences and Feedback Do Not Constitute Hiring or Firing</u>

The RLC and the Association also recommend that the first factor be clarified to state that customer preferences and feedback do not constitute hiring and firing, and that providing such feedback is not a factor that makes a joint employment relationship more or less likely. For example, a restaurant might contract out for cleaning services. If an individual whom the cleaning service assigns to perform that work does not do a good job, does not show up, is rude to the restaurant's customers, harasses the restaurant's employees or demonstrates other deficiencies, the restaurant must be able to report that to the cleaning service and to ask that someone else be assigned to perform such services. In this context, it is still the cleaning service's decision as to whether to fire the employee or assign him or her to some other account. This situation must be distinguished in the final rule from the example provided in the NPRM's proposed §791.2(g)(4) involving contracting services provided to a country club by a landscaping company. In that

example, a country club official actually supervised and directed the work of the landscaper's employees, and **at the club official's direction**, the landscaping company agreed to **terminate the employment** of an individual worker **for not following the club official's instructions**. This combination of facts is not the same as requesting a contractor to assign someone else to provide the service due to the individual's poor performance, behavior or conduct.

2. Second Factor – Whether the Alleged Joint Employer Supervises and Controls the Employee's Work Schedules or Conditions of Employment

The second factor is whether the alleged joint employer supervises and controls the employee's work schedules or conditions of employment. The RLC and the Association agree that this is a factor that should be included as part of the test, but believes that it can be further clarified.

a. Add a Substantial Frequency Requirement

The RLC and the Association recommend that a substantial frequency requirement be included in the definition and/or examples with respect to the second factor. Preferably, this would be a "day-to-day" frequency requirement. As is noted in the NPRM, the Third Circuit applies a four-factor test that it does not consider to be materially different from the *Bonnette* factors, and includes a requirement that the alleged joint employer "exercises day-to-day supervision, including employee discipline." 84 Fed. Reg. No. 68 at 140049 & nn.68-70 (citing and quoting *In re Enter. Rent-A-Car Wage & Hour Emp't Practices Litig.*, 683 F.3d 462, 469–71 (3d Cir. 2012)).

b. Business Guidance, Assistance and Operational and Safety Requirements and Standards are Not the Same as Supervising or Controlling Work Schedules or Conditions

The RLC and the Association recognize that the NPRM includes various provisions stating that certain types of business models, contractual requirements and business practices do not make joint employer status more or less likely. Consistent with this approach, the RLC and the

Association recommend that a greater emphasis be placed on the fact that joint employer status also is not more or less likely when one looks at a business model, contractual requirements and business practices in tandem, as opposed to in isolation. For example, a franchisor's providing guidance and assistance to a franchisee with respect to labor scheduling, and also requiring that a franchisee meet certain contractual obligations as to a minimum number of managers, does not and should not have any bearing or impact on the second factor.

An expanded discussion of this issue in the franchising context is particularly important because the franchising example provided in the NPRM at proposed §791.2(g)(8) discusses a very limited number of services that a franchisor might provide to a franchisee, and does not reflect the true scope and nature of the franchising relationship in the 21st century. For example, a foodservice franchisor may provide various types of tools and analytics to assist a franchisee in creating work schedules, and franchisees often are encouraged or required to purchase or use the franchisor's "back of the house" system that provides labor scheduling tools.

The franchisee will use this system to schedule hours, but the franchisor does not decide or control <u>who</u> is actually assigned to work those hours. Consistent with the point made in the NPRM, this type of service does not mean that the franchisor is "acting" in the interest of the employee, and therefore is not controlling any specific employee's work schedule. 84 Fed. Reg. No. 68 at 14047 n.48

Similarly, for safety reasons, a franchisor may require that its franchisees always have a certain minimum number of employees on duty at all times. A franchisor also may require that a franchisee employ a minimum number of managers. While these numbers may be required by the franchise agreement, it is still the franchisee that decides who is hired into these positions and that controls the actual day-to-day work schedules and hours of its employees.

To protect their brands, franchisors need to be able to provide guidance and support to franchisees. In the restaurant context, franchisors may require that certain point of sale, inventory management, and other software, products or equipment be used for purposes of brand protection, quality control, effective communication, and operational efficiency. Franchisors also need to be able to require that certain cleanliness, hygiene, safety, certification and training requirements are met. Franchisors may have corporate training facilities where franchisee employees receive such training.

If a franchisee were to hire a consultant to provide training services and send its employees to the consultant's office, this would not transform the consultant into a joint employer. Similarly, the fact that the training may be provided by a franchisor at a facility that is owned or operated by the franchisor does not convert the franchisor into a joint employer.

Likewise, as is referenced in the NPRM, a franchisor may provide a model handbook and/or model employment policies for its franchisees, but it is the franchisee that puts those policies into practice and directs the day-to-day activities of the employees, decides whether and how to discipline the employees for policy violations, and actually carries out the discipline.

Franchisors have the knowledge, experience and skill to help their franchisees run a successful business, and this ability to obtain guidance from a knowledgeable industry resource is obviously one of the attractive aspects for becoming a franchisee. As opposed to making use of a business consultant who may or may not have industry experience or access to precise analytics, a franchisee can rely upon a franchisor to help provide industry and operational guidance and expertise.

Many businesses use trade associations, outside consultants and lawyers to prepare and provide handbooks, policies, and guidance, but that does not transform those trade associations,

outside consultants and lawyers into joint employers. Similarly, the fact that the handbooks, policies and guidance may be provided by a franchisor does not create a joint employment relationship.

Indeed, businesses may contract with outside consultants, accountants, lawyers, software companies and other service providers for a wide range of services to help them operate a financially successful, technologically efficient, and legally compliant workplace with a positive culture and a well-trained workforce. The fact that some or all of these services may be provided by a franchisor does not make the franchisor a joint employer and should not be considered a factor when evaluating joint employer status.

c. Timing Dictated by Business Needs and Requirements for Contractors to Meet Certain Standards Does Not Constitute Control Over Hours and Conditions of Employment

In the context of contracting for services, a foodservice industry employer may set requirements as to when certain services are to be provided. The foodservice industry employer also may require that certain dress code standards be met. For example, if a restaurant contracts for certain services to be performed at the restaurant and specifies that they are to be performed during regular business hours, during peak hours, during non-peak hour, or after-hours, then those specifications are going to dictate when the services are going to be provided, but it is still the contractor who creates the day-to-day work schedules for its employees.

Although the example found in the NPRM at proposed §791.2(g)(3) indicates that this type of scheduling situation would not lead to joint employer status, it should be stated more explicitly. Similarly, if the restaurant requires that the contractor's employees wear clothes that contain the contractor's logo or the restaurant's logo, that also should not influence the joint employer analysis. *See* NPRM at proposed §791.2(g)(3).

The fact that the services provided by the contractor may be similar or complementary to those provided by the alleged joint employer also should make no difference in this analysis, and that should be stated in the final rule. For example, if a restaurant is catering an event but contracts out for another business to provide bartenders for the event, the bartenders' hours are going to be dictated by the event schedule. The restaurant also may require that the bartenders provided by its business partner wear certain clothes and meet certain licensing requirements.

Likewise, many restaurants now contract with virtual marketplace companies (e.g., Uber Eats, Grubhub, DoorDash) to use their technology so that consumers can order and schedule food delivery services. The delivery drivers are classified as independent contractors, and not employees, so there obviously can be no "joint employment" in this context. However, if a restaurant does contract with a delivery service that makes use of its own employees, there still would be no joint employment even though the restaurant's operating hours and location might have some impact on the drivers' working hours and conditions. This should be made clear in the final rule.

3. Third Factor – Whether the Alleged Joint Employer Determines the Employee's Rate and Method of Payment

The third factor is whether the alleged joint employer determines the employee's rate and method of payment. Arguably, this is the most important factor, as it goes to whether the employee is paid correctly under the FLSA and, if not, what the potential liability is for not meeting the FLSA's requirements. However, a distinction again needs to be made between providing guidance and analytics about topics such as labor costs and staffing as compared to actually setting pay rates and creating pay methodologies for specific employees.

As with the model handbook and policies, franchisees should be able to learn from and share in the knowledge, experience and skill franchisors possess with labor costs and pay

methodologies to run a successful business. It is the very reason the franchise model is an attractive and lucrative endeavor and effectively bolsters the national economy. But this sharing of historical information and knowledge does not and should not create a joint employment relationship because it does not dictate the pay rate or method of any specific employee, and franchise owners are at liberty to make their own personnel decisions as it relates to pay.

4. Fourth Factor – Whether the Alleged Joint Employer Maintained Employment Records.

The fourth *Bonnette* factor is whether the alleged joint employer "maintained employment records." 704 F.2d at 1470. Although the Ninth Circuit stated in *Bonnette* that the four factors it listed all were relevant to the particular situation in that case, it did not explain what it considered to be "employment records," what it meant when it used the word "maintained," or why the maintenance of such records actually was relevant. There was no actual analysis related to the fourth factor by the Ninth Circuit, but rather merely a statement that it was undisputed that the defendants in that case maintained employment records.

a. <u>The Fourth Factor Should be Deleted</u>

The RLC and the Association respectfully request that the DOL delete the fourth factor as part of its balancing test or that it clarify exactly what the phrase "maintained employment records" means and how maintaining such records would actually have relevance to the economic realities of the employment relationship for joint employment purposes.

One of the purposes of the rulemaking process is to update rules to make them relevant and applicable to the current workplace, as well as with an eye toward the future. When *Bonnette* was decided more than 35 years ago, secretaries still used typewriters and carbon paper to prepare documents and duplicates, hourly workers still recorded their time using punch cards, and there was no such thing as the Americans with Disabilities Act or the Family & Medical Leave Act.

There was no World Wide Web or gig economy, and the major battle in consumer technology was between Betamax and VHS.

This was long before the widespread use of the internet, e-mail, instant messaging, texting, electronic recordkeeping, cloud storage, automated form creation, payroll outsourcing, benefits outsourcing, HR outsourcing, FMLA outsourcing, Employee Assistance Programs, data analytics, artificial intelligence and a wide range of other technological and business developments that have resulted in multiple people and entities having access to and control over huge amounts of information that may have some relationship to an individual's or a group's work activities, hours, pay, benefits, training and performance.

Furthermore, the Ninth Circuit cited only two cases in *Bonnette* for the proposition that the four factors it referenced had been considered by other courts in varying combinations when evaluating joint employer status – neither of which support the need for this factor in determining joint employment.

The first case, *Real v. Driscoll Strawberry Assoc.*, 603 F.2d 748, 756 (9th Cir. 1979), did not discuss maintenance of employment records as a factor. The other case, *Hodgson v. Griffin & Brand of McAllen, Inc.*, 471 F.2d 235, 237-38 (5th Cir.), *cert. denied*, 4124 U.S. 819 (1973), did discuss employment records, but its analysis really focused on the actions of the alleged joint employer that were reflected in those specific records.

Hodgson is a 1973 case from the Fifth Circuit involving a fruit and vegetable company that made use of crew leaders who engaged field workers. The Fifth Circuit found that the company was a joint employer of the field workers with the crew leaders. The company paid the crew leader, and the crew leader then was to pay the field workers. However, the company kept social security records for the field workers and made the social security computations necessary for

social security payments to be paid to the government. The company made those social security payments to the government, and the check paying the social security to the IRS was drawn on a check from the company.

In finding joint employment, the Fifth Circuit identified several facts that now fall under the second and third *Bonnette* factors supporting joint employment. In addition to the work being performed on the company's premises, the company set the work hours for the field workers.

Moreover, company employees actually supervised the field workers and merely communicated their directions through the crew leaders, the company set the rate of pay, and the company decided whether crew leaders would pay the field workers an hourly rate or a piece rate for various types of work. The Fifth Circuit said that these facts and the fact that the company "handled the social security contributions for the harvest workers" all "tend to indicate an employment relationship."

Consistent with the above holding, the existence of certain employment-related documents may provide evidence in support of one or more of the *Bonnette* factors, but the physical maintenance, possession of, or control over, such records really has no relevance in the modern workplace. Even if it might have had some relevance back in 1983 when *Bonnette* was decided or in 1973 when *Hodgson* was decided, it no longer is relevant when one considers all of the types of outsourcing and payroll processing arrangements that now exist and all of the different types of materials that potentially could fall within the meaning of the undefined phrase "employment records."

As a result of the above, the RLC and the Association do not see any true value in having the maintenance of employment records as a factor, and we anticipate that any potential relevance it might have is only going to erode further as technology continues to change and evolve.

b. <u>If the Fourth Factor Is Going to Continue to Reference Records, Then It Must Be Rewritten and Defined Narrowly.</u>

If the fourth factor is retained, the DOL must define both the <u>use</u> and the <u>specific records,</u> or at least the specific types of records, being referenced in a narrow manner and consistent with the evolution of modern technology, modern business practices and the statements made in the NPRM at proposed §§791.2(d)(2)-(4). Otherwise, creative plaintiffs' lawyers will attempt to use the fourth factor as an end run to frustrate the purpose of the rule.

For example, a franchising relationship may provide the franchisors with access to information showing the number of hours that a franchisee's employees worked. Regardless of the form it takes, this information could constitute employment records within the meaning of 29 CFR Part 516, but this does not show any level of control by the franchisor over the specific hours assigned to a specific employee. As is stated in the NPRM at proposed §791.2(d)(3), a proposed joint employer may require a wage floor, may require sexual harassment and other training, and may establish workplace safety practices without making joint employer status more or less likely.

For these types of requirements to be meaningful, and for compliance to be monitored and audited, the training and other records documenting them need to be available to the franchisor or other business partner entering into this type of contractual arrangement. If these records are deemed to be employment records under the fourth factor, and the mere possession of these records is enough to show that they were "maintained" by the alleged joint employer, then proposed §791.2(d)(3) will become meaningless.

Even limiting the employment records to "payroll records" is not going to provide an adequate solution. Many employers outsource payroll processing to third parties, which means that those third parties have payroll records for people who clearly are not the processors' employees. Some franchisors also will process payroll as a service for franchisees, and the analysis

should be no different merely because of the franchising relationship. *See* NPRM at proposed §791.2(d)(2).

For these reasons, the RLC and the Association respectfully request that the fourth factor be dropped, or that it be rewritten so that it only addresses whether the alleged joint employer made social security contributions, or if the term "records" must be included, that the fourth factor be rewritten to address whether the alleged joint employer "created and used records showing that the alleged joint employer made social security contributions and withheld federal and state employment taxes from any payments it made directly to the employee or to the employee's employer."

5. The Proposal's Use of Additional Factors in Determining a Joint Employer Relationship Needs to be Narrowly Construed to Prevent the Liberal Application of the Terms "Significant Control" and "Acting Directly or Indirectly."

In the NPRM, the DOL proposes to further explain that additional factors may be used to determine joint employer status, but only if the they are indicative of whether the potential joint employer is (1) exercising significant control over the terms and conditions of the employee's work; or (2) otherwise acting directly or indirectly in the interest of the employer in relation to the employee. *See* NPRM at proposed §791.2(b).

a. No Other Factors Should be Considered

The NPRM is commendable because it limits the number of factors, increases predictability, and encourages innovation. However, by adding in the potential for more factors, especially ones that are based on broadly worded descriptions, predictability goes down and innovation is deterred. The RLC and the Association believe that the proposed four-factor test (or three-factor test if the fourth factor is dropped) adequately addresses the totality of the circumstances, and the RLC and the Association would recommend that no broad catch-alls be

added. The RLC and the Association are concerned that having an "additional factors" aspect to the balancing test has the potential to open the floodgates, particularly because the terms "significant control" and "acting directly or indirectly" could be broadly construed.

b. If Other Factors are Considered, More Examples, Explanations and Limitations are Needed.

To the extent additional factors are considered, they should be applied with caution, and it is crucial that the DOL identify in greater detail examples of business practices that should not be given any weight as part of the balancing test. In the foodservice industry, for example, franchisors may perform operational and food safety audits to ensure public health, customer satisfaction and a strong brand image.

If a restaurant fails a food safety audit, the terms of the franchising agreement may require that the franchisee's employees be retrained on food safety. This type of retraining provides an important public service, and franchisors should be able to maintain this type of requirement without being accused of "exercising significant control over the terms and conditions of the employee's work."

Franchisors also may retain the right to revoke a franchise agreement or close a franchisee's restaurant for a variety of reasons, such as if the franchisee is unable to maintain satisfactory safety and operational standards. If a restaurant closes or a franchise is revoked, then that obviously has a potential impact on the continued employment of the people who worked at that restaurant or for that franchisee. However, this is not a factor that should be considered as part of the balancing test.

In summary, foodservice industry franchisors need to be able to communicate freely with franchisees regarding their operations without the risk of joint employer liability. In this context,

the franchisor does not directly manage or direct the work of specific employees, nor does it control the terms of employment of specific employees.

6. Meaning of Economic Dependence and Clarification of Same

The DOL proposes to clarify that joint employer status is determined by the actions of the potential joint employer, not by the employee's economic dependence. Thus it is not relevant whether the employee: (1) Is in a specialty job or a job that otherwise requires special skill, initiative, judgment, or foresight; (2) has the opportunity for profit or loss based on his or her managerial skill; and (3) invests in equipment or materials required for work or the employment of helpers. *See* NPRM at §791.2(c)

The RLC and the Association agree with this clarification. The RLC and the Association would add that any purported economic dependence of a franchisee on the franchisor also is not relevant to the analysis and requests that this be expressly stated in the final rule.

7. Business Models Should Not Influence the Status of Whether a Business Is a Joint Employer.

There are many different types of franchising arrangements in the food service industry, and these arrangements should not be considered as factors that support a finding of joint employment. Although this issue is addressed to some extent by the statements contained in proposed §§791.2((d)(2)-(4), more specifics are needed for purposes of clarity.

For example, some franchisors will lease land, buildings, equipment or other property to franchisees. Thus, the premises where the work is performed or the equipment that is used to perform the work technically may be owned by the franchisor. This is not a factor that should influence joint employment status.

Other types of financial arrangements between a franchisor and a franchisee also are not relevant to the analysis, and it is important that the DOL addresses this directly in the final rule.

For example, some franchising and lease arrangements may only run for a year, whereas others may have multi-year terms. The anticipated or actual length of the franchisor-franchisee relationship is not a factor that should be considered. While some franchisees may pay a franchising fee, other models also exist, including profit sharing models. The fact that a franchisor, just like any other investor, might benefit from a profitable investment, should have no bearing on joint employer status, and the DOL should expressly state in the final rule that a profit-sharing arrangement between a franchisee and a franchisor is not a factor.

The fact that a franchisor may handle a franchisee's payroll as a back-of-the-house service or may set up accounts on behalf of the franchisee to process bills or payroll also should not be considered relevant factors.

8. <u>The Recent NLRB NPRM Proposal on the Joint Employer Relationship Provides a Reference Point to Ensure Uniformity for Employers and Employees.</u>

Businesses confront an ever-expanding nebula of different and often dissimilar or even contradictory obligations imposed by the federal government, states, and local governing bodies. The burden posed on businesses to understand and comply with this inconsistent patchwork of labor laws is onerous for both small employers, which generally have limited resources, and larger businesses that operate in multiple states. To the extent that federal labor laws can be harmonized, the resulting benefits would broadly enhance business efficiency and opportunity. Improved efficiency and greater opportunity, in turn, benefits everyone from the individual worker to the macro-level of our national economy.

Certainly, federal labor laws exist to serve different purposes, but the Supreme Court has emphasized that agencies must be cognizant of the broad regulatory scheme that Congress has created with a patchwork of various laws, rather than narrowly focusing on the particular statutes

that Congress has entrusted to the Court to interpret and enforce. For example, in admonishing the National Labor Relations Board ("NLRB"), the Supreme Court held that the NLRB fails to fulfill its obligations under the National Labor Relations Act ("NLRA") when it does not consider the important policies of other statutory schemes Congress has created. *S. Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942). Agencies responsible for interpreting and enforcing federal labor laws must do more than pay those interests passing homage; they should balance and harmonize them as the Court opined:

> It is sufficient for this case to observe that the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.

Id.

Although the FLSA and the NLRA, 29 U.S.C. § 151, are distinct statutes, the NPRM, in its terms and policy, serves the important purpose the Supreme Court identified by interpreting the FLSA as part of the federal labor policy Congress has adopted. The NPRM would apply a standard for joint employer determinations that would be similar to that proposed by the NLRB under the NLRA ("NLRB's joint employer rule"). Indeed, the NPRM notes the extensive legislative activities regarding how various federal agencies define joint employment, as well as the NLRB's joint employer rule, recognizing the importance of "promot[ing] certainty" that can be consistent across the landscape of federal labor law.

The NPRM also functions, like the NLRB's joint employer rule, to limit the recent overreach of various federal agencies in their attempts to expand employer obligations beyond the widely understood and historical meaning of what it takes to be an employer of any particular

employee. In particular, the NLRB's joint employer rule would return the board to the "direct and immediate control" standard that had been settled law for determining joint employer status for 30 years. That standard is, in essence, the same as the NPRM's modification of *Bonnette*'s first factor – which likewise would require a putative joint employer to have actually acted like an employer by hiring or firing the individual employee, rather than merely retaining the theoretical "power" to do so.

Like the NLRB's joint employer rule, the NPRM also provides examples that address different individual situations and various types of common business arrangements. Further demonstrating the DOL's intent to correlate its approach with that of the NRLB, several of the NPRM's examples are notably similar to those in the NLRB's joint employer rule. In particular, both NPRMs provide examples to demonstrate that franchisors (generally) would not be joint employers of their franchisees' employees provided they operate – as most do – without controlling "essential matters of employment," such as making decisions regarding the hiring, discipline, firing and compensation of the franchisees' employees.

Due to the varied tests utilized by the circuit courts, and the NLRB's abrupt departure from 30 years of precedent, employers are required to manage their businesses utilizing multiple standards for what Congress intended by a single concept – what makes one business the joint employer of another company's employees. With the revisions requested by the RLC and the Association, the NPRM and the NLRB Proposed Rule together would provide the business community with a single, clear standard. In doing so, both agencies would be faithful to the statutes Congress has entrusted them to interpret and enforce, while also fulfilling the Supreme Court's directive to apply those statutes in the context of the broad landscape of federal labor policy.

IV. CONCLUSION

We thank you for the opportunity to submit these comments and look forward to working with the DOL moving forward to bring clarity to this issue that affects so many business relationships in our industry.

Sincerely,

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