April 12, 2021

Ms. Amy DeBisschop
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

By electronic submission: www.regulations.gov

RE: Regulatory Information Number (RIN) 1235-AA37; Rescission of Joint Employer Status under the Fair Labor Standards Act; 86 Fed. Reg. 14038 (March 12, 2021)

Dear Ms. DeBisschop:

On behalf of the National Restaurant Association (Association) and the Restaurant Law Center (RLC), we are pleased to submit these comments in response to the United States Department of Labor's Wage and Hour Division (DOL or WHD)'s notice of proposed rulemaking proposing to rescind the regulations established by the final rule entitled "Joint Employer Status Under the Fair Labor Standards Act" that went into effect on March 16, 2020.

The Association and the RLC enthusiastically supported the final regulation, which provides a much-needed update and balanced approach to joint employment status under the Fair Labor Standards Act (FLSA) that reflects the realities of the modern workplace. Accordingly, we oppose the DOL's effort to rescind the regulation.

Founded in 1919, the Association is the largest trade association representing the restaurant and foodservice industry in the world. The industry is comprised of over one million restaurants and other foodservice outlets employing approximately 10 percent of the U.S. workforce. Its mission is to represent and advocate for industry interests, primarily with national policymakers and in the courts mainly through RLC. Members of the restaurant industry, under the leadership of the Association, joined together to form RLC in 2015 to enhance the restaurant industry's legal advocacy capabilities as well as to provide protection and advancement for the industry. Restaurants are job creators and the nation's second-largest private sector employer. Despite the size of the industry, small businesses dominate the sector, and even larger chains are often collections of smaller franchised businesses. For the benefit of all of its members, the Association supports rulemakings that are clear and provide certainty for businesses of all sizes.

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. Business models should not influence the status of whether a business is a joint employer. 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 Association and the RLC have a significant interest in the development and application of the DOL's joint employer regulations under the FLSA and other statues.

Foremost, the previous "not completely disassociated" standard for evaluating joint employment in situations where an employee's work for their employer benefits a second employer was vague, confusing, and difficult to administer with any clarity or consistency. That standard also proved to be unworkable given the existence of varying tests created by multiple courts that created a lack of uniformity and predictability for employers and employees.

The final joint employer status rule created a more appropriate and 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. Because this test focuses on the actual and direct control over the employee's terms and conditions of employment, there is greater predictability and uniformity in the joint employment analysis. Appropriately, the test should be based on the alleged joint employer's actions, and not whether the alleged joint employer has some level of association with the actual employer, let alone a lack of "disassociation."

Moreover, as a legal matter, there is a compelling basis for the Department to suspend its effort to rescind the joint employer rule at this time. The Department's proposed rescission is based largely on the fact that key provisions of the joint employer rule were vacated by a ruling of the U.S. District Court for the Southern District of New York in September 2020. That ruling is presently on appeal to the U.S. Court of Appeals for the Second Circuit. On April 8, 2021, the Second Circuit denied the Department's request to hold the appeal in abeyance, rejecting its argument that the proposed rescission of the rule justified delay of the appeal. As a practical matter, this means that if, on appeal, the Second Circuit determines that the lower's court's decision was incorrect (*i.e.*, finding the final joint employer rule was lawfully promulgated under the Administrative Procedures Act), the factual predicate for the Department's proposed rescission will be null and void. Given that the outcome of this appeal bears directly on the legal and factual bases for the proposed rescission, the Department should withdraw its effort to rescind the rule at this time, pending resolution of the appeal.

Lastly, it is important to highlight the fact that the restaurant industry has been uniquely hurt by the pandemic. No industry has lost more jobs or more revenue. As the nation's second-largest private sector employer, that should be alarming. Our analysis shows that in the first 12 months of the pandemic, restaurant and foodservice sales are down $270 billion from expected levels. Restaurants are still down 2 million jobs (or 16%) below its pre-coronavirus level. Approximately 17% of restaurants (which is about 110,000 restaurants) is closed permanently or long-term. The vast majority of permanently closed restaurants were well-established businesses, and fixtures in their communities, many of which had been open for at least 30 years.

As the industry attempts an economic recovery from the pandemic, it is critically important that restaurant employers and employees have workplace policies that provide clear guidelines, certainty, and predictability to achieve regulatory and legal compliance obligations. Notwithstanding the impacts of the pandemic, businesses already 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 changing regulations 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 law can be harmonized, consistent and predictable, the resulting benefits will broadly enhance business efficiency, opportunity, and allow businesses to emerge successfully from the pandemic. Improved efficiency and greater opportunity, in turn, benefits everyone from the individual worker to the macro-level of our national economy.

For these reasons stated above, the Association and RLC ask the DOL to withdraw the notice and leave in place the joint employer status rule.

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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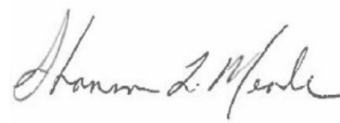

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