Texas Public Policy Foundation

April 12, 2021

Via https://www.regulations.gov/
Division of Regulations, Legislation, and Interpretation,
Wage and Hour Division,
U.S. Department of Labor,
200 Constitution Avenue, NW, Room S-3502
Washington, DC 20210

RE: Regulatory Information Number (RIN) 1235-AA37; Comments on 86 FR 14038, Joint Employer Status Under the Fair Labor Standards Act; Rescission

Ladies and Gentlemen,

In connection with the Notice of Proposed Rulemaking ("NPR") for the referenced RIN number, we submit these comments.

The rule titled "Joint Employer Status Under the Fair Labor Standards Act" ("Joint Employment Rule" or the "Rule") provided much needed clarity for employers, while the Department of Labor's Wage and Hour Division ("WHD") has failed to properly justify the proposed withdrawal – an action which is unsupported by the record.

The Withdrawal of the Joint Employment Rule Will Create Uncertainty and Harm Employers

Rescinding the Joint Employment Rule will put employers back in a position of regulatory uncertainty. The text of the Fair Labor Standards Act ("FLSA" or the "Act") does not provide a framework for determining joint employer status. This is why the CFR has contained regulations on the subject since 1958. *See* 23 FR 5905 (Aug. 5, 1958). *See New York v. Scalia*, 2020 U.S. Dist. LEXIS 163498 *91 ("The Court is sympathetic to the Department's concern that putative joint employers face uncertainty, and that this uncertainty is costly.").

Employers widely supported the adoption of the Joint Employment Rule and its proposed four-factor balancing test to analyze vertical joint employment, agreeing that it would provide necessary uniformity, clarity, and certainty. *See* 85 FR 2820, 2829 (January 16, 2020). For instance, the HR Policy Association commented on the lack of clarity in the status quo prior to the Rule's adoption, asserting that "ambiguity in the existing regulation has resulted in a 'maze of tests' that produce different judicial outcomes in cases with similar facts, creating "substantial

uncertainty for employers with national operations." *Id.* at 2824; *See also* Center for Workforce Compliance ("CWC supports the four factor balancing test that WHD has proposed[.]"). *Id.* at 2829.

A return to the status quo would mean a return to the "widely divergent tests for joint employer liability in different circuits is currently in practice." *Scalia*, 2020 LEXIS 163498, *91. Out of the 12 geographical judicial circuits in the United States, there are almost as many differing tests for vertical joint employment. 85 FR at 2823.

In 1983, the Ninth Circuit issued a seminal joint employer decision. *See Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983). In determining whether the counties were jointly liable for the home care workers under section 3(d) of the FLSA, the 9th Circuit found four factors to be relevant: "whether the alleged [joint] employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records." *Id.* at 1470.

The court noted that these four factors "are not etched in stone and will not be blindly applied" and that the determination of joint employer status depends on the circumstances of the whole activity. *Id.* The court concluded that the counties "exercised considerable control" and "had complete economic control" over "the nature and structure of the employment relationship" between the recipients and home care workers, and were therefore "employers" under section 3(d), jointly and severally liable with the recipients to the home care workers. *Id.*

Since the decision in *Bonnette*, the differing circuit courts have generated their own approaches to determining joint employment liability. *See, e.g, Salinas v. Commercial Interiors, Inc*., (4th Cir., 2017) (three factors of its six-factor test are similar to *Bonnette* factors; *Layton v. DHL Exp. (USA), Inc*., 686 F.3d 1172, 1176 (11th Cir. 2012) (more than half of the factors in its eight-factor test are similar to *Bonnette* factors); *Torres-Lopez v. May*, 111 F.3d 633, 639-41 (9th Cir. 1997) (court applied factors similar to the Bonnette factors but also added eight additional factors for consideration); *Zheng v. Liberty Apparel Co. Inc*., 355 F.3d 61, 71 (2d Cir. 2003) (acknowledging that the *Bonnette* factors can be sufficient to establish joint employer status, although a six-factor test with one factor resembling one of the *Bonnette* factors applies if the *Bonnette* factors do not establish joint employer status); *In re Enter. Rent-A-Car Wage & Hour Empl. Practices Litig*., 683 F.3d 462, 469, (3rd Cir., 2012) (modifying the *Bonnette* factors).

The Joint Employer Rule sought to synthesize and rationalize on a national basis these disparate judicial approaches in order to clarify the applicable standards for both employers and employees no matter where they may be geographically located. Rescinding the Rule will revert to the chaos among the circuits before the Rule was promulgated, leaving numerous employers and employees unclear about what potential joint employment status and liability they face. *See* 29 C.F.R. § 791.2(d)(2)-(5). Prior to the Rule, part 791 was silent on whether a business model can make joint employer status more or less likely. 85 FR at 2823. The Joint Employment Rule codified WHD's longstanding position that certain business models—such as the franchise model—do not themselves indicate joint employer status under the FLSA. The Rule rendered

irrelevant to the joint employer inquiry "certain business models (such as a franchise model), certain business practices (such as allowing the operation of a store on one's premises), and certain contractual agreements (such as requiring a party in a contract to institute sexual harassment policies)[.]" *Id.* at 2823. This provided franchises and other specific business models with a level of clarity that did not exist prior to the Rule. *Id; see also* 29 C.F.R. § 791.2(d)(2)-(5). WHD's proposed rescission would remove that clarity.

Most employers also applauded the Rule's exclusion of economic dependence from the joint employer analysis. *See*, *e.g.*, American Bakers Association (factors that are used to determine whether a worker is an employee or an independent contractor "certainly are less relevant in a setting in which the worker has an acknowledged relationship with an employing entity"); Associated Builders and Contractors ("'economic dependence' on the potential joint employer should not determine the potential joint employer's liability"); International Franchise Association ("strongly agree[ing] with the Department's rejection of [a standard] stating or implying that anyone who is 'economically dependent' on another employer somehow becomes that employer's employee). 85 FR at 2837.

WHD's rescission of the Rule will also harm the construction industry. When WHD announced that it would rescind the Rule, there was immediate objection. Ben Brubeck, VP of Associated Builders and Contractors, called the actions "disappointing," because the Trump Rule had "promote[d] economic growth in the construction industry by providing greater clarity and removing unnecessary burdens on construction industry employers."[1]

Similarly, Brian Turmail, spokesman for the Associated General Contractors of America, bemoaned the lack of clarity and consistency, stating that the rescission added "an unknown period of uncertainty" as the guidance is changed "for the third time in less than a decade."[2]

Thus, the decision to rescind the Rule will result in less clarity for employers attempting to analyze their joint employment liability, and more confusion and greater administrative and litigations costs, borne heaviest by small businesses. The rescission will also result in more employers being deemed to be joint employers, raising operating expenses for those employers.

WHD Has Failed to Make Findings that Support Rescission

WHD's proposed rescission is deficient because WHD has failed to make findings that adequately support its proposed course of action.

The propriety of agency action is judged solely by the grounds invoked by the agency. That basis "must be set forth with such clarity as to be understandable". *SEC v. Chenery Corp*., 332 U.S. 194, 196 (1947).

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[1] Ichniowksi, Tom, "Labor Dept. Seeks to Cancel Two Trump Administration Rules," March 11, 2021, *ENR,* available at https://www.enr.com/articles/51399-labor-dept-seeks-to-cancel-two-trump-administration-rules, (last accessed April 7, 2021).

[2] *Id.*

Agencies may change their existing policies provided they articulate a "reasoned explanation for the change," and they must show their work. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016). An agency must explain how "the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes [the new policy is] better" and why it is better. *F.C.C. v. Fox Television Stations, Inc*., 556 U.S. 502, 515 (2009).

Here, WHD has not shown its work based on specific findings leading to a reasoned conclusion supporting the proposed change. Nor has it affirmatively stated or even implied that withdrawing the Rule is actually better for employers or employees. As such, it has failed to comply with the requirements of the Administrative Procedures Act ("APA") because WHD's findings do not support the action taken. *See Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife Service*, *BLM*, 273 F. 3d 1229, 1236 (9th Cir. 2001) (observing that APA requires agencies to "articulate[] a rational connection between the facts found and the choice made").

WHD premises its rescission of the Joint Employer Rule on 3 primary bases: (A) the Rule's test and analysis for vertical joint employment may be inconsistent with the FLSA and differs from federal court precedent; (B) the Rule was different than WHD's prior analysis and enforcement approach; and (C) the effect the Rule's vertical joint employment analysis may have on employees, particularly females and people of color. 86 FR 14038, 14042-14045.

A. WHD Makes no Actual Findings that the Rule is Inconsistent with the FLSA

The first reason WHD proffers for rescinding the Joint Employment Rule is that the analysis and test for vertical joint employment set forth in the Rule allegedly differs from the analyses and tests applied by courts that have considered joint employer questions prior to the Rule's issuance, as well as WHD's previous enforcement approach. 86 FR 14038, 14042. WHD offers two different points to support its contention that the Rule's vertical joint employment test is novel and potentially unlawful. First, WHD asserts that the Rule's focus on the text of section 3(d) alone to determine joint employment is too narrow and the use of 3(d) to the exclusion of 3(g) "may not be faithful to the Act's definitions or Congress' intent" in enacting them. Second, a control-focused analysis is unduly narrow, and contrary to the predominant "totality-of-the-circumstances economic realities approach" utilized by federal courts. *Id.*

The first point relies on speculation by positing that the Rule "may not" align with the FLSA. "[T]the Rule's use of 3(d) to the exclusion of 3(g) *may not* be faithful to the Act's definitions or Congress' intent in enacting them." *Id.* at 14043. The Department of Labor ("DOL") thus proposes to take final action to rescind the Rule based on an inquiry that it makes no attempt to resolve. Such unjustified action is not permitted. WHD must make "a rational connection between the facts found and the choice made." *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2383-84 (2020) (cleaned up). This requires that DOL make findings of fact rather than engage in speculation. *Id.*

WHD then illogically reasons that it needs to rescind the Joint Employer Rule in order to "consider" if the Rule is statutorily accurate:

> WHD believes that *further consideration is needed* in order to ensure that its joint employment analysis is grounded in all relevant statutory definitions, and *it tentatively questions* whether the Rule's approach falls short of doing so in a supportable way." A textual analysis based only on section 3(d) *may* ignore the Act's other relevant statutory definitions and *may* needlessly bifurcate the analysis.

86 FR 14038, 14043 (emphasis added). A purported need for "further consideration" does not justify rescission. This is especially true here, where an exhaustive legal analysis was already performed within the past two years when the rule was implemented and a federal district court also performed its own analysis on the rule. 85 CFR 2820; *New York v. Scalia*, 2020 U.S. Dist. LEXIS 163498. WHD has the process backwards. It should consider the issue first, and then take action. Instead, it takes final action in order to later consider whether that final action is actually appropriate.

WHD notes that the Rule sets forth a basis for vertical joint employment that applies a different analytical framework to different employers (i.e., "substantial control" for "joint employers" vs. "economic realities" for "employers"), and that this approach differs from those used by certain courts. 86 FR at 14043. The problem with this reasoning is that circuit court decisions on this issue are "widely divergent." *New York v. Scalia*, 2020 U.S. Dist. LEXIS 163498, *91. The Joint Employer Rule rationalizes and clarifies the national confusion stemming from that divergence, while the proposed withdrawal offers no explanation for why the Rule fails to achieve that laudable goal. Accordingly, the facts found do not support the decision taken here. *See Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife Service,* 273 F. 3d at 1236.

B. A New Approach Does Not Justify Rescinding the Rule

The second reason proffered for rescinding the Rule is that "WHD ha[s] never before applied the Rule's analysis." 86 FR 14038, 14044. WHD states that upon further review, it does not believe that the Rule "take[s] into account and explain[s] departures from WHD's prior joint employment guidance." *Id.*

It is arbitrary for WHD to point to "inconsistencies" between the old agency guidance and the new agency guidance and assert that those inconsistencies, by themselves, justify rescission. Otherwise, an agency would never be able to offer new or updated regulatory guidance. In this case, WHD did not promulgate a rule providing guidance on the issue of joint employment liability until 1958. *See* 23 FR 5905 (Aug. 5, 1958); 29 CFR 791.2(a) (1958). That rule was novel at the time. Why then does the novel nature of the Joint Employment Rule justify rescission? A change from a prior policy or interpretation is not, of itself, a permissible reason for rescinding the change. *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) ("Agencies are free to change their existing policies as long as they provide a *reasoned explanation* for the change.") (emphasis added); *see also F.C.C. v. Fox Television Stations, Inc*., 556 U.S. 502, 515 (2009); *FORMULA v. Heckler*, 779 F.2d 743 (D.C. Cir. 1985).

WHD concludes its second major reason for rescission: "[h]aving initially considered the Joint Employer Rule in comparison to prior and existing guidance, WHD *tentatively* shares the concern that the Rule did not adequately account for inconsistencies with its previous guidance." 86 FR at 14044 (emphasis added). WHD needs to make up its mind whether it is either concerned that the Rule does not account for inconsistencies, or it is not concerned. It is impermissible for WHD to withdraw the Joint Employer Rule based on WHD's "tentative" concern. *See, e.g., Sorenson Communications, Inc. v. FCC*, 755 F.3d 702, 708-09, 410 U.S. App. D.C. 278 (D.C. Cir. 2014) (agency action based on speculation rather than evidence is arbitrary and capricious).

C. WHD Rescinds the Rule Because of Potential Effect on Workers, Yet Makes No Specific Findings on the Rule's Effect on Workers

WHD expresses concern for the effect the Rule's vertical joint employment analysis may have on employees. 86 FR 14038, 14045. Citing the fact that the Rule acknowledged that it may reduce the number of businesses currently found to be joint employers, "WHD *tentatively* shares the concern that the Joint Employer Rule *may not* have adequately considered the costs for employees." 86 FR at 14045 (emphasis added). This is yet another example of the type of speculation that sits at the heart of the proposed rule rescission. Rather than a "reasoned explanation,"[3] WHD offers a "*tentative concern*" that the Rule "*may not*" have adequately considered the costs to employees. *Compare id. with Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2125 (2016); Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 863-64 (1984)).* Such an evasive reason fails to satisfy WHD's requirement to provide a justification that offers "clarity" and "understand[ing]." *See SEC v. Chenery Corp*., 332 U.S. 194, 196, 91 L. Ed. 1995, 67 S. Ct. 1575 (1947) (basis for agency actions must "be set forth with such clarity as to be understandable.").

In its rescission proposal, WHD referenced the Economic Policy Institute's (EPI) analysis of the alleged monetary amount that would transfer from employees to employers as a result of the Rule. 86 FR 14038, 14045. However, WHD did not affirmatively adopt that analysis, nor even express an opinion as to its accuracy. *See id.* Rather, WHD merely noted that it had previously responded to EPI's comments by stating that it "[did] not believe there are data to accurately quantify the impact of this [R]ule." *Id.*, *citing* 85 FR 2831, 2853.

WHD further speculates about the possibility that the Rule *could* impact workers: "[a]s noted in the economic analysis, this rescission *could* impact the well-being and economic security of workers in low-wage industries, many of whom are immigrants and people of color, because FLSA violations are more severe and widespread in low-wage labor markets." 86 FR 14038, 14045-14046 (emphasis added). But an agency "must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made. This requirement allows courts to assess whether the agency has promulgated an arbitrary and capricious rule by 'entirely failing to consider an important aspect of the problem

[3] *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837, 863-64 (1984)).

or offering an explanation for its decision that runs counter to the evidence before it.'" *Little Sisters of the Poor*, 140 S. Ct. at 2383-84 (2020) (cleaned up).

Here, not only has WHD failed to offer a "rational connection" between the facts found and the choice made, it has arguably failed to make any findings of fact. WHD does not make an affirmative statement that it finds EPI's analysis credible, or even contest the validity of *its own* prior conclusion that it is not possible to accurately perform the analysis offered by EPI. 86 FR at14045, *citing* 85 FR at 2853. Rather, it speculates that the Rule "could" impact the economic security of workers. Once again, WHD fails to offer any assertion to justify its decision to rescind the rule. WHD concludes its deficient record on the hypothetical impact of the Rule by "*question[ing]* whether a rule that *may* result in employees being employed by fewer employers, effectuates the FLSA's purpose to provide broad coverage to employees. 86 FR at 14045 (emphasis added). Posing questions is not tantamount to providing a reasoned explanation for a change in policy. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. at 2125.

Respectfully submitted,

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