June 25, 2019

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

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

Re: Proposed Rulemaking Regarding Joint Employer Status Under the Fair Labor Standards Act (84 Fed. Reg. 14043; RIN: 1235-AA26)

Dear Ms. Smith:

The American Hotel & Lodging Association ("AHLA") submits these comments in response to the above-referenced Notice of Proposed Rulemaking ("Proposed Rule") published in the Federal Register on April 9, 2019.[1] AHLA has also joined and fully supports the comments submitted by the Coalition for a Democratic Workplace (CDW) and urges the Department to adopt the Proposed Rule along with the clarifying modifications proposed by CDW. AHLA submits these additional comments to emphasize concerns specific to the hospitality industry.

Serving the hospitality industry for more than a century, AHLA is the sole national association representing all segments of the U.S. lodging industry, including hotel owners, real estate investment trusts (REITs), chains, franchisees, management companies, independent properties, bed & breakfasts, state hotel associations, and industry suppliers. Headquartered in Washington, D.C., AHLA focuses on strategic advocacy, communications support, and workforce development programs for an industry that advances long-term career opportunities for employees, invests in local communities across the country, and hosts more than one billion guests in American hotels every year. AHLA proudly represents a dynamic hotel industry that is comprised of more than 54,000 properties, supports $1.1 trillion in U.S. sales, and generates nearly $170 billion in taxes to local, state and federal governments.

The hospitality industry is one of the nation's largest job providers. Supporting nearly 8 million jobs across the country, the hotel industry provides $75 billion in wages and salaries to our associates. The industry is largely comprised of small businesses—nearly 60 percent of all hotels meet the definition of small business—whose owners often must also rely on a host of vendors and contractors, some of them which provide services on site, to effectively and efficiently meet customer demands. Our industry is largely built upon the franchising model, under which every

[1] The original comment period for the Proposed Rule closed on June 10, 2019. On May 14, 2019, the Department of Labor extended conclusion of the comment period to June 25. 2019, through a notice published in 84 Fed. Reg. 21301.

franchisee owns and operates its own business and is independently responsible for its own decisions.[2]

The Fair Labor Standards Act ("FLSA") requires employers to pay employees above a minimum hourly wage set by statute and an "overtime" rate of one and one-half times an employee's regular hourly pay rate for any hours the employee works beyond forty in a given week. Under the FLSA, it is a longstanding principle that a worker can be jointly employed by two or more employers who are both responsible, simultaneously, for the employee's wages. Whether an employee has more than one employer is important in determining employees' rights and employers' obligations under the law.

AHLA thanks the Department of Labor ("DOL" or "the Department") for proposing revisions and clarifications to the Part 791 regulations governing joint employer status under the FLSA. The current joint employer standard was comprehensively revised more than 60 years ago and has not kept up with the unique business organizations and contractual relationships that are a part of the complex web of interactions defining today's modern economy. In the absence of updated guidance from the Department, federal courts have created a patchwork of differing multi-factor tests to determine joint employer status under the FLSA, creating uncertainty and increased compliance costs for the regulated community. Moreover, as the Department correctly notes in the Proposed Rule, public interest in the joint employer issue is at a fever pitch due to the National Labor Relations Board (NLRB) decisions altering its analysis for determining joint employer status under the National Labor Relations Act (NLRA) (a separate statute from the FLSA), the corresponding rulemaking regarding joint employer status under the NLRA, and other developments that have generated concern regarding joint employer status.[3]

To address this confusion, DOL is proposing to replace the language in Part 791—which deals with a joint-employer scenario "where an employee works one set of hours in the workweek for his or her employer, and that work simultaneously benefits another entity"—with a clear, four-factor test. Under the this new test, DOL would consider the extent to which potential joint employers actually "hire or fire the employee; supervise and control the employee's work schedules or conditions of employment; determine the employee's rate and method of payment; and maintain the employee's employment records."[4] DOL's proposal provides guidance on how to apply this test and explains that certain business practices, business agreements, and business models do not make joint employer status more or less likely under the FLSA. Finally, the

[2] The number of franchise establishments in the United States is projected to reach almost 760,000 in 2018. These businesses will employ over 7.8 million people and account for nearly 3% of the U.S. GDP in nominal dollars ($451 billion). See *Franchise Business Economic Outlook for 2018 (January Forecast)*, IHS Markit, January 2018.
[3] See WHD Administrator's Interpretation No. 2016-1, "Joint employment under the Fair Labor Standards Act and Migrant and Seasonal Agricultural Worker Protection Act."
[4] Proposed 29 CFR 791.2(a)(1). The proposed rule also states that additional factors may be relevant if they indicate that 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." Proposed 29 CFR 791.2(b).

Department includes descriptive examples which will assist the regulated community in understanding how DOL will apply the new standard in specific scenarios.

AHLA supports DOL's proposed changes to the existing regulations and agrees that the proposal will "reduce uncertainty over joint employer status and clarify for workers who is responsible for their employment protections, promote greater uniformity among court decisions, reduce litigation, and encourage innovation in the economy."[5]

DOL's Proposal Provides Needed Predictability and Stability for the Hotel Industry and Encourages Business-to-Business Cooperation

As previously noted, the hotel industry is largely is built on the franchising model, where every franchisee owns and operates its own business and is independently responsible for their own decisions. The franchisors in the lodging industry provide support for the brand through standards regarding quality and uniformity. Additionally, the industry is highly segmented. At any given hotel property, an iconic global brand could have signed a franchise agreement with a separate owner of a hotel, who, in turn, has hired a hotel management company to run the day-to-day operations of the property. In this complex business web of interactions, which has provided a pathway to the American Dream for thousands of small business owners, clarity and certainty as to who they employ and for whom they are liable under the law is critical to ensuring that fruitful business-to-business relationships continue, contributing to job growth and a robust economy.

AHLA and our members know all too well the negative consequences that arise when employers do not have clear rules with respect to joint employment. In 2015, the NLRB issued its *Browning-Ferris Industries* (*BFI)* decision extending joint employer status, under the NLRA, to situations where one company has "indirect" and "potential control" over the terms of employment of another company's employees—a vague and difficult-to-apply standard.[6] The decision created uncertainty around what constitutes permissible brand protection and suggested best practices in the franchise business model, discouraging both potential franchisors and franchisees from entering into such arrangements. This dilemma was eloquently illustrated by Vinay Patel, President and CEO of Fairbrook Hotels, who testified that, "changes in [the franchise] model will undeniably discourage entrepreneurship and create considerable uncertainty between employers and employees across the [hospitality] industry." He explained that "franchisors are particularly risk-averse and will not simply accept additional liability. Instead, they will likely choose only to work with few, large franchisees and foreclose new opportunities for small business owners like me, in an effort to mitigate liability from a lesser established business partner."[7]

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[5] See Wage and Hour Division Fact Sheet, "Notice of Proposed Rulemaking on Joint Employer Status under the FLSA"

[6] *See Browning Ferris Industries of California, Inc*., 362 NLRB No. 186 (2015).

[7] *Risky Business: Effects of New Joint Employer Standards for Small Firms,* Hearing Before the House Committee on Small Business Subcomm. on Investigations, Oversight and Regulations, 114th Cong. (2016) (Testimony of Vinay Patel).

Given the aforementioned uncertainty, we applaud DOL for including language in the Proposed Rule that specifically addresses business practices that will not result in joint employer status. Part (d) of the proposal makes clear that the following do not make joint employer status more or less likely under the FLSA: (a) operating as a franchisor; (b) having contractual agreements on wage floors, sexual harassment policies, workplace safety practices, morality, or similar generalized business practices; (c) providing sample handbooks or forms; (d) allowing another to operate a business on one's premises; (e) offering association retirement or health plans; or (f) participating with others in apprenticeship programs.

The Proposed Rule's exclusion of types of control that are merely "limited and routine" will ensure that companies can reserve control over common branding issues, such as uniforms, hours of operation and customer service standards, without rendering them joint employers under the FLSA. These branding issues are important to the success of franchising and various other business models that are powerful engines of economic growth in numerous business sectors.

Furthermore, the Proposed Rule's exceptions language is incredibly important as it will encourage the exchange of human resources policies and best practices (including those that address sexual harassment and human trafficking prevention) and the participation in apprenticeship programs by ensuring that neither business agreements nor practices will make joint employer status more or less likely. This is particularly important for the hotel and lodging industry as AHLA and the major hotel brands in our membership recently announced the 5-Star Promise, a pledge to provide hotel employees across the U.S. with employee safety devices (ESDs) and commit to enhanced policies, trainings and resources that together are aimed at enhancing hotel safety, including preventing and responding to sexual harassment and assault. Our commitment to provide employee safety devices and adopt enhanced policies, trainings and resources around sexual harassment and assault builds on the hotel industry's longstanding efforts to promote employee and guest safety.[8]

Additionally, AHLA has committed to participating in a cornerstone apprenticeship project to ensure the education marketplace is further connected to the needs of the lodging industry. This commitment includes leading, global companies who are committed to enrolling a minimum of 2,250 apprentices between 2017-2022. Apprenticeships are proven to reduce turnover costs, increase productivity, result in higher job satisfaction and create a more skilled and competitive workforce. However, without the clarity that DOL provides in the Proposed Rule, franchisors may hesitate from encouraging their franchisees to participate in an apprenticeship program that they are also involved in out fear that such a relationship could trigger joint employer liability.

DOL's Examples Assist Small Businesses in Understanding their Obligations

Part (g) of the Proposed Rule provides illustrative examples which demonstrate how DOL would evaluate joint employer status based on a specific set of facts. Many of these examples will

[8] For more on AHLA's Five Star Promise see here: https://www.ahla.com/5star

provide small businesses with the ability to gauge whether a situation they encounter involves joint employer status. With nearly sixty percent of hotels considered small businesses, AHLA commends the Department for including many of these examples which will help employers with fewer resources to comply.[9]

Specifically, AHLA thanks the Department for including example eight of a global franchisor in the hospitality industry that provides a single franchisee (likely a small business owner) with a "sample employment application, a sample employee handbook, and other forms and documents for use in operating the franchise" and clarifies that such an action would not cause a joint-employment relationship to exist between the franchisor and franchisee. Example seven is also very important for the hotel industry as it clarifies that a joint employment relationship would not exist in the case of a company that requires its contractors to comply with a code of conduct including a wage floor and a promise to comply with all applicable federal laws. Inclusion in the final rule of many of these illustrative examples will assist small businesses in gauging whether a situation they face involves joint employer status.

Conclusion

The American Hotel & Lodging Association thanks the Department of Labor for the opportunity to comment on this Proposed Rule. The members of the business community rely on clear, predictable and stable rules and regulations to structure the many different forms of relationships that are common to commerce and support a strong, vibrant economy. This clear rule would provide predictability and stability in the law, resulting in increased investment from the business community and economic growth across all sectors of the economy. Stable legal arrangements would encourage economically fruitful business-to-business relationships, which are particularly beneficial to small businesses. The Proposed Rule recognizes the importance of clarity and stability in the joint employment space and, if finalized with the clarifications proposed by CDW, would significantly benefit the regulated community.

Sincerely,

Brian Crawford
Executive Vice President of Government Affairs
American Hotel & Lodging Association

[9] Note, AHLA agrees with CDW's comments requesting DOL remove example four.