May 20, 2020

Scott Moss, Director
Division of Labor Standards and Statistics
Colorado Department of Labor and Employment
633 17th Street, Suite 600
Denver, CO 80202

Dear Director Moss:

The undersigned, representing employers and companies engaged with independent contractors in a broad range of industry sectors, employing or working with hundreds of thousands of Coloradoans write today to express our significant concerns with the Department of Labor and Employment's proposed amendments to the Wage Protection Act Rules and the Colorado Overtime & Minimum Pay Standards (COMPS Order) #36, published on April 15 (collectively, the "Proposed Rule").

Specifically, we are deeply concerned with the substance of the Proposed Rule, its potentially profound economic negative impact on Colorado employers (and, by extension, workers), the process by which it is being considered, and its timing. We urge the Department to delay consideration of the Proposed Rule to allow for full consideration of public comment, a full understanding of structural flaws in the Proposed Rule, and a more robust analysis of the dramatic impact the Proposed Rule will have on employers in the State of Colorado.

The Proposed Rule's Analysis of Joint Employment is Flawed and Relies on Factors Not Relevant to a Putative Joint Employment Relationship. Foremost, in creating a new hybrid standard that is broader than *either* of the prior 'rules' the Department relies on (and is certainly at odds with the U.S. Department of Labor's current final rule), the Proposed Rule will inject significant uncertainty into the relationships nearly all businesses that contract with third party vendors, suppliers, and businesses will have. By adopting this new and expanded "joint employer" test, the Proposed Rule will also result in a substantially different definition of "employer" under state wage and hour law than that under the federal Fair Labor Standards Act (the substance of which was explicitly adopted by the Colorado legislature only a year ago). Ultimately, until the Proposed Rule is applied through litigation, businesses will not be able to rely on any discernable goalposts when entering into legitimately-separate commercial arrangements. Given this uncertainty, the Proposed Rule may ultimately stifle economic growth in the state.

Additionally, the Proposed Rule gives no consideration to the structure of legitimately-separate business relationships (franchise, dealership, licensure, and other business-to-business relationships) entered into

by countless Colorado employers. Making the focus of the joint employment inquiry the "economic realities" of a specific business relationship—in addition to vague and undefined notions of "direct or indirect," "express or implied," and "exercised or reserved authority"—leaves Colorado businesses in a morass of uncertainty with respect to every relationship they have with any other business or service provider.

Moreover, the multi-factor test set forth in the Proposed Rule conflates the analysis for whether a worker is an employee or an independent contractor with a joint-employer analysis, relying on factors that have nothing to do with whether one or more employer is a joint employer of that worker. For example, there is simply no rational basis to consider whether a worker is in a so-called "lower skilled" position for purposes of determining whether one or more companies is that worker's "employer" under state wage and hour law. The relevant inquiry, instead, is whether an additional, second entity is *also* that individual's employer. The fact that an employee may be economically dependent on their direct employer has no bearing on the question of whether another entity has any relationship with that individual.

Similarly, the Proposed Rule provides that the "duration and extent of the relationship between the potential joint employers" is relevant in determining whether a joint employment relationship exists. This factor unfairly disadvantages certain commercial relationships merely as a result of their structure around long-term arrangements (dealerships, franchises, licensing agreements, and other long-term, legitimately separate commercial arrangements). There is nothing intrinsic to such commercial arrangements that should make a joint employer finding more likely, and Colorado should not discourage such legitimate economic arrangements, particularly at a time when the state should be encouraging job creation and development.

The Proposed Rule's Profound and Negative Economic Impact. We are also gravely concerned with the economic impact an expanded joint-employer rule will have on employers, insofar as it places undue emphasis on the potential or reserved right of one employer to control another employer's workers, even where that control is unexercised. An economic analysis conducted by the International Franchise Association and the U.S. Chamber of Commerce in 2019 concluded that the National Labor Relations Board's joint-employer standard (which focused on indirect control, or the reserved right of one employer to control another's employees) cost the franchising sector alone as much as $33.3 billion annually, and over 375.000 lost job opportunities. These costs represent the "distancing" behavior by franchisors from franchises caused by an expansive definition of "joint employer" which in turn results in franchisees experiencing lost sales and/or increased costs. And this was in a time of national robust economic growth, record low unemployment, and burgeoning job opportunities.

The Division, moreover, offers no data to support the need for such a vague, broad, and unprecedented standard. A "joint employer" analysis, by definition, addresses relationships where a worker already has a direct employer. The question, therefore, is whether two or more entities can both be held responsible for potential wage and hour issues. The Division's Statement of Basis, Purpose, Authority, & Findings (the "Statement") in support of the Proposed Rule claims a broader test must be applied in Colorado because employees are unable to recover unpaid wages or other compensation from their own employer, offering hypothetical scenarios where the employer is insolvent or claims another entity is responsible.

Contrary to these conclusory statements, there is no evidence or data provided that any such inability to collect backpay or wages exists in Colorado. Instead, the Statement cites to two sources: (1) statements made by the U.S. Department of Labor in connection with the ***rescinded*** 2016 Administrator's Interpretation and (2) a small number of New York lawsuits that were either decided in nonprecedential/unpublished summary orders or decided in 2003/2004, well over 15 years ago. *See*

Statement, at footnote 1. Neither source supports the idea that joint employer standards must be expanded in Colorado today to provide adequate protection and remedies for workers.

The Proposed Rule Raises Process Concerns and Comes at a Uniquely Precarious Time. We are likewise concerned that the Department's effort undermines the will of the state's legislature. Less than one year ago, the Colorado legislature enacted HR 19-1267, which expressly provides that the definition of "employer" under state law mirrors the federal definition of employer under the federal Fair Labor and Standards Act ("FLSA"). While we recognize the Department's authority to promulgate regulations regarding wage and hour laws, to do so in a manner that undermines the will of the state's elected officials is deeply troubling.

We respectfully submit that it goes without saying that pushing through these changes could not be more ill-conceived. The Proposed Rule was published on April 15, 2020, for thirty days of public review, in the midst of a national pandemic representing the most dire public health emergency in the last century, which has wrought unprecedented economic damage nationwide, the likes of which have not been seen since the Great Depression. The Department's timeline threatens to deprive the public the opportunity to meaningfully participate in the rulemaking process.

Colorado employers are currently facing the most dire economic situation they have faced in our lifetime, and as the state begins the slow and daunting task of safely resuming economic activity, the threat of expanded and unclear standards is likely to further negatively impact recovery. Our state is trusting businesses – large and small – to lead the recovery effort. Burdening them now with uncertainty and vague standards may have significant, long-term effects.

Finally, we also have significant concerns with the manner in which the Division describes the relevant legislative history. In its Statement, the Division acknowledges that, in May 2019, the Colorado Legislature adopted the definition of "employer" used in the FLSA. The Division states that the Proposed Rule is needed because, on January 12, 2020, the U.S. Department of Labor finalized its rule on the joint employer standard.

Putting aside the fact that the definition of an "employer" under the FLSA has not changed, the Division also states that the governing standard is the content of the law *at the time of adoption* in May 2019, not the U.S. DOL's new rule, thereby undermining their stated need for creating this rule in the midst of a global pandemic. *See* Statement, at 3. Further, if the goal of the rule was to restore the *status quo* of the Colorado legislature, the Proposed Rule could have done just that; instead, it creates a wholly new standard, in reliance upon caselaw and agency interpretations, both of which were available to the Colorado legislature at the time it acted, and neither of which were adopted by the full legislature.

Further, the State also does not account for the full regulatory history. As the Division notes, the U.S. Department of Labor issued an "Administrator's Interpretation" on joint employment under the FLSA on January 20, 2016 (the "2016 AI"). This nonbinding 2016 AI—which was not subject to any public comment or rulemaking process—was ***rescinded*** by the U.S. Department of Labor on June 7, 2017. The AI was therefore revoked long before Colorado passed any legislation in May 2019.[1] Further, at the time the Colorado legislature adopted its definition of "employer," the U.S. DOL had already issued its proposed regulations for its current four-factor test for joint employment. *See* U.S. Department of Labor, Notice of Proposed Rulemaking (April 1, 2019), *available at* https://www.dol.gov/agencies/whd/flsa/2019-joint-employment. Thus, at the time the legislature acted, it

[1] It is concerning that the Statement supporting the Proposed Rule lacks any acknowledgment that the U.S. DOL itself had revoked the 2016 AI two years prior to the Colorado amendments.

was well aware that the U.S. DOL had rejected the rescinded 2016 AI ***and*** that the U.S. DOL was adopting a new joint employer standard.

For all of these reasons, we respectfully request that the Department reconsider moving forward on the Proposed Rule at least until such time as a more fulsome economic analysis of its potential effects can be completed, and that policymakers and stakeholders who are all presently engaged in crisis mode in near every waking hour are afforded the opportunity to raise all relevant concerns to the attention of the Department.

Thank you for your consideration of this request.

Sincerely yours,

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American Hotel & Lodging Association
American Speedy Printing
Americans for Tax Reform
Any Lab Test Now
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Asian American Hotel Owners Association
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College Hunks Hauling Junk
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Colorado Hotel & Lodging Association
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Paul Davis Restoration
Payroll Vault
Pillar to Post Home Inspectors
PIP, Inc.
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