June 25, 2019

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

The Honorable Cheryl Stanton
Administrator
Wage and Hour Division
U.S. Department of Labor
Room S-3502
200 Constitution Avenue, NW
Washington, DC 20210

RE: RIN 1235-AA26—Joint Employer Status Under the Fair Labor Standards Act: Notice of Proposed Rulemaking and Request for Comments (84 Fed. Reg. 14043, April 9, 2019)

Dear Administrator Stanton:

The Society for Human Resource Management's (SHRM) mission is to create better workplaces where employers and employees thrive together. As the voice of all things work, workers and the workplace, SHRM is the foremost expert, convener and thought leader on issues impacting today's evolving workplaces. As such, we appreciate the opportunity to provide the Department of Labor with comments on its proposal to update the joint employment regulations under the Fair Labor Standards Act (FLSA). With 300,000+ HR and business executive members in 165 countries, SHRM impacts the lives of more than 115 million workers and families globally. Changes to the joint employment regulations affect the workplaces of nearly every SHRM member and the employees they serve.

SHRM generally supports the Department's proposal, which recognizes that the current regulatory framework around joint employment is unclear and difficult to apply. The proposal represents a large step forward and will assist HR professionals with a more uniform, clear, and certain standard. There is little doubt that issuing a final rule that follows the principles of the proposed rule -- as well as adopts the suggestions below -- will reduce litigation and provide employers with additional certainty in assessing their obligations under the FLSA in the context of a wide variety of business relationships.

Guided by the well-reasoned case of *Bonnette*, the Department's proposed rule aligns with the FLSA's concepts of employment. Similarly, by distancing itself from prior pronouncements

espousing "economic dependence" as the hallmark for joint employment (or suggesting that certain business models are inherently joint employment), the Department appropriately returns the focus of the joint employment inquiry to the FLSA's statutory language. Ultimately, by ensuring that the inquiry is directed at a putative joint employer's actual control over critical terms of employment, the proposal stands on solid ground statutorily, and is consistent with the relevant Supreme Court authority. As a result, SHRM supports the Department's proposal. `

Nevertheless, as described in more detail below, SHRM believes that the proposal's clarity and, thus, utility, would be enhanced by some modest revisions to the proposal.

As an initial matter, SHRM supports the Department's proposal to clarify and distinguish "vertical" and "horizontal" joint employment. With no real regulatory guidance addressing these differences -- indeed, the current regulatory language at 29 CFR 791 makes no effort to distinguish them -- applying the joint employment concepts that have been developed over time has proven to be both difficult and confusing. Concepts developed for "horizontal" have little utility to "vertical" and vice versa. For more than 60 years, the issue has been left unaddressed in the regulation. We appreciate the effort to provide clear and understandable explanations of when the two sets of concepts apply, which will greatly assist HR professionals in making determinations of joint employment.

SHRM Supports the Department's Proposal to Establish a Four-Factor Balancing Test for "Vertical" Joint Employer Status.

SHRM supports the centerpiece of the proposed rule: establishing -- in the context of "vertical" joint employment -- a four-factor test based on the concepts explained in *Bonnette v. California Health & Welfare Agency,* 704 F.2d 1465 (9th Cir. 1983). As explained below, however, in a final rule, the Department should: (1) provide guidance on what constitutes "maintain[ing] the employee's employment records" (preferably in the rule itself); (2) state that maintaining records, standing alone, will not establish joint employer status; (3) explain "indirect," but still actual, control; and (4) define "conditions of employment."

A. SHRM Supports the Department's Proposal to Reject the "Not Completely Disassociated" Standard for "Vertical" Joint Employment.

The current regulation contains a single standard -- "not completely disassociated" -- that is wholly inadequate for addressing the overwhelming majority of joint employer issues, namely, those involving putative "vertical" joint employment (*e.g.*, relationships involving subcontracting, staffing, franchising, supply chain). As the Department properly notes, in putative vertical joint employer scenarios, "the employer and the other [benefited] person are almost never 'completely disassociated,' and the real question is...whether the other person's actions in relation to the employee merit joint and several liability under the Act." 84 Fed. Reg. at 14044. The "not completely disassociated" standard was developed for "horizontal" joint employment, as the Department explains in the preamble. Specifically, the current standard is focused on those situations in which related companies attempted to evade overtime obligations by separately paying a worker for different sets of hours through sham "separate" entities. *See id.* at 14044-45. This concern is not present in the "vertical" context; the direct employer is always liable for any minimum wage or overtime violations. The Department's proposal to jettison the "not completely

disassociated" standard for "vertical" joint employment is well founded and will allow businesses to make more meaningful determinations of joint employer status.

B. The *Bonnette*-Based Test Will Provide Clear Guidance to Businesses Seeking to Determine Their Compliance Obligations Under the FLSA, but Additional Guidance is Needed.

The *Bonnette* factors address the main aspects of an employment relationship, including "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." 704 F.2d at 1470 (internal citation omitted) (cited at 84 Fed. Reg. at 14046). The *Bonnette* factors are focused on the relationship between the worker and the putative employer, specifically that the definition of "employer" in 29 U.S.C. § 203(d) guides the joint employer inquiry. Specifically, the factors are designed to get to the central question: whether the putative joint employer exercised substantial control over the terms and conditions of the work of the employees.

SHRM supports the Department's proposed modification to the first factor of the *Bonnette* test by placing the emphasis on whether the putative joint employer **actually** hired or fired the employee, rather than whether it "had the power" to do so. 84 Fed. Reg. 14043, 14048 & n. 59. This modification is consistent with the statutory language (*i.e.*, a putative employer must "act[]" in the interest of an employer in relation to an employee). "Actual" exercise of power demonstrates control with a clarity that latent power can never achieve. By focusing on the actual exercise of power, the Department allows businesses to understand their FLSA obligations without worrying that the existence of boilerplate reservations of rights (*e.g.*, to terminate an employee of a staffing agency) or similar rarely-or-never-used contractual provisions might unexpectedly trigger overtime obligations for a group of workers who were never anticipate to be employees (of the secondary employer).

The language in the proposed rule, however, could benefit from some additional clarification on certain points. Clarifying businesses' rights and obligations in this context allows them to proceed with more certainty and ensures that the appropriate entity will have responsibility for FLSA compliance issues.

First, SHRM members have expressed concern that the fourth factor "maintained employment records" is insufficiently clear. The proposed rule does not define "employment records," nor does the rule explain what it means to "maintain" them. Putative joint employers may possess a number of records related to the employees of third parties. Subcontractors may provide names, dates, and times an employee was performing work. Vendors may provide employment-related details of its employees who need access to a secured location of a putative joint employer's facility. Limiting "employment records" for the purposes of the joint employer determination to records related to hiring and firing, supervision and control of schedules and conditions of employment, or determining the rate and payment of the putative employees (*i.e.*, the other *Bonnette* factors) would go a long way to avoiding litigation over this term. Similarly, the Department should explain that "maintain[ing]" employment records is more than possession of or access to those records and/or provide further definitional language in the regulation itself explaining what the Department means by this term.

Second, the Department should go one step further and make clear that the maintenance of employment records, standing alone, does not establish joint employer status. The wide variety of reasons for a putative joint employer to "maintain" records -- for example, for insurance purposes, security clearance purposes, or the receipt of certified payroll records by a prime contractor on a Davis-Bacon Act covered contract -- means that "maintenance" of records is actually less dispositive than the other factors in the *Bonnette* test and should be expressly prohibited from serving as the sole basis for finding joint employers status.

Third, the phrase "directly or indirectly," used to modify "actually exercises" in the proposed language in 791.2(a)(2), is potentially confusing. What is "indirect, actual control"? The Department should provide examples of what it is -- and, more precisely -- what it is not.

Fourth, the proposed phrase "conditions of employment" (*i.e.*, the second *Bonnette* factor) requires further definition, particularly considering the possibility that "conditions of employment" could be controlled "indirectly." A consistent definition of "terms and conditions of employment" (in proposed 791.2(b)) is similarly needed to provide clarity on the issue. Ideally, the Department would provide a definition focused on specific items relevant to the FLSA definition of employer, for example, control of number of hours worked or the specific tasks performed.

SHRM Supports the Department's Proposal to Consider "Additional Factors" in the Determination of Joint Employer Status but Believes Additional Clarity is Necessary.

SHRM supports a requirement that the articulated factors be considered as the starting point, but understands the Department's desire to permit the consideration of additional factors to ensure the validity of the regulatory inquiry in a wide variety of scenarios. In all cases, however, such factors must, in order to ensure consistency both with the four *Bonnette* factors and with the statutory definition of employer under the FLSA, address the *actual* exercise of control. In finalizing this rulemaking, the Department should specifically identify the types of "additional factors" to be considered, should articulate that all "additional factors" to be considered must be consistent with four *Bonnette* factors, and should mandate that none of factors identified below as not relevant to the inquiry can ever be considered as an "additional factor."

SHRM Supports the Department's Proposal to Specifically Identify Factors that are Not Relevant to Joint Employer Status, but Requests that the Final Rule Provide Additional Factors That Are Not Relevant

SHRM agrees with the Department that considerations of a worker's "economic dependence" are not part of the joint employer inquiry, because such considerations are related to whether a worker is an "employee," not the actions of the putative joint employer with respect to the worker. Thus, SHRM suggests that the Department provide additional examples of factors related to economic dependence that should not be considered as part of the joint employer analysis. For example:

- The percentage or amount of the direct employer's income that is derived from its relationship with the putative joint employer.
- The length of the relationship between the direct employer or its employees and putative joint employer.

- The number of contractual relationships that one party has with other parties to provide or receive similar services.

SHRM also supports the Department's proposal to clarify that an entity's business model, certain standard business practices, and certain contractual provisions do not make joint employer status more or less likely. SHRM agrees with the Department's assessment that such contractual provisions, without the actual exercise of control over terms and conditions of employment, are irrelevant to whether the putative joint employer "acted" in the interest of the employer in relation to the employee.

SHRM appreciates the Department's proposal to include a limited list of contractual provisions deemed not relevant to the joint employer inquiry. Similarly, SHRM believes the list of certain standard business practices that do not "make joint employer status more or less likely" will prove valuable as businesses analyze their responsibilities under the FLSA. In both cases, SHRM, its members, and its members' workers would be still better served with additional clarity, provided in the form of additional examples of considerations to be designated as irrelevant, such as:

- An agreement that the direct employer will ensure its employees meet quantity, quality, and completion standards established by the benefited entity;
- An agreement that the direct employer and the benefited entity will share certain administrative functions related to implementation of the contract, such as insurance and training services;
- An agreement that the benefited entity may, from time to time, audit and take appropriate actions to enforce the direct employer's compliance with legal, regulatory, and conduct standards, including but not limited to compliance with federal, state, and local wage-hour laws;
- Use of the benefitted entity's email systems or email domains;
- Use of the benefitted entity's timekeeping system;
- Accessing the benefitted entity's electronic portals and platforms containing guidelines, forms, systems, tools, etc.;
- Participating in meetings conducted by the benefitted entity pertaining to matters such as health, safety, and legal compliance;
- Using the benefited entity's brand, for instance by wearing a shirt or handing out a card with its logo or demonstrating products or providing services to the benefitted entity's customers within its facility.
- A benefitted entity having access to or possession of data pertaining to a direct employer's employees; and
- Actions by a benefitted entity related to a direct entity's certified payroll reports under the Davis-Bacon and Related Acts, including receipt, review, and analysis to ensure compliance.

SHRM Supports the Department's Proposed Distinction Between "Horizontal" and "Vertical" Joint Employer Status and the Department's Proposed Revisions to the "Horizontal" Standard.

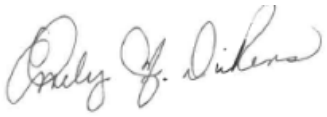
The Department suggests that the "not completely disassociated" standard in the current regulations has provided "clear and useful guidance" in "horizontal" employment situations (*i.e.*, "where multiple employers suffer, permit, or otherwise employ an employee to work separate sets of hours in the same workweek."). SHRM supports the Department's proposal to nevertheless change the language to more appropriately reflect the concepts, eliminating "completely disassociated" and "not completely disassociated" and articulating a standard of whether two employer/persons "are acting independently of each other and are disassociated with respect to the employment of the employee."

Conclusion

SHRM supports and appreciates the Department's decision to undertake this critical rulemaking at this time. The standard for joint employer status under the FLSA should be clarified to ensure that only a putative joint employer's actual control over a worker's hiring, firing, pay, hours, and other essential elements of employment will be considered. Doing so would help accomplish the Department's goals of reducing uncertainty over joint employer status, clarifying which employer is responsible for providing protections for employees, creating consistency among the courts, reducing ligation, and encouraging innovation. We thank the Department for the opportunity to comment.

Thank you for your consideration of these comments.

Sincerely,



Emily M. Dickens, J.D.

Chief of Staff

Society for Human Resource Management