United States Senate
WASHINGTON, DC 20510

June 25, 2019

The Honorable R. Alexander Acosta
Secretary of Labor
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

RE: Notice of Proposed Rulemaking, RIN 1235-AA26, Joint Employer Status Under the Fair Labor Standards Act

Dear Secretary Acosta:

We write to express our strong opposition to the Department of Labor's (DOL) proposed interpretation to dramatically narrow the circumstances under which employers may be considered jointly liable with contractors, franchisees, and temporary staffing companies for wage-and-hour violations. The proposed interpretation would violate the language and intent of the Fair Labor Standards Act (FLSA) and weaken the enforcement of wage-and-hour protections on behalf of many of the most vulnerable workers in the country, directly contradicting DOL's mission to "foster, promote, and develop the welfare of the wage earners… of the United States."[1]

For more than 80 years, federal wage-and-hour law has recognized that multiple companies can be held to be jointly responsible for workers, depending on the economic realities of the situation. As the prevalence of contracting, temporary staffing, and franchising arrangements has ballooned throughout the American economy, it is increasingly important that companies that share responsibility for workers are held liable for wage theft, child labor abuses, and other violations of federal wage-and-hour law that too often devastate the financial security of working families across the country. For example, the number of American workers in temporary staffing jobs alone is at a record high of almost 3 million workers. This group is disproportionately made up of African American and Latino workers, and these employees earn significantly less than their counterparts in the rest of the private sector.[2] DOL's proposal would make it easier for massive corporations to shirk their obligations under federal wage-and-hour laws simply by outsourcing jobs to contactors or staffing agencies, further accelerating this concerning trend.

By attempting to narrow the definition of employer under the FLSA to companies that "actually exercise" a strictly limited set of types of control,[3] DOL's proposal would exclude

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[1] U.S. Department of Labor, "About Us," https://www.dol.gov/general/aboutdol.
[2] National Employment Law Project, "Temped Out: How Domestic Outsourcing of Blue-Collar Jobs Harms America's Workers," Rebecca Smith and Claire McKenna, September 2, 2014, https://www.nelp.org/publication/temped-out-how-domestic-outsourcing-of-blue-collar-jobs-harms-americas-workers/.
[3] Wage and Hour Division, "Joint Employer Status Under the Fair Labor Standards Act," April 9, 2019, 29 CFR Part 791, https://www.regulations.gov/document?D=WHD-2019-0003-0001.

many of the arrangements that employers are using—and will increasingly use with DOL's blessing—to avoid their responsibilities to workers under the FLSA. Congress explicitly sought to avoid this problem when it crafted the FLSA to be as encompassing as possible, defining "employ" extraordinarily broadly—"to suffer or permit to work"—and "employer" to include "any person acting directly or indirectly in the interest of an employer."[4] But DOL proposes to ignore the plain language of the statute, inventing a new and extremely restrictive standard that employees would have to show to hold their employers liable for abuses for which Congress intended them to be responsible. This makes DOL's proposal a free pass for large employers, allowing even those that should be joint employers as shown by the economic realities of the situation to walk away from wage-and-hour and child labor violations for which they should be held responsible, leaving smaller businesses on the hook and potentially leaving employees empty-handed.

Despite DOL's claims that it is seeking to "reduce uncertainty" and "clarify for workers who is responsible for their employment protections,"[5] the Department is attempting to revise DOL's interpretation of the joint employer standard for the first time in the better part of a century, without any new statutory language or judicial precedent, laying out a roadmap for employers to abuse their workers in the process. Minimum wage violations, unpaid overtime, illegal use of child labor, and pay discrimination are all extremely serious problems faced by countless workers and families. Even under the current joint employer standard, enforcement of crucial wage-and-hour protections is unacceptably weak in the United States, and DOL should be at the forefront of the fight to better protect American workers. Instead, this proposal takes the Department in the opposite direction, undermining wage-and-hour enforcement for millions of workers who are already faced with particularly poor job quality, low wages, unpredictable schedules, and precarious work. We strongly urge you to reverse course and withdraw this harmful proposal.

Sincerely,

Elizabeth Warren
United States Senator

Sherrod Brown
United States Senator

Richard J. Durbin
United States Senator

Patty Murray
United States Senator

[4] Wage and Hour Division. "The Fair Labor Standards Act Of 1938, As Amended," https://www.dol.gov/whd/regs/statutes/fairlaborstandact.pdf.
[5] U.S. Department of Labor, "U.S. Department of Labor Issues Proposal for Joint Employer Regulation," press release, April 1, 2019, https://www.dol.gov/newsroom/releases/whd/whd20190401.

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