Michigan Immigrant Rights Center

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Amy DeBisschop
Division of Regulations, Legislation, and
Interpretation
Wage and Hour Division,
U.S. Department of Labor
Room S-3502
200 Constitution Avenue NW
Washington, D.C. 20210

Comments on RIN 1235-AA26: Joint Employer Status Under the Fair Labor Standards Act

Submitted at: https://www.regulations.gov/comment?D=WHD-2019-0003-0001

Dear Ms. DeBisschop:

The Michigan Immigrant Rights Center ("MIRC") opposes the proposed regulations that would attempt to drastically limit the scope of employment under the Fair Labor Standards Act (FLSA), in opposition to the Act's purposes, statutory requirements and decades of judicial precedent. The DOL's proposed rule ignores a statutory definition, Supreme Court authority and decades of federal Circuit Court precedent with a test that would encompass almost no subcontracting companies or farm labor contractors, and would especially hurt those low-wage workers who need the protections of the FLSA the most: those who are placed in jobs via temp or staffing agencies, and those, including children, who work in heavily contracted agricultural, janitorial, construction, manufacturing, and warehousing jobs.

Importance of joint employer responsibility to MIRC

MIRC is a state-wide advocacy and legal services organization that focuses on the rights of Michigan's immigrant communities, including but not limited to representation of migrant and seasonal farmworkers and low-wage immigrant workers in employment disputes. MIRC is a program of Michigan Statewide Advocacy Services (MSAS) and the Michigan Advocacy Program (MAP). MAP has a fifty year history of providing civil legal services to low income people in Michigan. Our staff participate in and hold leadership roles in a variety of relevant groups including the State of Michigan Interagency Migrant Services Committee, the Michigan Supreme Court Foreign Language Board of Review, the City of Detroit Immigration Task Force, the Michigan Human Trafficking Task Force, and the Michigan Coalition for Immigrant and Refugee Rights.

In today's economy, more and more corporations in lower-wage industries outsource to labor contractors and use labor intermediaries such as staffing firms, and this can result in degraded working conditions and a lack of employer responsibility. Through MIRC's outreach and advocacy, we understand first-hand how confusing it can be for workers, particularly those with limited English language capacity, to understand who exactly their employer is. While a worker's pay check may list one company name, every day directions, including scheduling,

daily job assignments, supervision, promotion, and hiring and firing decisions are made by individuals working for a different company or working as a stand-alone contractor.

MIRC's work representing and advocating for migrant and seasonal agricultural workers informs our understanding of the negative impact the DOL's proposed rule will have on low-wage workers, particularly immigrant workers who are vulnerable to exploitation due to their immigration status. Farm labor contractors and other intermediaries are common and are often under-resourced and working on slim profit-margins and therefore avoid compliance with labor and employment laws by disappearing or not responding to agency investigations or private lawsuits. The use of intermediaries like farm labor contractors or temp agencies in agricultural is well-documented to lead to a decrease in wages and increase in labor exploitation.

An especially poignant example of this reality involves five H-2A workers MIRC currently represents.[1] These 5 workers were recruited from Mexico by a farm labor contractor ("FLC") based in Florida that brought the workers to Michigan to work at a nursery off contract in violation of the H-2A regulations. The nursery management supervised the workers' work, set their schedule, and kept track of their hours. The FLC paid the workers intermittently without providing pay records. Moreover the FLC failed to pay the workers for about three to four weeks. Although the Sixth Circuit has not ruled on the issue of joint-employment in the FLSA context, under current Eastern District of Michigan case law, these facts would be sufficient for a finding of joint employment against the nursery. See *Parrott v. Marriott Int'l, Inc.*, No. 17-10359, 2017 U.S. Dist. LEXIS 144277, at *4 (E.D. Mich. Sep. 6, 2017) ("In this district, the focus in joint employment cases has been on 'whether the plaintiff's alleged joint employer (i) had the power to hire and fire [] employees, (ii) supervised and controlled employee work schedules or conditions of employment, (iii) determined the rate and method of payment, and (iv) maintained employment records.'"). A finding of joint employment in this case would be crucial for the workers to recover their unpaid wages, totaling over $10,000 (without liquidated damages), as the FLC is now debarred from the H-2A program due to its egregious violations of the H-2A regulations making it very unlikely that the FLC is solvent and able to pay any back wages. Meanwhile, the nursery is still operating at full capacity and continues to employ H-2A workers through the use of a different FLC intermediary.

Unfortunately the proposed rule would guarantee that these workers would not be able to find re-dress from the nursery, who benefited from their labor while skirting the law by outsourcing their responsibilities to an under resourced and non-compliant FLC.

The proposed rule is contrary to the FLSA's broad "suffer or permit" standard, Supreme Court authority, and the statutory intent of the Fair Labor Standards Act.

Labor and employment laws, including the FLSA, have long held that more than one employer can be the employer of a worker. When more than one employer is found responsible, jointly with another, companies provide better oversight of working conditions, to ensure that child labor, minimum wage and overtime rules are followed. The FLSA's definitions of covered

[1] The names of the workers and employer involved are being omitted to protect the worker's privacy and decrease the possibility of retaliation in the form of blacklisting.

employment and employers have not changed since the Act was enacted, and companies have been operating under these rules for over 80 years.

FLSA as a uniquely broad statute not constrained by common-law employment relationships. The proposed rule's narrow definition of who is responsible as an employer is contrary to the plain language of the statute's definition of "employ" contained in Section 203(g) of the Act. It is also contrary to U.S. Supreme Court precedent that has said the definition of employ is not based in common law concepts and applied Section 203(g) to determine that multiple entities are the employers of a group of employees. And it runs afoul of the majority of federal Circuit courts that have considered the scope of covered employers. Finally, it is contrary to the intent of the FLSA, because it will enable employers to insert labor intermediaries between their company and their workers and then walk away from any accountability for the child labor, minimum wage and overtime violations that may occur. This will further degrade fair pay standards in these industries.

Even under the more restrictive common-law employment test, the DOL's proposal is too narrow: it fails to consider the right to control, a cornerstone of common-law employment determinations under long-standing Supreme Court and FLSA law; It fails to consider instances where two companies share control over important terms and conditions of work, and it also states that it does not consider the "suffer or permit to work" definition of "employ" that is the cornerstone definition in the statute upon which the employment coverage definitions rely. The incredibly narrow proposed test leaves out many work relationships that are well within the long-understood scope of the FLSA's employment relationship, and is thus impermissibly contrary to law and the Act. For these reasons, the proposed rule is arbitrary and capricious, lacks a rationale based in the statute, and could permit employers of low-income workers to skirt responsibility.

Corporations that engage low-road contractors, especially those in agriculture and construction, where many low-wage vulnerable workers work, and then look the other way gain an unfair advantage over companies that play by the rules, resulting in a race to the bottom that rewards cheaters. For all of the above reasons, we oppose the proposed rule.

Sincerely,

Diana E. Marin
Supervising Attorney