June 22, 2026

Submitted via www.regulations.gov

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

Re: Comment Regarding "Joint Employer Status Under the Fair Labor Standards Act, Family and Medical Leave Act, and Migrant and Seasonal Agricultural Worker Protection Act" Proposed Rule, Docket No. WHD–2026–0067, RIN 1235–AA48, 91 Fed. Reg. 21878 (Apr. 23, 2026)

Dear Administrator Rogers:

Governing for Impact (GFI) and the National Employment Law Project (NELP) submit this comment on a Proposed Rule, "Joint Employer Status Under the Fair Labor Standards Act, Family and Medical Leave Act, and Migrant and Seasonal Agricultural Worker Protection Act" (Proposed Rule), issued by the Wage and Hour Division (WHD) within the Department of Labor (DOL).[1] GFI is a regulatory policy organization dedicated to ensuring that the federal government operates more effectively for everyday working Americans.[2] NELP is a nonprofit research and policy organization with nearly 60 years of experience advocating for the employment and labor rights of low-wage workers. NELP seeks to ensure that all employees, and especially the most vulnerable ones, receive the basic workplace protections guaranteed in our nation's labor and employment laws, and that all employers comply with those laws, including the child labor, minimum wage, and overtime protections of the Fair Labor Standards Act (FLSA). NELP has litigated directly on behalf of subcontracted workers, submitted amicus briefs in numerous joint employer cases, testified in Congress regarding the importance and scope of the FLSA's employment coverage, and is an expert in domestic outsourcing's magnitude and its impacts. NELP and its constituents have a direct and sustained interest in a fully enforced FLSA, an act that is particularly relevant to the low-wage workers who comprise a disproportionate and growing share of the workforce. We appreciate the opportunity to comment on the proposed regulations.

The FLSA—and the Family and Medical Leave Act (FMLA) and the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), by incorporation—uses especially broad definitions of "employ," "employer," and "employee" to create federal employment law liability for employers in situations that the common law standard might not.[3] The Supreme Court held in *Rutherford Food Corp. v. McComb* that the FLSA's "suffer or permit" language used to define "employ" was "broad" and required an analysis of the "circumstances of the whole activity" when evaluating potential employer liability.[4] Specifically, joint employment can exist either when an employee is formally

[1] 91 Fed. Reg. 21,878 (Apr. 23, 2026) (hereinafter "*Joint Employer Status*").
[2] www.governingforimpact.org.
[3] *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 726–27 (1947); 29 U.S.C. §§ 203, 2611(3), 1802(5).
[4] *Rutherford Food Corp.*, 331 U.S. at 728–30.

employed by two or more entities and those entities are sufficiently related (horizontal joint employment), or when an employee has a formal employment relationship with one employer, but the economic realities show that he or she is economically dependent on another entity involved in the work (vertical joint employment).[5] This liability is important because, while it does not change the amount of wages or other benefits to which a worker is entitled, it provides recourse if one of the employers in question "flakes on its legal obligations" or "is judgment-proof."[6]

DOL has proposed a rule that narrowly construes the test for determining joint employment liability.[7] Focusing on the Proposed Rule's test for vertical joint employment, this comment proceeds in four parts. First, it outlines how, if finalized, the Proposed Rule would be contrary to law due to its narrow, control-based focus and conflicts with established case law. Second, it describes how the Proposed Rule would be arbitrary and capricious due to inconsistent reasoning and its failure to comply with the change-in-position doctrine. Third, it describes the negative impacts the proposal could have on low-wage workers and small businesses. Finally, it reminds DOL of its obligations to disclose its use of artificial intelligence in this rulemaking if applicable. Due to these factors, we respectfully request that DOL withdraw the Proposed Rule.

I. If finalized, the Proposed Rule would be contrary to law.

Claiming a desire "to promote clarity and uniformity in [its] nationwide enforcement of federal wage and hour law," DOL proposes a new test that it describes as "the closest thing to a common denominator" among circuit courts' standards for vertical joint employment.[8] However, DOL fails to reconcile its Proposed Rule with the relevant statutory text and Supreme Court and circuit court precedent that demands a broad test based on "economic realities."[9]

A. The Proposed Rule's focus on control fails to implement the "suffer or permit" standard required by the FLSA.

As the Proposed Rule seems to facially concede,[10] whether an employer is a joint employer under the FLSA depends on factors beyond whether an employer controls a worker. The FLSA defines "employer" in relation to its definition of "employee."[11] In turn, the definition of "employee" includes "employ,"[12] which the FLSA defines to "include[] to suffer or permit to work."[13] Courts have consistently held that this "suffer or permit" language is broad and was included in the FLSA specifically to expand liability beyond the common law standard for employment, which centered on control.[14] The "suffer or permit" definition requires an expansive analysis that considers the "economic realities" of a worker relative to an employer, looking to the "totality of the

[5] U.S. Department of Labor, Administrator's Interpretation No. 2016-1 (Jan. 20, 2016) (rescinded Jun. 7, 2017).
[6] *New York v. Scalia*, 490 F. Supp. 3d 748, 793 (S.D.N.Y. 2020); *Reyes v. Remington Hybrid Seed Co.*, 495 F.3d 403, 408 (7th Cir. 2007), as amended (Aug. 30, 2007).
[7] *Joint Employer Status*, 91 Fed. Reg. at 21,910.
[8] *Id.* at 21,884, 21,891.
[9] *Rutherford Food Corp.*, 331 U.S. at 727 (quotation omitted).
[10] *Joint Employer Status*, 91 Fed. Reg. at 21,894–95.
[11] 29 U.S.C. § 203(d) (defining "employer" to "include[ ] any person acting directly or indirectly in the interest of an employer in relation to an employee.").
[12] 29 U.S.C. § 203(e)(1).
[13] 29 U.S.C. § 203(g).
[14] *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 324–26 (1992); *Rutherford Food Corp.*, 331 U.S. at 728; *Scalia*, 490 F. Supp. 3d at 758–59.

circumstances."[15] To reflect this state of affairs—and to respond to a district court's vacatur of a prior control-focused rule[16]—DOL claims to implement a more comprehensive statutory basis for the Proposed Rule: rather than cite only the FLSA's definition of "employer," DOL purports to add the definitions of "employee" and "employ" as additional bases for the Proposed Rule, the latter of which includes the "suffer or permit" language.[17]

The Proposed Rule's derivation and text reveals, however, a renewed, narrow focus on control that is inconsistent with the FLSA. The Proposed Rule adopts a four-factor test "derive[d] from, and align[ed] with," the Ninth Circuit's decision in *Bonnette v. California Health & Welfare Agency* as the core of its analytical framework.[18] While they may be helpful to resolve some cases,[19] use of the control-focused "*Bonnette* factors" as the exclusive means of determining employer liability would violate the FLSA.[20] In practice, the proposed test would render the FLSA's definition of "employ" superfluous: in virtually any scenario in which the common law standard would not be met, the proposed test would preclude a finding of vertical joint employment.

A court in the Southern District of New York previously held in *New York v. Scalia* that a similar 2020 rule based on the *Bonnette* factors "conflict[ed] with the FLSA because it ignore[d] the statute's broad definitions."[21] The Proposed Rule attempts to distinguish itself from the 2020 rule in two primary ways. First, as noted above, it acknowledges that the definitions of "employee" and "employ" in FLSA §§ 3(e) and 3(g), and the "suffer or permit" standard they include, are relevant to the analysis of joint employment.[22] Second, the Proposed Rule permits consideration of some factors outside of the *Bonnette* factors—the prohibition of which was cited by the district court in its holding that the 2020 rule's test was too narrow to comport with the FLSA.[23] These superficial attempts to comport with *Scalia* fail to expand the functional definition of employment beyond one focused on control. The Proposed Rule doubles down on control's primacy by claiming that "economic dependence on work is not the 'ultimate question'" in joint employment analysis, and that, if all of the control-based *Bonnette* factors point toward or against joint employer status, "there is a substantial likelihood that the indicated outcome is correct, and additional factors are highly unlikely … to outweigh the combined probative value of those four factors."[24]

However, not even the *Bonnette* court suggested that its factors were intended to supply the exclusive test for vertical joint employment. In *Bonnette*, the Ninth Circuit noted that while the "four factors … provide a useful framework" for vertical joint employer analysis, they are not "etched in stone."[25] Those four factors were merely *sufficient* to establish a vertical employment relationship under the facts of that case, while "[t]he ultimate determination must be based 'upon the circumstances of the whole activity.'"[26] Other courts have criticized the factors in *Bonnette* as being "unduly narrow" and

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[15] *Rutherford Food Corp.*, 331 U.S. at 727 (quotation omitted); *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1059 (2d Cir. 1988).
[16] *Joint Employer Status*, 91 Fed. Reg. at 21,883–84; *Scalia*, 490 F. Supp. 3d at 795.
[17] *Joint Employer Status*, 91 Fed. Reg. at 21,892.
[18] *Id.* at 21,890; *see Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983).
[19] *See generally Bonnette*, 704 F.2d 1465; *Baystate Alternative Staffing, Inc. v. Herman*, 163 F.3d 668, 675 (1st Cir. 1998).
[20] *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 67–69 (2d Cir. 2003).
[21] *Scalia*, 490 F. Supp. 3d at 757.
[22] *Joint Employer Status*, 91 Fed. Reg. at 21,892; *Scalia*, 490 F. Supp. 3d at 763.
[23] *Joint Employer Status*, 91 Fed. Reg. at 21,893; *Scalia*, 490 F. Supp. 3d at 790.
[24] *Joint Employer Status*, 91 Fed. Reg. at 21,895.
[25] *Bonnette*, 704 F.2d at 1470.
[26] *Id.* (quoting *Rutherford Food Corp.*, 331 U.S. at 730).

incompatible with the FLSA's "suffer or permit" language.[27] The Second Circuit in *Zheng v. Liberty Apparel Co. Inc.*, for example, explained that the *Bonnette* factors approximated the common law test for employment that the FLSA was enacted to overwrite.[28] In *Zheng*, the court clarified that the *Bonnette* factors *could* establish joint employment,[29] but that "under *Rutherford*," the court could not have held "that a positive finding on [the *Bonnette*] factors is *necessary* to establish an employment relationship."[30] While the test for vertical joint employment in the Proposed Rule purports to be broader than that in the vacated 2020 rule and than the common law standard, the Proposed Rule's test is still incompatible with *Rutherford* and *Zheng* because it elevates the four control-based *Bonnette* factors above any other consideration.[31]

In addition to *Bonnette*, the Proposed Rule also cites the Supreme Court's holding in *Falk v. Brennan* as evidence that "substantial control" is the primary standard for joint employment.[32] This contention was rejected in litigation over the 2020 rule, where the court faulted DOL for "confus[ing] necessary and sufficient conditions."[33] The court explained that the fact that *Falk* and *Bonnette* found joint employment in situations where there indeed existed control over an employee did not support DOL's claim that control was *necessary* for a finding of joint employment.[34] DOL now attempts to make the same argument in justifying its reliance on control, but *Falk* no more supports its contention now than it did in 2020. On the contrary, *Falk* may even cut against DOL's argument, as the Court there noted the expansive definition of employment under the FLSA.[35]

B. Rutherford *does not permit the Proposed Rule's prohibition on considering certain factors.*

The Supreme Court in *Rutherford* held that the employment test rests on "circumstances of the whole activity."[36] The Proposed Rule violates this straightforward principle by explicitly prohibiting the consideration of several factors relevant to a worker's economic dependence on an employer.[37] DOL justifies this provision by explaining that the enumerated factors are only relevant in determining "whether a worker is an employee or independent contractor," rather than whether an employee has more than one employer.[38] But this artificial division is not supported by the FLSA, which "does not distinguish between employers and joint employers."[39] As the *Scalia* court noted, "[a]ny factor that is relevant to whether an entity is an employer is also relevant to whether the entity is a joint employer."[40]

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[27] *Zheng*, 355 F.3d at 69.
[28] *Id.* at 69–70.
[29] *Id.*
[30] *Id.* (emphasis in original).
[31] *Joint Employer Status*, 91 Fed. Reg. at 21,895 (explaining that other factors are "highly unlikely" to outweigh the probative value of the *Bonnette* factors).
[32] 414 U.S. 190, 195 (1973); *Joint Employer Status*, 91 Fed. Reg. at 21,890.
[33] *Scalia*, 490 F. Supp. 3d at 788 n.22.
[34] *Id.* at 786.
[35] *Falk*, 414 U.S. at 195; *Scalia*, 490 F. Supp. 3d at 783.
[36] *Rutherford Food Corp.*, 331 U.S. at 730.
[37] *Joint Employer Status*, 91 Fed. Reg. at 21,896–901.
[38] *Id.* at 21,896–97.
[39] *Scalia*, 490 F. Supp. 3d at 790.
[40] *Id.* at 790.

C. The Proposed Rule impermissibly discounts the relevance of "reserved control" categorically.

Similarly, the Proposed Rule impermissibly discounts reserved control in favor of actually-exerted control, rather than adhering to the "circumstances of the whole activity" analysis required by *Rutherford*.[41] As discussed above, by incorporating FLSA's definition of "employ," the Proposed Rule must operationalize its "suffer or permit" standard. Courts applying this standard have repeatedly considered reserved control alongside actual control without systematically favoring one over the other.[42] In *Moreau v. Air France*, for example, the Ninth Circuit cited the lack of a potential joint employer's "authority to directly 'control'" and "ability to hire or fire" workers, rather than a failure to actually exercise that control, when dismissing a claim of joint employment.[43] While the applicability of various factors to a particular set of facts will necessarily vary, the FLSA does not permit the proposal's categorical rule elevating actual control over reserved control.

D. The Proposed Rule's attempt to extend a Portal-to-Portal Act defense to employers fails.

The Proposed Rule claims that it would extend Portal-to-Portal Act liability protections to employers that rely on it, but the Proposed Rule's incompatibility with controlling case law calls this blanket claim into question.[44] The Portal-to-Portal Act provides an employer with a defense to liability for an act or omission taken in good faith reliance on a DOL administrative interpretation of the FLSA regardless of whether DOL later modifies or rescinds, or a court invalidates, that interpretation.[45]

Due to the Proposed Rule's contradictions with prevailing Supreme Court and circuit case law, many employers likely could not satisfy the good faith standard, which is only available if a "reasonably prudent man would have" also relied on the DOL interpretation at issue "under the same or similar circumstances."[46] The regulations interpreting this section of the Portal-to-Portal Act describe how employers might need to seek clarification from agencies when conflicting regulations are issued and the advice of competent counsel in relation to potentially conflicting case law.[47] As this comment describes, and as the Proposed Rule concedes at least in part, its test for joint employment conflicts with controlling law, especially in circuit courts that have explicitly rejected the utility of the *Bonnette* factors.[48] As such, the Portal-to-Portal Act would not shield employers that rely on a final rule if competent counsel would have advised them that the DOL's rule did not comport with the law applicable to a given employment arrangement.

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[41] *Joint Employer Status*, 91 Fed. Reg. at 21,893; *Rutherford Food Corp.*, 331 U.S. at 730.
[42] *See, e.g.*, *Torres-Lopez v. May*, 111 F.3d 633, 640 (9th Cir. 1997) (citing joint employment factors that variously consider the employer's "power" and "right" to take certain actions); *Brock*, 840 F.2d at 1060 (same, in the independent contractor context).
[43] 356 F.3d 942, 950–51 (9th Cir. 2004).
[44] *Joint Employer Status*, 91 Fed. Reg. at 21,886.
[45] 29 U.S.C. § 259; *Encino Motorcars, LLC v. Navarro,* 579 U.S. 211, 223 (2016); *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 106 (2015).
[46] 29 C.F.R. § 790.15(a).
[47] 29 C.F.R. § 790.15(b), (c).
[48] *Joint Employer Status*, 91 Fed. Reg. at 21,891 (noting the Fourth and D.C. Circuits' rejection of the *Bonnette* factors).

E. The Proposed Rule's replacement of the MSPA and FMLA regulations conflicts with those statutes.

The MSPA and FMLA adopted the FLSA's definition of "employ" and therefore are subject to the same, broad "suffer or permit" test and resulting "economic reality" analysis.[49] As discussed above, the four-factor test that the Proposed Rule derives from *Bonnette* fails to operationalize the "suffer or permit" language and therefore also conflicts with the MSPA and FMLA.

II. If finalized, the Proposed Rule would be arbitrary and capricious.

The Proposed Rule is justified by a primary rationale that contains unreconciled logical errors; is internally inconsistent by claiming to incorporate a broad statutory basis but implementing a narrow test in practice; and does not sufficiently address various reliance interests engendered by the current MSPA and FMLA regulations.

A. The Proposed Rule's primary rationale contains logical errors.

The Proposed Rule's central justification is that it seeks to create a national joint employment standard by adopting the *Bonnette* factors, which, it claims, are the "closest thing to a common denominator" among circuit court approaches to the joint employer determination.[50] This, DOL argues, will "provide clarity and a measure of uniformity" to help employers and employees navigate a complicated area of the law.[51] But circuit courts differ sharply on the relevance of the *Bonnette* factors, and adopting a test that conflicts with various circuits' interpretations could create more confusion than it allays. Because the Proposed Rule is "founded on unsupported assertions," the agency has "articulated no reasoned basis for its decision" and, if finalized, it will be arbitrary and capricious.[52]

As noted above, the *Bonnette* factors were never intended to provide the exclusive test for vertical joint employment.[53] The Proposed Rule also does not explain or resolve apparent conflicts with relevant circuit case law. For example, the Proposed Rule fails to adequately address the Fourth Circuit's rejection of the *Bonnette* factors.[54] The Proposed Rule also notes only in a footnote that the D.C. Circuit recently agreed with the Fourth Circuit.[55] The Fourth Circuit rejected the *Bonnette* factors in *Salinas v. Commercial Interiors, Inc.* because they were incompatible with "Congress's intent that the FLSA's definition of 'employee' encompass a broader swath of workers than would constitute employees at common law."[56] The D.C. Circuit subsequently cited *Salinas* in *Mills v. Anadolu Agency NA, Inc.*, rather than *Bonnette*, for its own analysis of joint employment.[57] Failing to meaningfully engage with these circuit court decisions and explain why they should be put to the side undermines the Proposed Rule's purpose of synthesizing disparate tests into a nationally uniform standard.

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[49] 29 U.S.C. §§ 2611(3), 1802(5).
[50] *Joint Employer Status*, 91 Fed. Reg. at 21,884–85, 21,891.
[51] *Id.* at 21,878.
[52] *Tripoli Rocketry Ass'n, Inc. v. ATF*, 437 F.3d 75, 83 (D.C. Cir. 2006) (quotations omitted).
[53] *Zheng*, 355 F.3d at 71; *Bonnette*, 704 F.2d at 1470; *Scalia*, 490 F. Supp. 3d at 787-88.
[54] *Joint Employer Status*, 91 Fed. Reg. at 21,891.
[55] *Id.* n.173.
[56] 848 F.3d 125, 137 (4th Cir. 2017).
[57] *Mills v. Anadolu Agency NA, Inc.*, 105 F.4th 388, 398–99 (D.C. Cir. 2024).

Moreover, this inconsistency undercuts the policy rationale for the change—creating clarity for businesses and employees—by further confusing them as to what the legal standard for joint employment is in a given circuit.

B. The Proposed Rule is internally inconsistent because it claims a broad statutory foundation but operationalizes a narrow, control-based framework.

As discussed above, the Proposed Rule acknowledges that the definitions of "employee" and "employ" in FLSA §§ 3(e) and 3(g), and the "suffer or permit" standard they include, are relevant to the analysis of joint employment.[58] However, despite these provisions being included as part of the Proposed Rule's stated statutory basis, in practice the rule allows for essentially no scenario in which the "suffer or permit" standard would create joint employment liability where the common law standard would not.[59] This gap between the rule's statutory recitation and its operative content is the kind of "logical inconsistency" that would render a final rule arbitrary and capricious.[60]

C. The Proposed Rule violates the change-in-position doctrine by ignoring reliance interests engendered by the longstanding 1995 FMLA and 1997 MSPA regulations.

When changing a position, agencies are required to assess whether reliance interests exist, determine whether they are significant, and, if so, address them.[61] Here, employers and millions of employees in the agricultural sector have structured their business relationships around the seven factors considered in longstanding MSPA regulations.[62] Additionally, millions of employment relationships across the economy have been structured in reliance on similar regulations implementing the FMLA.[63] The consequences of changes to these relationships will not only affect parties to them, but will "radiate outward" to their broader communities.[64] Further, state labor agencies have administered and staffed their enforcement efforts based on the existing federal regulations. The court in *Scalia* recognized similar factors as injuries sufficient to give states standing when challenging the 2020 rule.[65] The Proposed Rule does not adequately address these serious reliance interests and therefore violates the change-in-position doctrine.

III. The Proposed Rule puts low-wage workers and small businesses at risk.

Beyond the legal vulnerabilities in the Proposed Rule, some of which are described in the prior sections, the Proposed Rule would also harm low-wage workers and small businesses. As drafted, this Proposed Rule would narrow the joint employment standard for the FLSA, FMLA, and MSPA, thereby incentivizing outsourcing as a means for employers to shift their responsibilities onto smaller

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[58] *Joint Employer Status*, 91 Fed. Reg. at 21,892.
[59] *Id.* at 21,895.
[60] *Evergreen Shipping Agency (Am.) Corp. v. Fed. Mar. Comm'n*, 106 F.4th 1113, 1118 (D.C. Cir. 2024).
[61] *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 591 U.S. 1, 33 (2020).
[62] 29 C.F.R. § 500.20(h)(5)(iv); *see generally* Congressional Research Service, *Work Authorization Among Hired Agricultural Workers* (Apr. 30, 2025), https://www.congress.gov/crs-product/IF12979 (estimating the number of agricultural workers in the United States).
[63] 29 C.F.R. § 825.106; *see generally Key Facts: The Family and Medical Leave Act*, Nat'l P'ship for Women & Families (Jan. 2026), https://nationalpartnership.org/report/fmla-key-facts/.
[64] *Dep't of Homeland Sec.*, 591 U.S. at 31 (quotation omitted).
[65] *Scalia*, 490 F. Supp. 3d at 768.

businesses. Consequently, workers in already precarious sectors are likely to experience deteriorated working conditions and face an increasingly difficult path to enforcing their rights.

a. The Proposed Rule would make it more difficult for low-wage workers in increasingly outsourced sectors to hold employers accountable.

Since its inception, the FLSA has created broad employer coverage to ensure that companies that use temporary or staffing agencies or other labor contractors care about—and have liability for—the working conditions in their business.[66] Still, in fissured workplaces like temporary and staffing firms, it is often difficult to obtain a meaningful remedy for workers whose rights have been violated.[67] Contractors and subcontractors can declare bankruptcy and owners of companies can simply incorporate under another name to continue their business.[68] Meanwhile the host company—the company for whose benefit the work is performed and who directly or indirectly controls workers' wages and working conditions—can simply cancel its labor services contract at the first sign of a problematic lawsuit and select a competitor contractor. In such instances, DOL's proposed joint employment standard could significantly affect workers' ability to enforce their rights and recover their wages.

By inserting temporary and staffing agencies and other types of subcontractors between themselves and workers, contracting companies can degrade work conditions and more successfully avoid liability for violations of workplace laws even as they benefit from and control the work itself. Because each level of a subcontracted structure requires a financial return for its work, the further down the subcontracted entity is, the slimmer the remaining profit margins. At the same time, the further down an entity is on a subcontracted structure, labor typically represents a larger share of overall costs—and one of the only costs in direct control of those entities. This creates incentives to cut corners and violate workers' rights, such as by failing to pay subcontracted janitors, cable installers, carpenters, housekeepers, home care workers, or distribution workers the wages and overtime they had rightly earned.[69] Thus, workers in fissured, low-wage jobs are precisely the ones that most require stringent protections.

It follows that workers employed through intermediaries like temporary and staffing agencies earn less money and endure worse working conditions than permanent, direct hires. Full-time staffing and temporary help agency workers earn 28 percent less than do workers in standard work arrangements.[70] They also experience large benefit penalties relative to their counterparts in standard work arrangements. Nearly 55 percent of workers in standard arrangements receive an

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[66] Bruce Goldstein et al., *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L. Rev. 983, 1065 (1999) (noting that subcontracted garment sweatshops were among the ills the FLSA intended to address via its broad definitions of employment).

[67] *See generally* David Weil, *Enforcing Labour Standards in Fissured Workplaces: The US Experience*, 22 Econ. & Lab. Rels. Rev. 33 (2011), https://www.fissuredworkplace.net/assets/Weil.Enforcing-Labour-Standards.ELRR-2011.pdf.

[68] *See, e.g.*, David F. Albright Jr., *The Maryland Construction Trust Statute: New Personal Liability—Its Scope and Federal Bankruptcy Implications*, 17 U. Balt. L. Rev. 482, 484 (1988), https://scholarworks.law.ubalt.edu/cgi/viewcontent.cgi?article=1500&context=ublr.

[69] *See, e.g.*, Mimi Whittaker & Dan Ocampo, *As a Delivery Worker Union Campaign Takes Off, Amazon Tries to Dodge Labor Law*, Nat'l Emp. Law Project (Nov. 22, 2024), https://www.nelp.org/as-a-delivery-worker-union-campaign-takes-off-amazon-tries-to-dodge-labor-law/.

[70] Bureau of Labor Statistics, *Table 11. Median usual weekly earnings of full- and part-time workers by contingent status and alternative work arrangement on sole or main job by sex, race, and Hispanic or Latino ethnicity, July 2023*, U.S. Dep't of Lab. (Nov. 8, 2024), https://www.bls.gov/news.release/conemp.t11.htm.

employer-provided health insurance benefit, compared to only 16.6 percent of temporary and staffing help agency workers.[71] Along with an erosion in wages, staffing and temporary agency workers typically work in more hazardous jobs than permanent workers.[72]

In many fast-growing industries—including warehouse and logistics, janitorial, hospitality, waste management, and manufacturing—outsourcing has become deeply entrenched. For example, the warehouse and logistics industry has been reshaped by outsourcing to "third party" logistics firms, highly integrated companies with the capacity to handle goods at several points in a supply chain.[73] These logistics companies, in turn, contract with staffing agencies, which hire workers to unpack, load, and ship goods to retail facilities across the country and with truck driving and courier companies to deliver the goods.[74] Workers employed at the bottom of this supply chain face deteriorated working conditions, with significant increases in wage and hour and health and safety violations as staffing agencies cut corners.[75] A well-known example of this model is Amazon: while the behemoth operates many of its warehouses, it relies heavily on staffing firms to provide the labor.[76] Under DOL's proposed joint employer standard, Amazon may not be considered an employer of the temporary workers in its warehouses even though Amazon controls—and has the capacity to improve—these workers' unfair and exploitative work conditions.

Similarly, in the janitorial services context, labor is outsourced through lead companies that contract with a janitorial company to provide maintenance services at the lead company's facilities.[77] The janitorial company generally hires a second-tier subcontractor to supply workers to clean the facilities. Often, these subcontractors can make a profit only by engaging in cost-savings strategies, including misclassifying janitors as independent contractors or selling "franchise" licenses to unwitting workers.[78] Job quality in the industry has decreased significantly since the emergence of these contracting and franchising models, and violations of basic labor law protections are now endemic in the janitorial industry.[79] In California, where 37 percent of private sector janitors work for subcontractors, subcontracted janitors are 10 percent more likely to have a family income below

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[71] Bureau of Labor Statistics, *Table 10. Health insurance coverage by contingent status and alternative work arrangement on sole or main job, July 2023*, U.S. Dep't of Lab. (Nov. 8, 2024), https://www.bls.gov/news.release/conemp.t10.htm.

[72] Lauren M. Menger-Ogle et al., *A Staffing Perspective on Barriers to and Facilitators of Temporary Worker Safety and Health*, 66 Am. J. Indus. Med. 736 (2023).

[73] As of 2017, 90 percent of Fortune 500 companies operating within the United States contract with one or more third party logistics providers to handle their goods, a sharp increase from 46 percent in 2001. Jennifer McKevitt, *Fortune 500 Companies Are Using 3PLs More, Study Finds*, Supply Chain Dive (May 30, 2017), https://www.supplychaindive.com/news/third-party-logistics-3pl-increase-large-companies-2017/443710/.

[74] Jason Rowe, *New Jersey's Supply Chain Pain: Warehouse & Logistics Work Under WalMart and Other Big Box Retailers* (2012), *available at* https://www.nelp.org/app/uploads/2015/03/NJ_SupplyChainPain_Report.pdf; Jason Struna et al., *Unsafe and Unfair: Labor Conditions in the Warehouse Industry*, Pol'y Matters: Q. Publication U.C. Riverside, Summer 2012, at 1, *available at* https://policymatters.ucr.edu/pmatters-vol5-2-warehouse.pdf.

[75] *See, e.g.,* Michael H. Belzer, *Technological Innovation and the Trucking Industry: Information Revolution and the Effect on the Work Process*, 23 J. Lab. Res. 375 (2002).

[76] Stacy Mitchell & Olivia LaVecchia, *Amazon's Stranglehold: How the Company's Tightening Grip Is Stifling Competition, Eroding Jobs, and Threatening Communities* (Nov. 2016), https://ilsr.org/wp-content/uploads/2020/04/ILSR_AmazonReport_final.pdf.

[77] Catherine Ruckelshaus et al., *Who's the Boss: Restoring Accountability for Labor Standards in Outsourced Work*, Nat'l Emp. Law Project (May 7, 2014), https://www.nelp.org/app/uploads/2015/02/Whos-the-Boss-Restoring-Accountability-Labor-Standards-Outsourced-Work-Report.pdf.

[78] *See, e.g., Awuah v. Coverall N. Am.*, 554 F.3d 7 (1st Cir. 2009).

[79] Ruckelshaus, *supra* note 77, at 9-10.

200 percent of the federal poverty line.[80] An academic survey of low-wage workers found that at least 26 percent of building service and ground service workers had not received minimum wage payments, and 71 percent had not received overtime pay. Over half did not receive required meal breaks.[81]

A broad joint employment standard is critical for ensuring compliance with labor and employment laws and that employers are held accountable when companies decide to outsource. Through this Proposed Rule, the Department of Labor seeks to narrow its joint employment standard at a time when companies in low-wage sectors are increasingly using temporary and staffing agencies to source their labor. If implemented, the Proposed Rule would incentivize outsourcing employers to contract away their legal duties and immunize themselves from responsibility for the workplace conditions they create, while also degrading workers' labor conditions and depriving them of their statutory rights.

b. The Proposed Rule would put small businesses at a competitive disadvantage.

Beyond creating significant barriers for workers hoping to obtain a meaningful remedy for workplace violations, the Proposed Rule would also adversely affect small businesses. While DOL projects that small businesses would not incur large individual costs as a result of this Proposed Rule, it only takes into account a narrow set of "regulatory familiarization costs."[82] In reality, small businesses are likely to be substantially and adversely affected if the Proposed Rule is finalized. In effect, small businesses will be left to ensure compliance with the law alone, without any assistance from the larger employer, in situations where the smaller company may not be able to ensure compliance without the cooperation of the larger lead or worksite employer.[83] Under the proposed narrow standard, small businesses that can't afford to subcontract out operations will be at a competitive disadvantage to large corporations that can and do outsource and underbid based on lower labor costs.[84] For example, under the Proposed Rule, a smaller temporary staffing agency may be held solely responsible and liable for violations such as dangerous child labor conditions in a field, although certain aspects of the work relationship might be outside the company's control. If the small business is liable and not able to properly remedy the situation, it may be unable to operate, hurting small business owners and leaving workers and their families without relief.[85] The Proposed Rule pushes liability onto smaller business owners and places small businesses at a competitive disadvantage.

IV. Any use of artificial intelligence in this rulemaking must be disclosed.

Finally, DOL must disclose information related to any use of artificial intelligence as part of this rulemaking and, to the extent such use is significant, provide an additional opportunity for public

[80] Paul Hayes et al., *Profile of Janitorial Workers in California*, at 6, 16 (Aug. 2022), https://www.labor.ucla.edu/wp-content/uploads/2022/12/221205-UCLAReport.pdf.
[81] Annette Bernhardt et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities*, 31, 34, 37 (2009), https://www.nelp.org/wp-content/uploads/2015/03/BrokenLawsReport2009.pdf.
[82] *Joint Employer Status*, 91 Fed. Reg. at 21,917.
[83] *See* National Employment Law Project, *Joint Employment Explained: How H.R. 3441 Legalizes a Corporate Rip-Off of Workers* (Sept. 2017), https://www.nelp.org/app/uploads/2017/09/Fact-Sheet-Joint-Employment-Explained.pdf.
[84] New York City Department of Consumer Affairs, Comment Letter on Proposed Rule regarding Joint Employer Status Under the Fair Labor Standards Act (June 25, 2019), *available at* https://www.nyc.gov/assets/dca/downloads/pdf/partners/Advocacy-DOL-JointEmployerRule-RIN1235AA26.pdf.
[85] National Employment Law Project, *supra* note 83.

comment.[86] Under the APA's reasoned-decisionmaking requirement, "[w]hen an agency uses a computer model, it must explain the assumptions and methodology used in preparing the model."[87] Moreover, the public must have notice of, and an opportunity to comment on, agencies' uses of models and data, AI-enhanced and otherwise, to regulate.[88] Such disclosures are "[t]he safety valves in the use of … sophisticated methodology."[89]

Beyond being legally required, disclosure of AI usage is prudent policy. Administrative agencies should uphold the values of transparency and public participation.[90] In particular, the Administrative Conference of the United States has recognized that "[a]gencies' efforts to ensure transparency in connection with their AI systems can serve many valuable goals," and it therefore recommends that "agencies might prioritize transparency in the service of legitimizing its AI systems, facilitating internal or external review of its AI-based decision making, or coordinating its AI-based activities."[91] Among other things, disclosure of AI usage allows the public to confirm that agencies are adhering to relevant laws, apply technical expertise to improve agencies' use of technology, assess the risk that federal policies might be influenced by biased or otherwise faulty methods or products, and learn about an emerging and important field of technology. Indeed, the Office of Management and Budget has recognized that the government, in using AI, must "provide improved services to the public, while maintaining strong safeguards for civil rights, civil liberties, and privacy."[92]

Consistent with these requirements and principles, DOL must disclose, first, whether it has used or plans to use AI as part of this rulemaking, including to develop substantive policy, produce supporting analysis, or respond to public comments. If so, DOL must disclose the particular AI product it has used and why it was selected, how that product was procured, whether the product was fine-tuned, what prompts or inputs the agency used to elicit responses from the product, and the responses the product produced. DOL must also disclose how agency staff used AI-produced information, including any quality control, peer review, or other validation performed. And DOL must disclose what measures it took to ensure that its use of AI complied with applicable data security and privacy requirements. To that end, it must disclose whether and to what extent any persons and entities not employed by the agency developed, modified, provided access to, or used AI in the course of the agency's decisionmaking process. To the extent the disclosed use of AI is significant, DOL must provide an additional opportunity for public comment.

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[86] We adopt the definition of artificial intelligence at Pub. L. 115-232 § 238(g), 132 Stat. 1697–98.
[87] *Owner-Operator Ind. Drivers Ass'n, Inc. v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 204 (D.C. Cir. 2007) (quotation omitted).
[88] *See Am. Radio Relay League v. FCC*, 524 F.3d 227, 236 (D.C. Cir. 2008); *Air Transp. Ass'n v. FAA*, 169 F.3d 1, 7 (D.C. Cir. 1999).
[89] *Sierra Club v. Costle*, 657 F.2d 298, 334 (D.C. Cir. 1981).
[90] *See* Attorney General's Manual on the Administrative Procedure Act 9 (1947) (describing the APA's purposes to include "requir[ing] agencies to keep the public currently informed of their organization, procedures, and rules" and "provid[ing] for public participation in the rule making process").
[91] Admin. Conf. of the U.S., Statement #20, Agency Use of Artificial Intelligence, 86 Fed. Reg. 6612, 6616 (Jan. 22, 2021).
[92] Memorandum for the Heads of Executive Departments and Agencies from Russell T. Vought, Director, Office of Management & Budget 1, M-25-21 (Apr. 3, 2025), https://www.whitehouse.gov/wp-content/uploads/2025/02/M-25-21-Accelerating-Federal-Use-of-AI-through-Innovation-Governance-and-Public-Trust.pdf.

V. Conclusion

The FLSA, FMLA, and MSPA were designed to sweep broadly to protect workers beyond the pre-existing common law. The Proposed Rule would improperly narrow their scope. For the reasons described above, the Proposed Rule, if finalized, would be contrary to law, arbitrary and capricious, and put low-wage workers and small businesses at a disadvantage. We respectfully request that DOL withdraw the proposal.

Sincerely,

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