INTERNATIONAL FRANCHISE ASSOCIATION

June 22, 2026

Via Electronic Submission: https://www.regulations.gov

The Honorable Andrew B. Rogers
Administrator
Wage and Hour Division
Division of Regulations, Legislation, and Interpretation
United States Department of Labor
200 Constitution Avenue N.W., Rm. S-3502
Washington, D.C. 20210

Re: RIN 1235-AA48; Joint Employer Status Under the Fair Labor Standards Act, Family and Medical Leave Act, and Migrant and Seasonal Agricultural Worker Protection Act

Dear Administrator Rogers:

The International Franchise Association ("IFA") respectfully submits the following comments in response to the U.S. Department of Labor's Notice of Proposed Rulemaking concerning the standard for determining joint employer status under the Fair Labor Standards Act (FLSA), the Family and Medical Leave Act (FMLA), and Migrant and Seasonal Agricultural Worker Protection Act (MSPA), published in the Federal Register at 91 Fed. Reg. 21878, RIN 1235-AA46 (April 23, 2026) (the "Proposed Rule").

IFA has a strong interest in promoting clear, consistent, and legally sound joint employment standards that:

(1) align with longstanding statutory and judicial precedent;

(2) preserve the economic and legal independence that is foundational to the franchise business model;

(3) recognize the federal Lanham Act and the Federal Trade Commission's Franchise Rule legally require franchisors to take certain actions and impose certain requirements on their franchisees; and

(4) make clear that operating as a franchisor or entering into a brand or supply agreement does not, by itself, make joint employment status more likely.

Subject to the proposed revisions requested and described more fully below, IFA strongly supports DOL's Proposed Rule and its acknowledgement and re-affirmation that operating as a franchisor and entering into and enforcing brand and supply agreements do not, by themselves, make joint employer status more or less likely. IFA also supports the Department's efforts to provide concrete examples in the Proposed Rules.

All interested parties – including the regulated franchise businesses and employer community, the American workers who work for those entities, and other stakeholders – seek clarity and predictability. The Proposed Rule provides both. The Proposed Rule is balanced and reasonable, it aligns with established caselaw, it complies with the Administrative Procedures Act, and it supports the franchise model, the American worker, and the American consumer. IFA therefore urges its adoption via final rule.

I. About IFA And Its Interest In And Engagement On Joint Employment Standards.

IFA is the world's oldest and largest organization representing franchising worldwide. Celebrating over 65 years of excellence, education and advocacy, IFA works through its government relations and public policy, media relations and educational programs to protect, enhance and promote franchising.

IFA's members include franchise companies in over 300 different industries, individual franchisees, and companies that support those franchise companies in marketing, law, technology, human resources, business development, and operations. Franchising serves as an engine for economic growth, contributing an estimated ***$907.3 billion in economic output*** and providing an estimated ***8.8 million direct jobs in 2025*** across the more than 830,000 franchised establishments operating in the United States.[1] Franchising reflects 3% of U.S. GDP with growth expected to outpace the rest of the U.S. economy. As a cornerstone of small business success, franchising drives innovation, job creation, and prosperity in every corner of the country.

Franchising business is small business, with 64% of franchisees being first-time business owners and 85% of franchisees living where they operate their business.[2] Franchising offers a path to entrepreneurship to a diverse group of Americans, and the businesses these franchisees build tend to have higher sales and more employees than non-franchised ventures. Franchised businesses are locally owned, which keep resources in the local community through supply chains and charitable giving. According to a survey of 2,900 franchisees commissioned by IFA and conducted by Oxford Economics, 82% of franchisees own and operate only 1 location, 94% of establishments employ fewer than 50 employees, 47% of franchised brands operate 25 units or fewer, and fast food represents less than 1/4 of franchise establishments.[3]

Franchised businesses also treat their employees well—and often better than non-franchised businesses. Pay progression, job retention, and part-time to full-time transitions are better among workers at franchised businesses compared with non-franchised businesses, with franchisees also offering benefits at greater rates than, and pay on par with, comparable non-franchised businesses.[4]

IFA has a history of engagement on the joint employer issue – from its 2019 comments in support of the U.S. DOL's NPRM regarding joint employment under FLSA, to its comments in opposition to the NLRB's 2022 NRPM regarding joint employment, to its role as intervenor in support of the 2020 NPRM in *New York v. Scalia*, 490 F. Supp. 3d 748 (S.D.N.Y. 2020), and most recently to its coalition challenge to the 2023 NLRB rule in the Eastern District of Texas. IFA has also actively

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[1] Alka Sinha, Khadija Cochinwala & Jin Wang, 2026 FRANCHISING ECONOMIC OUTLOOK 4, (INT'L FRANCHISE ASS'N 2026), https://www.franchise.org/franchising-economic-outlook/.
[2] Oxford Economics, The Value of Franchising (Int'l Franchise Ass'n January 2026), https://www.franchise.org/wp-content/uploads/2026/01/IFA_ValueOfFranchisingFINAL.pdf.
[3] *Id*.
[4] *Id*.

pursued a stable statutory solution to the joint employment issue through the American Franchise Act (H.R. 5267 / S. 3525).[5] IFA's members have also shared their lived experiences with the DOL's past interpretations of the joint employment standard. They shared the time and financial costs they have incurred to monitor the changing rules and evaluate their working relationships. Indeed, the availability, quality, and cost of labor has been identified by franchisor executives as the number one business challenge faced in franchising.[6] IFA is therefore uniquely informed about and able to share the experiences of its members.

II. The Nature of the Franchising Model.

At the heart of every franchise is a synergistic relationship between a franchisor (the brand) and a franchisee (a local small business owner). In its simplest form, franchising is a business model in which a franchisor licenses its trade names, trademarks and service marks (the "Marks") in addition to its name, brand, operating model and systems to an independently owned and operated franchisee in exchange for a fee. The franchisor often provides franchisees with franchising leadership and support and exercises some controls to ensure the franchisees' adherence to brand standards. "Franchising is a method of marketing goods and services" that depends upon the existence of the franchisor's control over a trademark, other intellectual property or some other commercially desirable interest sufficient to induce independently owned and operated franchisees into paying to participate in the franchisor's system and distribute goods or services under the franchisor's trademark or name.[7] The franchisor provides a proven business model and ongoing support, while the franchisee invests capital and personnel to run the location.

Franchisees, by contrast, are independent entrepreneurs who invest substantial capital in their businesses, control their labor relations, and build equity in an independently owned business for the benefit of themselves, their families, their employees, and their communities. For a franchisee, the purchase of a franchise means avoiding those costs of market entry that are ameliorated by the franchisor's extensive guidance and training in many aspects of the operation of the franchised business. It also means enjoying the goodwill generated by the use of the franchisor's marks, brand and system collectively with other franchisees and company-operated outlets. Dependence by the franchisee on the detailed brand standards and methods of operation honed by franchisor experience is therefore a basic part of what a franchisee bargains for in acquiring a franchise. The use of trademarks that project to members of the consuming public that they will enjoy a quality and predictable consumer experience at each franchisee location—even though each is independently owned and operated—is the other principal part of the equation, which again benefits both franchisees and consumers. Each franchisee "is responsible for the day-to-day management of its independently owned business and benefits or risks loss based on [its] own

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[5] IFA believes that the American Franchise Act complements, but does not substitute or replace, DOL's NPRM regarding joint employment.

[6] FRANdata, 2025 Annual Franchisor Survey (Int'l Franchise Ass'n 2025), https://www.franchise.org/wp-content/uploads/2025/02/2025-Franchisor-Survey_For-IFA-review-FINAL.pdf. The survey included responses from 171 senior executives representing franchisors and franchise portfolio companies that own 229 franchise brands from 24 different industries with franchise units ranging from less than 10 to 9,500. Together, the respondents represented nearly 20% of all domestic franchised businesses.

[7] Joseph H. King, Jr., Limiting the Vicarious Liability of Franchisors for the Torts of Their Franchisees, 62 Wash. & Lee L. Rev. 417, 420-21 (2005)

performance and capabilities."[8]

There are often two principal explanations given for the popularity of franchising as a model. One is that it "was developed in response to the massive amounts of capital required to establish and operate a national or international network of uniform product or service vendors, as demanded by an increasingly mobile consuming public."[9] The other is that "franchising is usually undertaken in situations where the franchisee is physically removed from the franchisor, and thus where monitoring of the performance and behavior of the franchisee would be difficult."[10] These two motivations are consistent with a business model in which the licensing and protection of the trademark rests with the franchisor and the capital investment and direct management of day-to-day operations of the retail outlets are the responsibility of the franchisee, which owns, and receives the net profits from, its individually-owned franchise unit. This model works because it strikes a balance: franchisees operate independently, hiring their teams and running their businesses day to day, while franchisors provide brand consistency, training tools, and support.

Franchising has been identified as a leading pathway to ownership for women, people of color, veterans, and first-time business owners. Under-capitalized communities often bear the disproportionate burden when the model is destabilized.

III. Other Legal Requirements That Impact The Franchisor-Franchisee Relationship.

As it finalizes the joint employer rule, the DOL should keep in mind the other federal statutes that govern franchised businesses. Indeed, franchising is already a "heavily regulated" business model,[4] as it is governed by the Lanham Act, the Franchise Rule, and multiple federal and state joint employment tests.

A. Federal Trademark Law Requires Brand Control – Not Employment Control.

It is typical in franchising for a franchisor to license, among other things, the use of its name, its products or services, and its reputation to its franchisees. Consequently, it is commonplace for a franchisor to impose standards on its franchisees, necessary under the federal Lanham (Trademark) Act to protect the consumer. These standards require franchisors to maintain the uniformity and quality of product and service offerings and, in doing so, to protect their Marks,the goodwill associated with those Marks, and most importantly, the protection of the consumer.

The Lanham Act, the federal law regulating trademarks, service marks, and unfair competition, requires trademark owners to maintain reasonable control of the licensee's use of the mark to ensure the "nature and quality of goods or services" that the licensee distributes under the mark.[11] Moreover, because the Lanham Act provides that a trademark can be deemed "abandoned" when "any course of conduct of the owner . . . causes the mark . . . to lose its significance,"[12] franchisors

[8] International Franchise Association, "What is a Franchise?", https://www.franchise.org/franchising-overview/what-is-a-franchise/ (last accessed June 12, 2026).
[9] Kevin M. Shelley & Susan H. Morton, "Control" in Franchising and the Common Law, 19 Fran. L. J. 119, 121 (1999-2000).
[10] Paul H. Rubin, The Theory of the Firm and the Structure of the Franchise Contract, 21 J. Law & Econ. 223, 226 (1978).
[11] 15 U.S.C. §1055; 15 U.S.C. §1127.
[12] 15 U.S.C. § 1127.

have a strong incentive to control the nature and quality of the good or services sold by their franchisees. As a result, franchisors are compelled to establish and monitor brand standards and provide global oversight of their franchisees.

Likewise, it is imperative that franchisees protect their franchisors' brands and the trademark value of those brands. A franchisee, functioning as an independent operator under a Brand License, is trusted and relied upon (by the franchisor) to protect the trademark value in implementing brand standards, and exercising day-to-day management over the operation, since the franchisor is typically not present at franchised business locations. Because franchising requires the collective use of Marks by franchisees and franchisors, all stakeholders affiliated with a brand collectively share risks and rewards. For example, if a franchisee fails to take adequate steps to protect the brand or otherwise engages in an action that injures the brand's reputation, the damage inflicted on the brand impacts all the brand's stakeholders, including all other franchisees and the consuming public. It is therefore essential to franchising that all the stakeholders understand the expectations for brand protection standards and take all necessary action to ensure that those standards are met. Furthermore, these rights and obligations are enunciated in well-drafted franchise agreements and reviewed in advance under a prescribed set of mandated disclosures.

The ability of a customer to identify a certain level of quality and uniformity in the products or services offered by disparate franchisees within a system has led to the explosive growth of franchising. A patron may enter a chain restaurant in New York, Mexico City, or Hong Kong and expect and receive virtually the same food. The uniformity and quality of products offered under a single brand is a prime factor in the success of the franchising concept. Without uniform standards, franchisees could build and operate units in whatever dissimilar fashions they choose, resulting in different buildings, uniforms, food, consumer service standards, and supply chain issues which could raise health concerns, ultimately causing the destruction of the reputation of the brand and the franchisor's concept as a whole.[13]

B. Requirements Under the Federal Trade Commission Franchise Rule.

The Federal Trade Commission (FTC) authorizes and regulates the sale of franchises in the U.S., and it defines a "franchise" in part as "any continuing commercial relationship or arrangement" whereby the franchisor promises that the franchisee "will obtain the right to operate a business that is identified or associated with the franchisor's trademark...."[14]

In 1978, the FTC published the Franchise Rule, which provides prospective purchasers of franchises information they may use to weigh the risks and benefits of a franchise investment, and requires franchisors to provide potential franchisees with specific items of information about the offered franchise, its officers, and other franchisees. Importantly, the Franchise Rule mandates that a franchisor "exert a significant degree of control over the franchisee's ***method of operation***."[15] A franchisor's exercise of control over a franchisee is commonly manifested through written contract and expressly limited to creating and enforcing brand standards. Brand standards typically include, among other things, requirements to comply with all applicable laws.

[13] *See* Shelley & Morton, supra note 7, at 121
[14] 16 C.F.R. §436.1(h)(1) (the "Franchise Rule")
[15] 16 C.F.R. §436.1(h)(2) (emphasis added).

This legally required level of control can be erroneously conflated with control over the franchisee's manner of performance, which is often highlighted as an indicia of an employment relationship under various state and other joint employment laws. Franchisors, however, do not exercise day-to-day management over the business operations or employees of its their franchisees. Yet, broad and ever-changing joint employment standards create uncertainty over whether mere compliance with the FTC's franchise-specific requirements will create an unintended joint employment finding.

If the control which franchisors asserted to protect their brands were used against them to successfully argue the establishment of an employment relationship of any kind (joint-employment or employment of the franchisee), the franchise business model would be destroyed.[16] Further, franchisor support of its franchisees such as guidance aimed at a franchisee's profitability and unit economics — even guidance touching on appropriate staffing levels — should not, by itself, demonstrate the kind of control that establishes a joint-employment relationship.[17]

C. Instability in Federal and State Joint Employment Standards.

Franchising is also subject to joint employment tests under multiple federal and state laws. Under the FLSA, as just one example, courts around the country have articulated different tests that analyze different factors based on the version of the joint employer standard then in effect. The number of different standards and factors employed in each test by various courts has bewildered and frustrated employers seeking to operate franchise businesses efficiently and profitably, without inadvertently creating joint employment. By way of examples only, the Second Circuit has applied a six-factor test in *Zheng v. Liberty Apparel Co.,* 355 F.3d 61, 72 (2d Cir. 2003), while the Third Circuit applied four different factors in *Enterprise Rent-A-Car Wage & Hour Employment Practices Litigation*, 683 F.3d 462, 469-70 (3d Cir. 2012), the Fourth Circuit utilized a different six-factor test in *Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125, 141 (4th Cir. 2017), while various cases in the Seventh Circuit have applied "economic realities" tests (that are indeterminate in nature), and the Eleventh Circuit applied an eight-factor test in *Freeman v. Key Largo Volunteer Fire and Rescue Dept., Inc*., 494 F. App'x 940, 943 (11th Cir. 2012). Most recently, the Department issued an opinion letter describing when "horizontal" joint employment will require separate legal entities to be treated as a single employer for purposes of overtime under the FLSA. FLSA 2025-05 (Sept. 30, 2025) (citing *Chao v. A-One Medical Services, Inc.*, 346 F.3d 908, 917–18 (9th Cir. 2003)). IFA appreciates that DOL provided this guidance to the regulated community.

While the joint employer standard and analysis form the most relevant and appropriate test for the franchise community, thoughtful rulemaking related to both the joint employer standard and the independent contractor standard will help avoid muddying the determination of "control" relevant to franchising. It would also avoid creating two different theories of liability from which plaintiffs

[16] FRANdata, *Franchise Business Economic Outlook 2020* (2019) (prepared for the International Franchise Association).

[17] *C.f. Orozco v. Plackis*, 757 F.3d 445 at 449-51 (5th Cir. 2014) (holding that there was insufficient evidence to legally find that the potential joint employer supervised and controlled workers' schedules, pay rates, or other conditions of employment, where the potential joint employer advised a franchisee on how to increase profitability, including a review of employees schedules, and the franchisee then adjusted workers' hour and pay, where the decision as to whether or how workers' schedules and pay would be adjusted was still up to the franchisee)

could pick and choose the most favorable test to achieve their desired outcome.

IV. DOL Guidance and Clarification is Needed.

As the proposed rule correctly recognizes, courts around the country have historically issued divergent and inconsistent rulings on the joint employer issue, most of which purport to apply the "economic realities" standard. The number of different standards, and the number of factors employed in each different test by the courts, has bewildered and frustrated employers seeking to operate franchise businesses efficiently and profitably, without inadvertently creating joint employment.

Since 2015, the regulated community has experienced joint employment standard whiplash. The standards for determining joint employment under the NLRA and FLSA have changed multiple times, with each new administration offering its own interpretation through the respective agencies charged with enforcing federal laws. To complicate the matter further, courts have created and applied their own multi-factor tests and vacated regulatory actions they deem extra-statutory. Most recently in 2020, a U.S. District Court for the Southern District of New York partially vacated the Department's 2020 joint employment rule. While the appeal was pending, the new administration fully rescinded the 2020 rule, which in turn led to the Second Circuit vacating the district court's decision. This back-and-forth based on the political persuasion of the Administration in office and myriad articulations of the rule of law has created confusion, stifled franchisor support, discouraged growth, and harmed franchise entities, the American worker, and the American consumer. Indeed, the 2015 NLRB standard cost franchise businesses over $33 billion per year, resulting in 376,000 lost job opportunities, and led to 93% more lawsuits.[18]

These costs have created a negative situation for everyone involved. The confusion and lack of clarity has led to costly litigation and has caused franchisors to hesitate to offer help to franchisees where their help could arguably be viewed as exercising control over a franchisee's employees or otherwise used against them in a joint employment analysis. This assistance would often enable small and diverse business entrepreneurs to better train their teams, comply with myriad applicable laws, or have access to better or more cost-effective tools and resources. Faced with the risks that such tools and actions could be used against them, most franchisors attempted to stay as far as they could from the potential joint employer line. This concern—generated by short-sighted regulatory approaches—likely has harmed franchisees, the American worker who ultimately received less training and support, and ultimately the American consumer who receives products and services from franchise businesses.

A. Current Rules and Guidance Contribute To Significant Litigation Threats and Costs.

The employer community has faced significant litigation and costs due to the lack of clarity surrounding the joint employer standard. Indeed, the U.S. Supreme Court's decision in *Falk v. Brennan*, 414 U.S. 190 (1973), cited by the Proposed Rule as one of two key cases establishing precedent for the FLSA's joint employment standard, has been cited more than 300 times related to its joint employment holding. More recently, between 2021 and May 2026, more than 100 FLSA

[18] *See* Ronal Bird, "Statement Regarding the Economic Impact of the Prospective NLRB Public Policy Decision Regarding the Definition of Joint Employer," (2018).

lawsuits have been filed alleging joint employment liability. In these cases, defendants are asked to expend time and significant financial resources on defense counsel. In many cases, fears over the extent of wage and hour class or collective action exposure as well as shared liability for a business partner's practices can be a great deterrent to the formation and/or maintenance of business relationships.

The persistent uncertainty over what facts establish joint-employer status — and, in particular, whether reserved, unexercised, or indirect control can suffice, and how far the economic-reality inquiry reaches — is itself the engine of this litigation and its cost. Defendants settle non-meritorious claims not because liability is likely, but because the governing standard is sufficiently indeterminate that the cost and risk of resolving the question through litigation dwarfs the cost of settlement. The recent history of *Talarico* illustrates the point.

In May 2026, the Third Circuit issued an opinion in *Ralph Talarico et al v. Public Partnerships LLC, d/b/a PCG Pub. Partnerships*, No. 25-1369*,* 2026 WL 1398232, at *1 (3d Cir. May 19, 2026), addressing joint employment. In that case, a care worker pursued a federal Fair Labor Standards Act collective action claim, in addition to a state law class action claim, against Public Partnerships LLC ("PPL") alleging unpaid overtime. The case was filed in 2019 and litigated for seven years. The purported employer defendant, PPL, defended itself through:

- a motion for summary judgment that was decided in its favor,
- an appeal that resulted in the Third Circuit reversing the summary judgment decision on the basis that there was a genuine dispute of material fact as to whether PPL was a joint employer of the plaintiffs,
- class and collective action certification with notice being issued to all care workers it contracted with on behalf of care recipient employers for a multi-year period, and
- a seven-day bench trial on the joint employment question.

After trial, the district court concluded PPL was not the care workers' joint employer. The plaintiff appealed that decision. On May 19, 2026, after seven years of litigation and expense, the Third Circuit affirmed the district court's holding. Despite "winning" for a second time in the most recent ruling in this multi-year battle,[19] PPL has expended significant time and fees (not to mention potential reputational harm) defending itself. That a defendant can prevail twice on the merits — at trial and on appeal — only after seven years of proceedings underscores that the cost imposed by an unclear standard falls on meritorious and non-meritorious defendants alike, and is incurred long before any court reaches the merits.

We recognize that the Proposed Rule will not, standing alone, dictate the outcome in cases like *Talarico*. The FLSA's definitions of "employ," "employer," and "employee" are statutory, and following *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), a reviewing court owes the Department's interpretation no controlling deference on that question of statutory meaning. The Department should draft accordingly — grounding the Proposed Rule in the text and structure of the FLSA and the economic-reality precedents the statute embodies, so that it functions not as a deference-dependent command but as a well-reasoned articulation entitled to respect under

[19] As of the time of filing these Comments, it is unclear whether plaintiff intends to seek appeal the Third Circuit's decision.

Skidmore v. Swift & Co., 323 U.S. 134 (1944), to the extent of its persuasive force.

So understood, the Proposed Rule does meaningful work. It governs the Department's own enforcement and investigative posture directly, reducing the volume of WHD-initiated joint-employer actions premised on attenuated theories of control. And by supplying courts and litigants a clear, reasoned federal articulation of the standard — particularly on the two questions that drive the bulk of joint-employer disputes, the insufficiency of reserved, unexercised, or indirect control standing alone and the properly cabined role of economic dependence — it reduces the very uncertainty that fuels in terrorem settlements and deters the formation and maintenance of legitimate business relationships. It is in narrowing that uncertainty, rather than in binding any court, that the Proposed Rule offers the most durable protection against the litigation costs described above.

B. Real-Life Examples That Illustrate The Uncertainty That Results From Varying, Unclear, and Broad Joint Employer Standards.

Several real-life examples illustrate the uncertainty that results because of the vague and ever-changing joint employer standards. Consider the following examples of franchisor-franchisee interactions:

1. The franchisor's franchise agreement sets forth specific requirements for franchisees, such as minimum operating hours, required uniforms, and required pre-employment background checks and screenings.

2. The franchisor provides training to franchisees regarding best practices for operations, which include suggestions for qualifications for certain roles (e.g., massage therapists, boutique fitness instructors, hotel general managers), recommended staffing levels across day parts and peak customer traffic periods to ensure quality standards are met and performance standards that are common to the business environment.

3. The franchisor shares example employee handbooks or other personnel policies with its franchisees that may be conformed for use with respect to the franchisee's employees.

4. The franchisor provides its franchisees with sample policies or best practices regarding workplace civil rights issues, such as anti-discrimination and anti-harassment policies.

5. The franchisor conducts on-site inspections of its franchisees to ensure brand standards are being maintained.

6. The franchisor conducts audits to ensure adherence to brand standards, the results of which cause the franchisee to correct behavior of employee(s) to ensure brand standards and quality control standards are being met.

7. The franchisor issues to a franchisee's employee an award recognizing the employee's quality service and the franchisee later rewards the employee.

8. The franchisee requests input from its franchisor regarding desired skill sets of a sales or marketing employee or store general manager, which the franchisee references but is not

required to adopt to hire its employees.

9. The franchisor provides its franchisees with regular newsletter updates advising the franchisees of recent developments in the law that could impact the franchisees.

10. In light of negative publicity resulting from an allegation that a franchisee's employee has harassed customers, the franchisor contacts the franchisee to gather further information on the allegations and the status of any investigation into such allegations.

11. Franchisor suggests one or more law firms as potential options for franchisor to consider at its discretion for legal advice or litigation matters.

12. The franchisor provides its franchisees with e-mail addresses.

13. The franchisor negotiates preferred rates with vendors, which the vendors offer to all franchisees from that franchise system.

14. The franchisor provides its franchisees with point of sale ("POS") software that includes tools that assist franchisees with scheduling and allows employees to clock in and out for shifts.

15. The franchisor requires the franchisee to comply with all applicable laws, which promotes attention and adherence to legal requirements under federal, state, and local law.

16. The franchisor requires that its franchisees maintain drug-free workplaces, which potentially could lead to franchisee correction or discipline of employees who violate such a policy.

17. The franchisor shares general, optional resources that may include best practices for scheduling, training, and other management function.

18. The franchisor offers a hotline through which its franchisees can seek resources or general, optional best practices on operational matters other than employment decisions and practices.

19. The franchisor contracts with an outside vendor to provide a hotline to offer independent, optional resources and information relating to franchisee questions about payroll, human resources, and employment law issues.

20. The franchisor provides its franchisees with suggested models for adequate staffing to meet anticipated customer service needs.

In the past, these types of interactions may have been considered essential to maintaining a brand's reputation and were insufficient to support a joint employer finding, because they presented no direct control over the terms and conditions of employment of the franchisee's employees. Without the Department's guidance, however, these practices may create significant uncertainty about what conduct is permissible and increase the risk that the joint employment standard will be misapplied to reach an improper joint employer finding. That lack of clarity and risk should be remedied by way of a final rule that makes clear that the examples set forth above are *not* indicia of joint employer status.

Properly structured rules will encourage the regulated community to continue to exchange best practices, which ultimately benefits franchisees, the American worker, and the American consumer. Franchisors often provide sample handbooks or other employment documents to their franchisees, not because they wish to control the franchisees' employees, but because these resources help their small business partners reduce costs and succeed independently. Moreover, a franchisor may be required to ensure its franchisees follow certain laws or contract requirements. Courts have acknowledged that a party in a contracting relationship may need to exercise some amount of supervision over their contract partners.[20] But they also realize the "substantial and valuable place that subcontracting relationships have come to occupy in the American economy" and that such relationships are "unlikely to be mere subterfuge to avoid complying with labor laws."[21]

C. Unclear and Overbroad Standards Cause Defensive Joint Employment Distancing That Harms Small and Diverse Businesses/Entrepreneurs, the American Worker, And American Consumers.

When the joint employment standard is overbroad or unclear, franchisors withdraw support, tools, and resources from franchisees out of a fear of being accused of, let alone determined to be, a joint employer of a franchisee's employees. In response to surveys conducted by the International Franchise Association and the U.S. Chamber of Commerce related to the prior proposed joint employer standards, franchisors in hospitality, healthcare, quick-service restaurants, and salons said they cut back significantly on assistance provided to franchisees. More than 90 percent of franchisors surveyed said they implemented defensive distancing behaviors to avoid potential liability, including, among other examples: (1) withdrawal of IT and training resources; (2) providing fewer or less detailed (optional) sample documents for franchisees; (3) decreasing supervision of operations and performance standards; and (4) withdrawing access to (a) proprietary or licensed systems, (b) software/hardware products, (c) expertise and guidance regarding operations, (d) assistance and best practices with regards to facility and employee safety, and (e) system-wide or third-party vendor data, as well as other resources that could offer valuable insights and solutions for other franchisees.

Franchisees reported feelings of isolation and lack of support from their franchisor partners and said they missed out on many of the benefits that encouraged them to enter into a franchise relationship in the first place. The effect of reduced interactions between franchisees and franchisors resulted in slowed growth, reduced expansion and fewer entrepreneurial opportunities for both franchisees and franchisors. For example, in response to the prior IFA/U.S. Chamber

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[20] *Zheng v. Liberty Apparel Co. Inc.*, 355 F.3d 61, 73 (2d Cir. 2003) (noting that a joint employer test should consider both the type of control exercised by putative employer over the work of the employee and whether the putative employer "function[s] as employers of the plaintiff rather than mere business partners of plaintiffs' direct employer," to avoid overbroad reach of joint employer liability); *Jacobson v. Comcast Corp*., 740 F. Supp. 2d 683, 690 (D. Md. 2010) (distinguishing between control over an employee and general quality control of a contract partner's work, and finding "a high level of supervision and control is not an automatic trigger for joint employment," when such it is focused on the quality of the product rather than the day-to-day performance of the employee).
[21] *Zheng*, 355 F.3d at 73–74.

survey, franchisees reported revenue suppression rates between two (2) and ten (10) percent because of the additional expenses they were forced to incur related to withdrawal of franchisor support. Franchisors commented that they were less likely to enter into franchise agreements with less experienced or new franchisee-owners, because they could not provide the type of assistance and oversight they traditionally provided to help new partners get off the ground and succeed. Franchisees also reported problems with talent acquisition because of the lack of optional resources shared by franchisors, resulting in staffing shortages in key positions that prevented the franchises from reaching their full revenue potential.[22]

This defensive withdrawal of support harms franchisees, American workers, and American consumers.

D. Unclear Rules Hamper Franchise System Collective Efforts And Training To Help Combat Threats to Workplace Safety and Scourges Like Human Trafficking.

Human trafficking is a devastating scourge facing our country. The U.S. Department of Homeland Security defines human trafficking as "the crime of compelling a person to provide labor or services, or to engage in commercial sex acts."[23] "Exploitation of a minor for commercial sex is human trafficking, regardless of whether any form of force, fraud, or coercion was used."[24] Although it is difficult to accurately assess the scope and extent of human trafficking in the United States, the U.S. Department of Homeland Security cites statistics from the United Nations' International Labour Organization indicating that an estimated 27.6 million people are victims of human trafficking worldwide. U.S. ICE Homeland Security investigations have uncovered human traffickers operating within, among other industries, agriculture, landscaping, construction, hospitality, manufacturing, domestic work, restaurants, elder care, grocery retailers, salon services, and janitorial services.

The franchisor-franchisee relationship exists in many of these industries, and more and more hotel franchisors are being pursued for liability for human trafficking that occurs at franchised hotels about which neither the franchisee owner nor the hotel franchisor were aware. This places the entities in these franchisor-franchisee relationships in a unique and important position to educate and train personnel on the signs of human trafficking, how to help prevent suspected trafficking, and reporting mechanisms for suspected trafficking. While franchisors may have or be willing to invest in training to help combat human trafficking, they may also be hesitant to do so where it could be used against them in a joint employer challenge. For example, the U.S. Department of Justice Office of Victims of Crime offers, among other resources, "a series of five interactive online

[22] For example, one franchise reported it could employ about six additional stylists for its salon business if it had recruiting assistance from its franchisor and that each stylist could create $50,000 in annual revenue. Other businesses made similar reports. Where franchisors have clarity on joint employment, they are better able to allow franchisees to take advantage of their economies of scale with respect to things such as job fairs, unified job postings, and referrals of potential applicants to franchisee locations. Much of this can be achieved through assessment and similar technology, which assists with matching people to positions more quickly and efficiently. In fact, in the past, many franchisors had provided assistance or recommendations to franchisees regarding talent acquisition. Without clear guidance from the Department, however, many refrain from doing so because of joint employer liability risks.

[23] U.S. Department of Homeland Security, Human Trafficking Quick Facts, https://www.dhs.gov/human-trafficking-quick-facts (last accessed June 12, 2026).

[24] *Id*.

modules that offer foundational learning on trauma-informed and victim-centered approaches to human trafficking."[25] A franchisor that recommends, or even requires, a franchisee to provide this or other training to their employees should not have to be concerned about this being used against the franchisor in subsequent employment litigation.

E. DOL's Proposed Rule Will Provide Clarity For DOL's Enforcement Activities, To The Benefit Of Franchisors, Franchisees, And American Workers.

Particularly as strengthened with the modest amendments IFA suggests below, the Proposed Rule will provide clarity and reduce the harm to franchisors, franchisees, and employees from an unclear DOL standard. For one thing, the Proposed Rule will underscore that ordinary aspects of the franchisor-franchisee business relationship—including the franchisor's enforcement of brand standards and provision of support to franchisees—do not indicate a joint employer situation. *Compare supra* Section IV.B.

For another thing, the Proposed Rule will reduce franchisors' incentives to engage in defensive distancing and facilitate their greater support of franchisees. *Compare supra* Section IV.C. The Proposed Rule's exclusion from liability of certain types of business-to-business cooperation will simultaneously encourage the sharing of resources with small businesses and subcontractors while reducing the likelihood (due to the potential over-exercise of control by larger partners that have no choice but to maintain certain supplier or franchised relationships) that those smaller businesses will have to sacrifice independence and entrepreneurial control in order to maintain meaningful business relationships.

Finally, the clarity flowing from the Proposed Rule will facilitate franchisors and franchisees using their unique position to engage in more robust system-wide efforts to combat human trafficking. *See supra* Section IV.D.

The practical stakes of this clarity are concrete. Because the rule speaks first to the Department's own investigative and enforcement choices, it operates where an unclear standard does its earliest damage. A franchise relationship inevitably carries reserved, unexercised, and indirect authority; once the final rule confirms that such authority cannot by itself establish joint employment, and that economic dependence occupies only the narrow role the rule assigns it, the Wage and Hour Division will have markedly fewer occasions to pursue joint-employer theories resting on attenuated control. Such theories impose years of cost on franchisors and franchisees even when they ultimately fail, as the seven-year course of *Talarico* illustrates. *See supra* Section IV.E. That same predictability lets franchisors restore the assistance—training, shared systems, model policies, and operational guidance—that defensive distancing had caused them to pull back, to the benefit of franchisees and the workers they employ. The Proposed Rule therefore does more than restate settled law: it withdraws the principal source of enforcement uncertainty that has fueled litigation, chilled franchisor support, and ultimately fallen on the very workers the FLSA exists to protect.

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[25] U.S. Department of Justice Office of Victims of Crime, Human Trafficking Training and Technical Assistance, https://ovc.ojp.gov/program/human-trafficking/training-and-technical-assistance (last accessed June 12, 2026).

V. DOL's Proposed Rule Correctly Identifies The Independent and Neutral Nature of the Franchise Relationship and Faithfully Implements the FLSA and Supreme Court's "Economic Reality" Framework Based On Four Core Factors.

From *Rutherford Food Corp v. McComb*[26] and *Falk v. Brennan*[27] to guidance provided in *Bonnett v. California Health & Welfare*[28], *In re Enterprise Rent-A-Car Wage & Hour Emp't Practices Litig.*,[29] and *Zheng v. Liberty Apparel Co.*,[30] and *Enterprise*, among others, DOL's Proposed Rule faithfully seeks to implement the "economic reality" test for determining joint employment.

In *Bonnette v. California Health & Welfare Agency*, the Ninth Circuit held that state and county agencies were the joint employers of in-home care workers for purposes of the minimum wage provisions of the Act.[31] In reaching its decision, the Court stated that the employment relationship should not be evaluated based on "isolated factors," but instead should be based on the economic reality of the relationship between the employee and the putative employer. The court announced a four-part test for determining whether a putative employer held an employment relationship with an employee for purposes of the FLSA: "whether the alleged 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."[32] The Court acknowledged these four factors should not be applied blindly, but rather must be viewed within the context of the whole relationship. In the decades since the Ninth Circuit's decision in *Bonnette*, some federal courts have adopted its four-part framework and applied the same or a similar test—others, however, have declined to adopt *Bonnette*.

The Department sought to codify a modestly revised version of the *Bonnette* test in 2020. Those efforts, however, were challenged via litigation with the district court in *New York v. Scalia* partially vacating the Department's rulemaking.[33] The decision was appealed, but the appeal was dismissed after the new administration withdrew the 2020 rule. Although the merits of the district court's decision in *New York v. Scalia* were not ultimately resolved via binding precedent, the Proposed Rule re-introduces much of the 2020 rule while also identifying and seeking to cure the purported defects identified in that case.

While the *Bonnette* test is not perfect, IFA agrees with the Department's proposal to re-focus the joint employer regulations on the core principles expressed by the Ninth Circuit and a plurality of other courts. The *Bonnette* test has stood the test of time, has developed a body of law applicable to specific factual examples, and provides the clearest guidance to employers and employees attempting to determine which business entities are or are not joint employers under specific

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[26] 331 U.S. 722 (1947).
[27] 414 U.S. 190 (1973).
[28] 704 F.2d 1465 (9th Cir. 1983), *abrogated on other grounds by Garcia v. San Antonio Metro. Transit Auth.,*, 469 U.S. 528 (1985).
[29] 683 F.3d 462 (3d Cir. 2012) (citing, among others *Goldberg v. Whitaker House*, *Nationwide Mut. Ins. Co. v. Darden*, *Rutherford Food v. McComb*, *N.L.R.B. V. Browning-Ferris Indus. Of PA*, and *Bonnette. v. California Health & Welfare Agency*).
[30] 355 F.3d 61 (2d Cir. 2003).
[31] *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983).
[32] *Id.* at 1470.
[33] 490 F. Supp. 3d 748 (S.D.N.Y. 2020).

circumstances.

A. The Proposed Rule Correctly States That The Nature Of The Franchising Relationship Does Not, By Itself, Indicate Joint Employment.

IFA strongly supports the Proposed Rule's recognition and acknowledgement that:

> *"franchising and brand-and-supply agreements are common and legitimate business models, and that such arrangements do not in and of themselves result in joint employment under the FLSA."*
>
> *"[in applying the economic realities analysis to the facts before them]. . . courts . . . almost always reject[] arguments that franchisors are joint employers unless there is sufficient supporting evidence above and beyond the franchise relationship that the franchisor is involve din the day-to-day management of the franchisee and its employees."*

91 Fed. Reg. 21899 (Apr. 23, 2026). As set forth in more detail in section II and III above, franchisors and franchisees run independently owned and operated businesses. Franchising is a distinct commercial and trademark-licensing vehicle, not an employment relationship. While franchisors often have years of experience and resources, and make optional employment or HR tools and resources available for their franchisees, franchisees are both contractually and in reality responsible for all of the terms and conditions of employment for their workforce. Franchisees control the hiring, monitoring, supervising, disciplining, and termination of their employees; they set and control pay; and they maintain employment records. IFA strongly supports readoption of this provision from the 2020 Rule as well as the clarification that "such guidance is applicable in the contexts of both horizontal joint employment as well as vertical joint employment." 91 Fed. Reg. 21899 (Apr. 23, 2026).

B. Proposed Section 791.125 Correctly Clarifies That Imposing Contractual Agreement Requirements Is Joint Employment Neutral.

Section 791.125(b) and (c) state that contractual agreements requiring the employer to comply with general legal obligations, to meet certain standards to protect the health or safety of its employees or the public, or to meet certain quality control standards to ensure the consistent quality of the brand or business reputation do not make a joint employer status more likely under the Act. 91 Fed. Reg. 21921 (Apr. 23, 2026). In franchising, the Lanham Act and FTC's franchising rule mandate affirmative requirements that franchisors implement via contractual agreements and terms. As a result, franchisors are compelled to establish and monitor brand standards and provide global oversight with regard to their franchisees. As one examination of the franchisor/franchisee model explained:

> *Typically, a franchisor imposes systemwide standards by means of the franchise agreement between the parties that establishes uniform specifications with regard to: advertising and promotion; site selection; construction and design; furniture and fixtures; products and services; cash control; bookkeeping and reporting procedures; general operations; personnel; revenue reports; customer lists; accounting; display of signs and notices; authorized or required equipment,*

appliances, and appurtenances; required uses of trademark; insurance requirements; license requirements; standards for management and personnel; hours of operation; required uniforms; local advertising; required manner of offering or selling products or services; standards of maintenance and appearance; and training requirements. Other procedures, specifications, and standards may also be imposed. This list is not exhaustive, but it touches upon many of the characteristics of the franchise relationship that courts have erroneously cited as examples of the franchisor's "control" over its franchisees in order to justify imposing direct or vicarious liability upon a franchisor.[34]

Indeed, most franchise agreements include contractual provisions governing many aspects of business operation, some in great detail, but which have little to no bearing on a franchisor's "control" of its franchisees' employees. In *Drafting Franchise Agreements After Patterson v. Domino's: Avoiding the Minefield of Vicarious Liability and Joint Employment*,[35] the authors describe and analyze a series of such provisions commonly found in franchisor/franchisee agreements:

- Language expressly characterizing the relationship of both businesses, and setting forth which responsibilities each party assumes or retains;[36]
- Brand standards manuals and guidance, which give franchisees the benefit of the franchisor's experience and expertise to assist them in running a successful franchise, while giving the franchisor an assurance that its brand standards are used consistently, and in a manner consonant with its policies and procedures for business operations;[37]
- Training requirements for franchisees and their franchises' executive management on business operation;[38]
- The rights and responsibilities of the parties with respect to ongoing business guidance, recommendations, or advice for franchisees to use at their discretion, and obligations relating to periodic advice and communication;[39]
- Broad contours for the conduct of business administration, including required hours of operation, trade dress provisions ensuring the visual consistency of brand décor, design, color, and signage;[40]
- Optional staffing guidance, offering suggestions or sample documents for, e.g., HR policies, employee discipline, training, and scheduling, to use (or not use) as the

[34] Shelley & Morton, *supra* note 9, at 121.
[35] Susan A. Grueneberg, Joshua Schneiderman, Lulu Y. Chiu, *Drafting Franchise Agreements After Patterson v. Domino's: Avoiding the Minefield of Vicarious Liability and Joint Employment*, 36 Franchise L. J. No. 2 189, 195-97 (Fall 2016).
[36] *Id*.
[37] *See id.* at 197-199.
[38] *See id.* at 199-201.
[39] *See id.* at 201-202.
[40] *See id.* at 203-207.

franchisee sees fit;[41]

- The use of proprietary software for scheduling, timekeeping or payroll processing;[42]
- Safety and security requirements which franchisees must meet;[43] and
- Language requiring the franchisee to operate the franchise in compliance with all applicable laws and regulations.[44]

Some or all of these are likely to be found in common franchisor/franchisee agreements, and on their face can suggest to one less experienced in franchising a far greater involvement of the franchisor in its franchisees' day-to-day operations than is actually the case, and which in no way bear on the relationship of the franchisor to the franchisee's employees. While, as one commentator noted, these "[t]ypical franchisor controls can look pervasive to judges, lawyers, and jurors who are not schooled in modern franchising,"[45] they are nevertheless the very types of standards that many courts have found to be: (1) consistent with a franchisor's right to control its trademarks and the quality of products and services distributed under those Marks; and (2) insufficient to justify the imposition of vicarious liability. Establishing and monitoring brand standards performance merely constitutes the global oversight necessitated by the Lanham Act to ensure that franchisors protect and preserve their Marks and brands. Indeed, global oversight, unlike the exercise of control over the essential terms and conditions of employees' work lives, is a "routine feature of independent contracts."[46] Likewise, it is essential to all Brand Licenses, whether in franchising or not.

A franchisor's exercise of controls is limited only to brand standards and the Proposed Rules correctly note that such control should not be viewed as day-to-day management over the business operations or employees of its franchisees. Any final rule should be consistent with the Proposed Rule and meticulously avoid disturbing commonplace and necessary contractual provisions implementing legal requirements wholly unrelated to the direct control of the terms and conditions of franchisee employees' employment.[47]

C. Proposed Section 791.115(e) Correctly States That Although Additional Factors May In Certain Instances Be Relevant, They Cannot Overcome The Four Core Factors.

Section 791.115(e) in the proposed rule adds that if the four factors identified in section 791.115(a)

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[41] *See id.* at 207-210.
[42] *See id.* at 210-211.
[43] *See id.* at 212-213.
[44] *See id.* at 213-214.
[45] William L. Killion, *Franchisor Vicarious Liability—The Proverbial Assault on the Citadel*, 24 Franchise L. J. 162, 165 (2005).
[46] *Id.*
[47] It would also provide clarity to the regulated community if the final rule expressly stated that reserving contractual rights — to for example approve or terminate the franchise, inspect the premises, audit books and records, and require operating-standard compliance — that the franchisor does not directly exercise over the franchisee's employees is not indicative of a joint employment relationship.

all point in the same direction—i.e., they unanimously indicate joint employment or no joint employment—then any "additional factors are highly unlikely, either individually or collectively, to outweigh the combined probative value of those four factors." 91 Fed. Reg. 21895 (Apr. 23, 2026). This rationale is precisely correct. The four core factors cut to the heart of what it means to be an employer. The "additional factors," however, do not.

VI. Recommended Revisions To The Proposed Rule To Strengthen And Clarify Standard.

While IFA strongly supports the Proposed Rule, it proposes changes below to more closely align the Proposed Rule with the FLSA, to avoid confusion, to protect unintended consequences for franchising, and to fortify the Proposed Rule for legal review.

A. The Final Rule Should Apply the Franchising-Neutrality Provisions of Section 791.125 Consistently To Both Vertical and Horizontal Joint Employment.

The Proposed Rule's franchising-neutrality provision, § 791.125(a), provides that operating as a franchisor, using a franchise model, or entering a brand-and-supply agreement does not, by itself, make joint-employer status more or less likely under the Act. That neutrality principle is reflected in the horizontal joint-employment provision, § 791.120, but the vertical joint-employment provision, § 791.115, does not mention franchising at all. To eliminate any inference that the principle operates differently depending on the type of joint employment at issue, IFA asks the Department to clarify in the final rule that the franchising-neutrality provisions of § 791.125(a) apply consistently across all joint-employment scenarios—both vertical and horizontal. A franchise relationship is no more probative of joint employment when a franchisor's relationship with its franchisee's employees is examined (vertical) than when two franchisees of the same brand are compared (horizontal). Stating the principle consistently—whether by adding the neutrality language to § 791.115 or by cross-referencing § 791.125(a) in both the vertical and horizontal provisions—will prevent litigants from exploiting the asymmetry between §§ 791.115 and 791.120 to argue that the franchise relationship carries greater weight in the vertical analysis.

B. The Final Rule Should Make Clear That Reservation of Contractual Rights or Indirect Control, Alone, Does Not Indicate Joint Employment.

Section 791.115(c) correctly states that it is the actual exercise of control that is more relevant to the joint employment analysis than the reserved or indirect right to control. The Proposed Rule, however, now says reserved and yet unexercised contractual authority is relevant – albeit less relevant than actual exercises of control. Critically, the rule does not say that reserved-but-unexercised authority, or indirect control, is insufficient on its own. Given this weighting language ("more relevant" / "less relevant"), a factor can be assigned less weight and still be outcome-determinative in a particular case. While the Proposed Rule's actual-exercise-of-control-is-more-relevant" weighting is a welcome direction, it is not a floor and leaves the door open to a joint-employer finding resting on dormant contractual rights or attenuated indirect input alone. In franchising, this would be a perverse and impermissible outcome.

As noted above, franchising agreements routinely reserve rights that could be challenged as reservations of control and yet are never exercised or have nothing to do with a franchisee's employees. Examples include the right to terminate the franchise, inspect operations, audit books and records, and require compliance with operating standards. Franchisors often also reserve the right to provide indirect input via recommendations, suggestions, and optional guidance regarding things like staffing levels, training materials, and business consulting. If either category of indirect control can establish joint employment, franchisors may be exposed to liability for the ordinary architecture of franchising itself. For purposes of control, and specifically control identified in sections 791.115, IFA asks the Department to consider expressly stating in the final rule that the mere reservation of contractual authority that is not exercised and could be viewed as indirect control, standing alone, cannot establish or even be viewed as a strong indicator of a joint-employer relationship.

Section 791.115(d) also correctly states that indirect control must include mandatory directions to another employer that controls an employee. Suggestions, guidance, and the "employer's voluntary decision to grant the potential joint employer's request, recommendation, or suggestion does not constitute indirect control that can demonstrate joint employer status." 91 Fed. Reg. 21919-21920 (Apr. 23, 2026). The final rule should include subsection (d) in its current form, and offer concrete examples showing that a franchisor's optional recommendations regarding employment actions do not evidence a joint employment relationship. Here, an evidence problem is created for franchisors regarding whether its recommendations were in fact optional or mandatory and required. To provide clarity and certainty, the final rule should expressly state that written documentation stating a recommendation is voluntary or optional is dispositive on the issue absent competent evidence clearly demonstrating the falsity of such a statement.

C. The Final Rule Should Clarify that the Franchise Relationship Itself Does Not Create "Economic Dependence" Between A Franchisee's Employees And A Franchisor that Justifies A Joint Employment Finding.

Every commercial relationship between entities involves "economic dependence." Indeed, every employee is to some extent, directly or indirectly, economically dependent on their employer's vendors, affiliated entities, and even the consumers that purchase or receive the ultimate product or service. In the franchising context, a franchisee's employee arguably might not have gainful employment or economic income without a franchisor's brand and business model. Yet, a franchisee's employees are not "economically dependent" on a franchisor.

The final rule should therefore clarify that a franchise relationship does not reflect the kind of "economic dependence" that makes joint employment more likely. It should also clarify that "economic dependence" is only relevant to the analysis where it relates to or bears directly on direct and immediate control of terms and conditions of employment. "Economic dependence" as to non-employment terms is not relevant to, and standing alone can never establish, joint employment liability. Additionally, the final rule should expressly state that a franchisee's employee is not economically dependent on the franchisor for its continued employment based solely on the franchisor's exercise of control over brand protections and operational standards.

D. The Final Rule Should Clarify and Add More Concrete Examples To Proposed 29 C.F.R. § 791.125(d) and (e) related to Technology, Tools, and Data Sharing.

Franchisors often have access to, are able to create, or are able to negotiate better deals for tools and resources on behalf of the entire system than would any individual franchisee. For example, franchisors are often able to negotiate for proprietary or licensed systems or software/hardware products related to point of sale, labor scheduling, inventory management, HR forms and resources, and training. Franchisors may also develop and license their own proprietary technology, or have access to system-wide data that would provide valuable insights and business practices for franchisees. The Proposed Rule, however, does not address whether a franchisor providing such tools and resources to a franchisee would constitute or demonstrate control or create unnecessary joint employment risk.

Therefore, IFA asks the Department to clarify that providing such resources, tools, and information between a franchisor and franchisee do not, without more, constitute control for purposes of the joint employment analysis. IFA asks the Department to add and specifically list in subsection 791.125(e)(3) that the following, without more, do not indicate or give rise to a vertical joint employment relationship because they evidence franchisor support and not employment control:

- Licensing proprietary technology, either a vendor's or the franchisor's own technology—such as a point-of-sale system, a labor-scheduling tool, an inventory-management solution, electronic training, payroll-processing software, or AI human resources software— that the franchisee uses to make its own employment decisions.

- Negotiating system-wide vendor agreements and preferential pricing that are available to franchisees.

E. The Final Rule Should Clarify and Add More Concrete Examples To Proposed 29 C.F.R. § 791.115(g) Reflecting Conduct That Does Not Give Rise To Vertical Joint Employment.

IFA asks the Department to add and specifically list in subsection 791.115(g) that the following, without more, do not give rise to a vertical joint employment relationship because they evidence franchisor support rather than control over employment terms and conditions:

- Providing optional sample employee handbooks, HR policy templates, and training materials the franchisee may adopt, modify, or decline (support as included).

- Recommending (not requiring) staffing levels or providing benchmarking data.

- Requiring compliance with health, safety, and other legal requirements.

- Reserving contractual rights — to approve or terminate the franchise, inspect the premises, audit books and records, and require operating-standard compliance — that the franchisor does not directly exercise over the franchisee's employees.

- Offering access to group purchasing arrangements or association benefit plans.

IFA recognizes that several of these examples—particularly the provision of sample handbooks and policy templates, the imposition of legal-compliance and health-and-safety requirements, and the offering of association benefit plans—are already addressed in proposed § 791.125(d). IFA nonetheless asks the Department to restate them within the operative vertical-analysis provision,

§ 791.115(g). Section 791.115 supplies the four-core-factor framework that adjudicators and litigants will consult first in any vertical joint-employment dispute, whereas the separately located franchising provisions of § 791.125 are easily overlooked or argued to be confined to their own subsection. Restating these examples in § 791.115(g) ensures the conduct is recognized as non-probative within the very provision that governs the analysis, without requiring a cross-reference a court could decline to draw. The marginal cost of the redundancy is slight; the cost of an adjudicator treating the omission from § 791.115 as meaningful is not.

F. The Final Rule Should Clarify and Add More Concrete Examples To Proposed 29 C.F.R. § 791.115(g) Reflecting Conduct That May Give Rise To Vertical Joint Employment.

IFA asks the Department to add and specifically list in subsection 791.115(g) that the following may give rise to a vertical joint employment relationship because they evidence control over employment terms and conditions:

- Conducting interviews and actually hiring, firing, or disciplining the franchisee's employees — or mandating that the franchisee take such action as to specific employees.

- Setting the actual wage rates or pay of the franchisee's employees (mandating, not recommending).

- Directing day-to-day supervision or controlling individual employees' schedules and assignments.

- Acting as the decision-maker over the franchisee's employment records or payroll — as opposed to supplying a tool the franchisee controls.

- Issuing mandatory directions to the franchisee that control specific terms and conditions of the employees' employment (the narrow "indirect control" the rule recognizes).

G. The Final Rule Should Clarify 29 C.F.R. § 791.115 To Make Clear That Mere Premises/Land Ownership Does Not Indicate Vertical Joint Employment Where The Owner Does Not Also Control Employment Terms For Employees Working On Property.

Many franchisors own or master-lease real property and sublease that property to a franchisee. This relationship reflects a landlord-tenant relationship, not an employment relationship. The Proposed Rule, however, drops the "store within a store" neutrality language that had been present in the 2020 rule proposal and states instead that working at a location "owned or controlled by the potential joint employer that benefits from the employee's work . . . may indicate joint employment." 91 Fed. Reg 21895 (Apr. 23, 2026).

IFA asks the Department to reconsider this language and instead clarify that ownership or leasing of the premises/land that is subleased to a franchisee in a landlord/tenant relationship does not implicate any of the four factors and therefore does not make joint employer status more or less likely *where the owner/alleged joint employer does not also control employment terms for the lessee's employees*. Whether in the franchisor or franchisee context, commercial real estate ownership and place of employment are only relevant to the joint employment question if it results in control over terms and conditions for a franchisee's/lessee's employees.

H. The Final Rule Should Clarify and Add More Concrete Examples To Proposed 29 C.F.R. § 791.120(c) Reflecting Conduct That Does Not Give Rise To Horizonal Joint Employment.

IFA asks the Department to add and specifically list in subsection 791.120(c) that the following, without more, do not give rise to a horizonal joint employment relationship:

- A franchisor and an independently owned franchisee, two franchisees of the same brand, or a franchisor-owned company unit and a nearby franchised unit—in each case operating independently with separate workforces. A common franchisor, common brand, and common operating systems do not make these entities joint employers of one another's employees.

- Franchisees using the same franchisor-provided POS, scheduling, or other technology platform while each independently controls its own workforce.

IFA recognizes that the Proposed Rule already reflects several of these points: §§ 791.120(b) and 791.120(c)(1) treat common-franchisor status as insufficient by itself to establish horizontal joint employment; § 791.125(a) provides that operating as a franchisor or using a franchise model does not by itself make joint-employer status more or less likely; and § 791.125(e)(3) supplies a franchising example involving shared proprietary software and sample forms. IFA's request is therefore one of consolidation rather than new substance. The franchise-specific horizontal scenarios listed above are presently dispersed across the franchising provisions of § 791.125 and the general associational-sufficiency language of § 791.120(b), and none appears as a worked example within § 791.120(c)—the provision that actually governs the horizontal analysis. For the same reasons stated in connection with § 791.115(g) above, IFA asks the Department to gather these points into § 791.120(c) as explicit horizontal examples, so that the conduct is recognized as non-probative within the operative provision and litigants cannot argue that its omission from § 791.120(c) signals a contrary result.

I. The Final Rule Should Clarify and Add More Concrete Examples To Proposed 29 C.F.R. § 791.120(c) Reflecting Conduct That May Give Rise To Horizonal Joint Employment.

IFA asks the Department to add and specifically list in subsection 791.120(c) that the following may give rise to a horizonal joint employment relationship:

- A single franchisee that owns multiple units, shares management and control of the workforce between units, and had has one or more employee(s) working across those commonly owned units.

- Two units — whether two franchisees, or a franchisor-owned and a franchised unit — that actually agree to share a specific employee's services and jointly control that employee's terms and conditions.

J. The Final Rule Should State That Contracts Are Important Evidence of the "Economic Realities" of a Business-to-Business Relationship and Must Be Considered in the Joint Employer Analysis.

The Proposed Rule correctly observes that the "economic reality" of a relationship governs the joint employment analysis, and it identifies four core factors that help ascertain this reality: (1) hires or fires the employee; (2) supervises and controls the employee's work schedule or conditions of employment to a substantial degree; (3) determines the employee's rate and method of payment; and (4) maintains the employee's employment records. The Proposed Rule risks undervaluing, however, an important category of highly reliable evidence—namely contemporaneously created contractual agreements that describe expectations regarding these very terms. By doing so, the Department impliedly telegraphs to courts and parties that their contracts do not matter and should not be considered. Indeed, courts have often given perfunctory or dismissive views towards the parties' own contractual allocations of responsibility, treating an arms'-length agreement that expressly assigns the terms and conditions of employment to one entity as self-serving boilerplate rather than as probative evidence of the economic reality the inquiry is meant to capture.

While IFA agrees that contractual terms would not be dispositive where they materially diverge from real-world operations, they should form the starting point of any joint employment analysis between contracting parties. Where companies enter contracts that expressly address which entity is responsible for the terms and conditions of employment such as hiring/firing, supervision and control, pay, and records, and that disclaim responsibility for those terms on behalf of another entity, they should not be lightly disregarded. Consideration of contracts is even more reasonable and important in industries characterized by structured, arm's-length business relationships, including franchising, subcontracting, and staffing arrangements. In these contexts, parties rely on detailed agreements to define operational boundaries, allocate compliance responsibilities, and ensure adherence to federal and state regulatory requirements. Such a contract reflects not merely a theoretical possibility, but a legally binding structure that shapes how the parties organize their conduct. Contractual provisions are therefore often more reliable than post hoc and biased accounts of practice. Unlike after-the-fact testimony—potentially colored by litigation positions or interpersonal disputes—contracts are created contemporaneously, typically with the benefit of legal counsel, designed to reflect the intent of the parties, and drafted to govern the relationship prospectively as the respective parties intended for the relationship to unfold. For that reason, contracts in many cases offer a more objective and less manipulable indicator of the parties' intended roles than selective evidence of day-to-day conduct.

If contractual terms and allocations of responsibility are easily discounted and regularly disregarded, the Proposed Rule may inadvertently signal that parties cannot meaningfully structure their relationships ex ante to avoid unintended joint employment liability. This would undermine the Department's stated goal of providing clarity and predictability to regulated entities and could discourage legitimate business arrangements that depend on well-defined contractual boundaries. IFA therefore respectfully suggests that any final rule make clear that (1) any relevant contract should be the starting point of the joint employment analysis; and (2) competent evidence—not just argument or speculation—must be presented that shows the contract does not match reality in order for the contract to be set aside or disregarded. This analysis is consistent with U.S. Supreme

Court precedent and guidance. As the Supreme Court has made clear, the joint employment inquiry must be grounded in the "circumstances of the whole activity," not isolated facts. *See Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947). This necessarily includes the parties' agreed-upon allocation of rights and responsibilities at the outset of the relationship.

VII. DOL's Proposed Rule Is a Lawful Exercise of Its Authority.

As the agency responsible for implementing and enforcing the FLSA, MSPA, and FMLA, DOL is authorized to issue guidance interpreting those statutes. That is precisely what DOL has done with the Proposed Rule. The DOL's Proposed Rule is not arbitrary or capricious. By contrast, the DOL's Proposed Rule is the best interpretation of the FLSA, MSPA, and FMLA. The Proposed Rule is thorough in its consideration, valid in its reasoning, and largely consistent with almost 80 years of Supreme Court precedent and the Department's own guidance. DOL's rulemaking is therefore lawful, and moreover beneficial to employers, American workers, American consumers, enforcement officers, and courts.

A. DOL'S Proposed Rule Is Not Arbitrary and Capricious.

Under the APA, agency decisions may be set aside only if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *NRDC v. National Highway Traffic Safety Admin*., 894 F.3d 95, 107 (2d Cir. 2018); *Texas v. Biden*, 20 F.4th 928, 988 (5th Cir. 2021) (quoting 5 U.S.C. § 706(2)(A)). As an interpretive agency rule,[48] the Joint Employer Rule is "eligible to claim respect according to its persuasiveness" under the deference standard of *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *United States v. Mead Corp*., 533 U.S. 218, 234-35 (2001); *accord Alaska Dep't of Environmental Conservation v. EPA*, 540 U.S. 461, 488 (2004).

Longstanding precedent recognizes that "the well-reasoned views of the agencies implementing a statute constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998) (quotation marks omitted). "The APA's arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained." *Fed. Commc'ns Comm'n v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021); *accord Texas*, 20 F.4th at 988-89. To that end, agency action is arbitrary and capricious if:

> *the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.*

Motor Vehicle Manufacturers Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983*); accord Sierra Club v. U.S. Envtl. Prot. Agency*, 939 F.3d 649, 663-64 (5th Cir. 2019) (*quoting Tex. Oil & Gas Ass'n v. U.S. Envtl. Prot. Agency*, 161 F.3d 923, 933 (5th Cir.

[48] In *New York v. Scalia*, the 2020 Final Rule was held to be an "interpretative rule." *New York v. Scalia*, 490 F. Supp. 3d 748, 774-775 (S.D.N.Y. 2020).

1998)).).

Thus, the Rule must be given weight in accordance with its "thoroughness, validity, consistency, and power to persuade." *De La Mota v. Dep't of Education*, 412 F.3d 71, 80 (2d Cir. 2005) (quotation marks omitted); accord *Mead*, 533 U.S. at 228 ("The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position." (footnotes and citation omitted)). A reviewing court must not "substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc*., 463 U.S. at 43; *accord Sierra Club*, 939 F.3d at 664. Nevertheless, the court must "ensure that the agency 'examined the relevant data and articulated a satisfactory explanation for its action.'" Sierra Club, 939 F.3d at 664 (quoting *10 Ring Precision, Inc. v. Jones*, 722 F.3d 711, 723 (5th Cir. 2013)); *accord Motor Vehicle Mfrs. Ass'n of the U.S., Inc*., 463 U.S. at 43. In reviewing the agency's explanation, the court must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Sierra Club*, 939 F.3d at 664 (quoting Motor Vehicle Mfrs. Ass'n of the U.S., Inc., 463 U.S. at 43).

Agencies, of course, are "free to change their existing policies," as long as "they provide a reasoned explanation for the change." *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016) (*citing Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981-82 (2005)); *see Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc*., 467 U.S. 837, 863-64 (1984). "[T]he agency must at least 'display awareness that it is changing position' and 'show that there are good reasons for the new policy.'" *Encino Motorcars, LLC*, 579 U.S. at 222 (*citing Fed. Commc'n Comm'n v. Fox Television Stations, Inc*., 556 U.S. 502, 515 (2009)); *see Texas*, 20 F.4th at 991 ("When a 'new policy rests upon factual findings that contradict those which underlay [an agency's] prior policy,' the agency must provide 'a more detailed justification' than usual to avoid arbitrariness and capriciousness." (*quoting Fed. Commc'n Comm'n*, 556 U.S. at 515)). Where "an agency rescinds a prior policy[,] its reasoned analysis must consider the alternatives that are within the ambit of the existing policy." *Dep't of Homeland Sec. v. Regents of the Univ. of Cal*., 591 U.S. 1, 30 (2020) (*citing Motor Vehicle Mfrs. Ass'n of U.S., Inc*., 463 U.S. at 51); *accord Texas*, 20 F.4th at 992; *Wages & White Lion Invs., L.L.C*., 16 F.4th at 1139.

Although a final rule has not yet been published, the examination conducted and explanation provided in the Proposed Rule was reasoned and comprehensive. Relying on the Department's experience and expertise, it considered the language of the statutes, tethered its analysis to the statutory language, and its interpretation is consistent with the statutes. The Proposed Rule is also faithful to Supreme Court precedent and relevant case law interpreting and applying the statute as well as the Department's own history interpreting the statute. The Proposed Rule describes in detail the reasons and need for the Proposed Rule, it provides a thorough and detailed chronology of the regulatory and sub-regulatory history of the joint employer standard, it explains why the Department chose a multi-factor balancing test for its new joint employer policy, it identifies concrete examples designed to clarify standard's requirements, it identifies where it proposes to modify or add to the proposed 2020 Rule, and it recognized and displayed awareness where it is changing position from its 1958 joint employer regulation, and noted that its 2014 and 2016

Administrator's Interpretations[49] had been withdrawn. *See Encino Motorcars*, 579 U.S. at 221.[50] The Proposed Rule also clarified points that the prior regulation had been silent on – i.e., the business models and practices that do not make joint employer status more or less likely under the statutes.

In addition, the reasonableness of the Proposed Rule is demonstrated by the fact that the Department is publishing the rule and inviting comments that it will consider—a process that is not required in connection with an interpretive rule. *See Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 101 (2015) (section 4 of the APA "specifically exempts interpretive rules from the notice-and-comment requirements that apply to legislative rules"); *see also* 84 Fed. Reg. at 14,044; (SPA 160). This transparency by the Department, as well as the willingness to substantively address the comments received, demonstrate the Department's commitment to providing guidance that is faithful to the FLSA and informs the public how the Department will enforce the FLSA. DOL's Proposed Rule is therefore not arbitrary or capricious, or reflective of a clear error of law or judgment.

B. DOL's Proposed Rule Complies with APA's Notice and Comment Requirements.

The Administrative Procedure Act ("APA") "establishes the procedures federal administrative agencies use for 'rule making,' [which is] defined as the process of 'formulating, amending, or repealing a rule.'" *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 95 (2015) (quoting 5 U.S.C. § 551(5)). A "'[r]ule,' in turn, is defined broadly to include 'statement[s] of general or particular applicability and future effect' that are designed to 'implement, interpret, or prescribe law or policy.'" *Id*. at 95-96 (*quoting* 5 U.S.C. § 551(4)). Administrative agency rules are required to "undergo notice and comment unless they are exempt." *Texas v. United States*, 524 F. Supp. 3d 598, 657 (S.D. Tex. 2021) (citing 5 U.S.C. § 553(a)-(b)). Rules that are required to be issued through the notice-and-comment process are known as legislative or substantive rules. *Perez*, 575 U.S. at 96 (*citing Chrysler Corp. v. Brown*, 441 U.S. 281, 302-03 (1979)); *Texas v. United States*, 201 F. Supp. 3d 810, 829 (N.D. Tex. 2016). Legislative rules affect existing individual rights and obligations and have the "force and effect of law." *Perez*, 575 U.S. at 96 (*citing Chrysler Corp*., 441 U.S. at 302-03).[51]

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[49] See Administrator's Interpretation No. 2016–1, available at 2016 WL 284582 (Jan. 20, 2016) (asserting that the scope of joint employment under the FLSA is "as broad as possible") (withdrawn effective June 7, 2017); Administrator's Interpretation No. 2014–2, available at 2014 WL 2816951 (June 19, 2014) (addressing joint employment in home care) (withdrawn on March 10, 2020).

[50] An agency must "display awareness that it is changing position" and "show that there are good reasons" for its new policy, but it need not show that "the reasons for the new policy are better than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which the conscious change of course adequately indicates." *FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 515 (2009).

[51] Not all rules, however, are required to be issued using the notice-and-comment process. *Perez,* 575 U.S. at 96. In relevant part, the APA exempts from notice and comment "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(A). An "interpretive rule" "advise[s] the public of the agency's construction of the statutes and rules which it administers." *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 97 (2015) (quoting Shalala v. Guernsey Mem. Hosp., 514 U.S. 87, 99 (1955) (internal quotation marks omitted)). An interpretive rule must also be logically related to the statute it interprets. *See Catholic Health Initiatives v. Sebelius*, 617 F.3d 490, 494-95 (D.C. Cir. 2010); *Cabais v. Egger*, 690 F.2d 234, 238 (D.C. Cir. 1982) ("Generally speaking, it seems to be established that 'regulations,' 'substantive rules' or 'legislative rules' are those which create law, usually

The APA "prescribes a three-step procedure" for notice-and-comment rulemaking plus a "waiting period before the rule becomes effective:

First, the agency must issue a "[g]eneral notice of proposed rule making," ordinarily by publication in the Federal Register.

Second, if "notice [is] required," the agency must "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." An agency must consider and respond to significant comments received during the period for public comment. Although "the APA does not establish a minimum time period for third parties to submit comments," courts require that agencies provide a "meaningful" opportunity for comment. *E.g., Fleming Cos., Inc. v. U.S. Dep't of Agric*., 322 F. Supp. 2d 744, 764 (E.D. Tex. 2004) (citing 5 U.S.C. § 553), *aff'd sub nom. Fleming Cos., Inc. v. Dep't of Agric*., 164 F. App'x 528 (5th Cir. 2006). The Fifth Circuit, for instance, has observed that the APA generally requires "a minimum thirty-day period for participation in the rulemaking through comment." *Chem. Mfrs. Ass'n v. Envtl. Prot. Agency*, 899 F.2d 344, 347 (5th Cir. 1990); *see Azar v. Allina Health Servs.*, 587 U.S. 566, 569-570 (2019) (noting that a congressionally-mandated 60-day comment period was "twice the APA minimum of 30 days").

Third, when the agency promulgates the final rule, it must include in the rule's text "a concise general statement of [its] basis and purpose." *Perez*, 575 U.S. at 96 (quoting 5 U.S.C. § 553(b)-(c)).

Finally, the APA generally requires agencies to provide a thirty day "waiting period" before a rule becomes effective. *United States v. Johnson*, 632 F.3d 9129, 16 (5th Cir. 2011). The thirty-day waiting period is "intended to give affected parties time to adjust their behavior before the final rule takes effect." E. Bay II, 993 F.3d at 675 n.15 (quoting Riverbend Farms, Inc., 958 F.2d at 1485).

Here, DOL met the first and second requirements by publishing the Proposed Rule in the Federal Register on April 23, 2026 and providing a 60-day period until June 22, 2026 for public comments. DOL has not restricted the scope of its comments. Instead, it invited interested persons to participate in the rule making through submission of written data, views, or arguments. The comment period ensures the Proposed Rule is tested via exposure to diverse public comment, ensures fairness to affected parties, and gives the public an opportunity provide relevant information in support or opposition to the rule.[52] It is anticipated that DOL will consider and respond to significant comments, will include in any final rule's text the concise general statement of the rule's basis and purpose, and will provide an effective date thirty or more days after publication of the final rule. Therefore, DOL's Proposed Rule will meet the APA's notice and

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implementary to an existing law; whereas interpretative rules are statements as to what the administrative officer thinks the statute or regulation means.). Although described as interpretive guidance in the Proposed Rule, DOL is proceeding with notice and comment and therefore IFA will presume for purposes of these comments that DOL intends to comply with the notice-and-comment requirements of 5 U.S.C. § 553(b)-(c).

[52] *See, Texas v. U.S. Envtl. Prot. Agency*, 389 F. Supp. 3d 497, 503 (S.D. Tex. 2019) (*quoting Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin*., 407 F.3d 1250, 1259 (D.C. Cir. 2005)); *accord Mid Continent Nail Corp. v. United States*, 846 F.3d 1364, 1373 (Fed. Cir. 2017); *United States v. Lott*, 750 F.3d 214, 219 (2d Cir. 2014); *United States v. Reynolds*, 710 F.3d 498, 517 (3d Cir. 2013).

comment requirements.

C. DOL's Proposed Rule Follows Almost 80 Years of Supreme Court Precedent and Is The Best Interpretation of the Statutes.

DOL's interpretation is the best interpretation based on traditional tools of statutory interpretation. *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 at 371 (2024) ("courts . . . may . . . seek aid from the interpretations of those responsible for implementing particular statutes."), *citing Skidmore v. Swift & Co*., 323 U.S. 134, 140 (1944). Under *Skidmore*, the weight given to the agency's interpretation "depend[s] upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." *Loper Bright*, 603 U.S. at 388 (quoting *Skidmore*, 323 U.S. at 140). "The last factor, persuasiveness, is the touchstone in determining how much to defer to an agency interpretation." *Midship Pipeline, Co., LLC v. FERC*, 45 F.4th 867, 875 (5th Cir. 2022); *cf., Rest. L. Ctr. v. DOL*, 120 F.4th 163, 174 (5th Cir. 2024) (court was not persuaded by the regulation where it was contrary to the statute).

Here, although a final rule has not yet been published, DOL's Proposed Rule, as proposed to be modified herein, reflects the best interpretation of the FLSA, MSPA, and FMLA. It is thorough, carefully reasoned, and consistent with almost 80 years of Supreme Court precedent.

D. DOL's Proposed Rule Responds To And Addresses Concerns Identified In *New York v. Scalia*, 490 F. Supp. 3d 748 (S.D.N.Y. 2020).

In 2020, a district court identified six main flaws in its decision partially vacated the 2020 Rule. Although the district court's decision was subsequently vacated by the Second Circuit, the Department's Proposed Rule identifies and responds to the alleged flaws.

With regards to its conclusion that the 2020 Rule conflicted with the FLSA, the court identified three conflicts: the rule's exclusive reliance on the FLSA's definition of "employer" in section 3(d) as the textual basis for joint employment; the rules adoption of a control-based test for determining vertical joint employment; and the rule's prohibition on considering additional factors beyond control, such as economic dependence. In addition, the district court determined the rule was arbitrary and capricious because the rule did not (1) adequately explain why it departed from the Department's prior interpretations, (2) consider the conflict between it and the Department's MSPA joint employer regulations, and (3) adequately consider its costs to workers.

In response, the Proposed Rule now recognizes that "the FLSA's employment definitions must be viewed together; none should be excluded when considering potential joint employment"; it identifies a weighted control test where direct exercised control is weighted more heavily than reserved and indirect control; and permits consideration of additional factors such as economic dependence where the four core factors do not clearly establish joint employment or a lack thereof. It also thoroughly wrestles with and explains its current changes and departures from prior interpretations, resolves the purported conflict with the MSPA regulations (by adopting consistent regulations across the FLSA, MSPA, and FMLA), and addresses its costs to workers.

VIII. IFA Supports The American Franchise Act.

For the reasons stated more fully above, the joint employment standard is critically important to the franchisor-franchisee relationship, impacts the American worker, impacts local communities where franchisees operate their businesses,[53] and impacts the entrepreneurial nature of business in the franchise context. The plethora of standards, and critically overbroad joint employer standards, create confusion and unnecessary risks of litigation for the franchising community. Worse yet, a broad or loose standard that is misapplied in the franchisor-franchisee context where little to no evidence exists that a franchisor in fact exerts direct control over essential terms and conditions of employment risks significant liability and exposure. Indeed, during the period from 2015 to 2017 when an expansive joint employment standard was law under the National Labor Relations Act, it irreparably scarred the franchisor-franchisee relationship, and the ramifications of that law continue to be felt and seen as set forth in Section IV above.

IFA, together with the broader business community, has therefore worked tirelessly with Congress to seek a statutory remedy to this problem. Through a bipartisan, bicameral effort, the American Franchise Act[54] was introduced in 2025 to protect the next generation of franchise entrepreneurs. The American Franchise Act seeks to amend the FLSA and National Labor Relations Act to clarify that "A franchisor may be considered a joint employer of the employees of a franchisee ***only if the franchisor possesses and exercises <u>substantial direct and immediate control</u> over one or more <u>essential terms or conditions of the employees of the franchisee</u>***."[55] At its heart, this is what it means to be an employer. This standard is also consistent with historical FLSA and NLRB precedent and current NLRB policy.

Franchisors are not immune from a joint employer finding under the proposed American Franchise Act legislation. It simply makes clear that actions such as setting minimum standards for brand protection – including to protect the franchisor's trademarks and IP – and offering training materials, licensing proprietary technology or data access, or other operations resources do not amount to direct and immediate control sufficient to make the franchisor an employer.

IX. The DOL's Companion Proposed Independent Contractor Rule Further Supports Finalization of the Proposed Joint Employer Rule and Reinforces That Brand Standards and Franchise Business Practices Do Not Constitute Employer Control.

On February 26, 2026, the Department published a Notice of Proposed Rulemaking on independent-contractor status status under the FLSA, FMLA, and MSPA (the "Independent Contractor NPRM"), RIN 1235-AA46. The current joint employer proposed rule and the

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[53] Indeed, the ramifications and impact on these local businesses have additional unintended consequences. Based on data IFA has gathered, approximately (1) 85% of franchise owners live in the community where they run their business; and (2) 83% of franchisees give to local charities that fund schools, sponsor youth sports, and support local nonprofits and other charities. Permitting expansive or broad joint employment standards creates unnecessary joint employment risk that directly impacts and harms these local business owners and the charities they would otherwise support.

[54] The American Franchise Act is also supported by 100+ businesses, advocacy, and diversity organizations, including franchisee associations like the Coalition of Franchisee Associations, American Association of Franchisees & Dealers and Asian American Hotel Owners Association.

[55] The American Franchise Act applies only to franchisors and franchisees alleged to be joint employers under the FLSA and NLRA. Non-franchise independent contractor relationships and other tests of multi-party liability – e.g., misclassification, single employer, agency – are not covered by the legislation.

Independent Contractor NPRM are deeply complementary. The proposed joint employer rule addresses when two or more businesses are jointly and severally liable as co-employers of the same workers; the Independent Contractor NPRM addresses when a worker is an employee at all rather than an independent contractor. IFA strongly supports both rulemakings and respectfully submits that the policies expressed in the joint employer proposed rule reinforce and amplify the arguments for finalizing the independent contractor proposed rule.

IFA is concerned, however, about the potential for regulatory incoherence if the two rulemakings are finalized without explicit cross-referencing. A franchisor that provides a sample employee handbook to a franchisee is expressly protected under proposed § 791.125(d) of the Joint Employer NPRM: such conduct does not make joint employer status more or less likely. But without a parallel provision in the independent contractor rule, a plaintiff could argue that the same handbook provision is evidence of the franchisor's "control" over the franchisee's business operations under the economic reality test. This would create an untenable result: the franchisor is simultaneously protected from joint employer liability and exposed to an argument that it is the franchisee's employer. The Department can and should prevent this outcome by including parallel provisions or cross-referencing the Joint Employer NPRM's franchise-protective provisions in the preamble to the independent contractor final rule, and by adding franchise-specific guidance and examples to proposed § 795.115 as IFA recommends.

The Joint Employer NPRM also expressly recognizes that the Department's enforcement practice has been that when investigating a typical franchisee for potential FLSA violations, "the Department does not seek recovery from the franchisor as a joint employer simply because it has a franchise arrangement." The independent contractor final rule should reflect the same enforcement philosophy: the mere existence of a franchise relationship, including the standard indicia of brand oversight, operational guidance, and compliance requirements that are inseparable from every franchise system, does not transform the franchisor-franchisee relationship into an employment relationship. Consistent administration of the FLSA across both rules is not only legally sound—it is essential to the predictability and stability that the franchise community and the broader independent contracting economy require.

X. Conclusion

For the reasons set forth above, IFA strongly supports the Department's Proposed Rule and urges the Department to finalize the NPRM with a few noted revisions. Prompt action will help clarify the economic reality test and better serve the regulated community and workers alike. A final rule is essential to franchising – a model that promotes small business and creates a pathway for individuals who wish to start their own businesses, create jobs, and maximize their participation in the American economy – as well as the American worker and American consumer.

IFA appreciates the Department's engagement on this important issue, thanks the Department for considering the experiences of IFA's members and welcomes the opportunity to provide the Department with any additional information it may deem useful.

Respectfully Submitted,

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