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

Dear Director Navarrete:

The Center for Law and Social Policy submits these comments on the Department of Labor’s (“Department” or “DOL”) Notice of Proposed Rulemaking (“NPRM”) regarding the standard for determining whom is a joint employer under the Fair Labor Standards Act (“FLSA”), the Family and Medical Leave Act (“FMLA”) and the Migrant and Seasonal Agricultural Worker Protection Act (“MSPA”), RIN 1235-AA48; Fed. Reg. Vol. 91, No. 78 (April 23, 2026).

The Proposed Rule improperly constricts the standard for determining joint employment, undermining the broad coverage Congress intended under the FLSA, FMLA, and MSPA. Narrowing the joint employment standard at a moment when the traditional employer-employee relationship is increasingly rare will severely limit workers’ access to vital statutory rights, including minimum wage, overtime pay, and job-protected leave. Although the Proposed Rule will harm a broad spectrum of workers, it will have a disproportionate impact on the most vulnerable workers, women and people of color, who tend to predominate low-paying jobs that are endemic to the fissured workplace. For the reasons stated below, the Center for Law and Social Policy writes in opposition to this NPRM and urges the DOL to withdraw this proposed rule.

Established in 1969, The Center for Law and Social Policy, otherwise known as CLASP, is a national, non-partisan, non-profit, anti-poverty organization that advances policy solutions for people with low incomes. With deep expertise in a wide range of programs and policy ideas, longstanding relationships with anti-poverty, child and family, higher education, immigration, workforce development, and economic justice stakeholders, and over 50 years of history, CLASP works to amplify the voices of directly-impacted workers and families and help public officials design and implement effective programs. CLASP seeks to improve job quality for low-income workers. That includes increasing wages and providing access to paid sick days, paid family and medical leave, and stable work schedules. Quality jobs enable individuals to balance their work, school, and family obligations – promoting economic stability as well as career advancement.

Today’s labor market is typified by a growing number of heavily fissured industries, including retail, hotels, fast food, janitorial, construction, agriculture, and app-based platforms. In this model, companies outsource traditional “in-house” services like recruitment, training, and day-to-day management to subcontractors and staffing firms; franchise agreements are premised on a similar structure, by which a lead company sells its brand to third parties that operate with nominal independence. The fissured workplace has significant gender inequities: among the low-wage jobs that are commonly outsourced are those disproportionately performed by women, particularly Black and brown women—such as health care, domestic work, janitorial, clerical, and hospitality. Workers in these industries disproportionately face wage theft, poor working conditions, and other violations of their statutory rights, yet they also struggle to obtain relief from such mistreatment. Under these structures, the companies profiting the most from workers’ labor and holding the most power to control their working conditions, disclaim liability because the workers are not on their payroll.

The joint employment doctrine ensures that workers’ rights can be meaningfully enforced even when more than one entity performs the functions of an employer. Under the doctrine, when companies outsource their workforce without ceding the ability to exert control over the work, they remain jointly accountable under labor and employment laws. When employers are subject to such joint responsibility, they are invested in ensuring that such statutes are followed, and consequently, in providing better oversight of working conditions and employment practices. And when the companies with day-to-day contact with workers violate their statutory rights, the joint employment doctrine allows employees to hold accountable the entities that are truly calling the shots.

In sum, the Proposed Rule adopts a severely limited approach to defining joint employment that ignores congressional intent, Supreme Court precedent, and decades of DOL authority, and should be withdrawn immediately.

The Importance of Joint Employment Standards in The Modern Economy

Over the past several decades, the fissured workplace has changed the structure of work. While subcontracting arrangements may alter the formal employment relationship, they often do not diminish the ability of the lead firms to influence how work is performed. Rather many firms continue to set productivity expectations, establish workplace policies, dictate scheduling systems, monitor performance through digital technologies, determine contract standards, and control the economic conditions under which work is completed.

In the fissured workplace, businesses separate responsibility for employment from responsibility for production, allowing them to retain significant control over operations while outsourcing labor costs, legal obligations, and employment risks to intermediary agencies. This model is increasingly common across warehousing and logistics, hospitality, janitorial services, home care, food production, retail, transportation, and app-based work.

Joint employment standards play a critical role in regulating this dynamic and ensuring that labor law remains effective within work arrangements. Without meaningful and effective joint employer accountability, firms can exercise substantial control while avoiding responsibility for compliance for wages, overtime, leave, and other workplace standards. A broad and functional joint employer standard is therefore necessary to reflect the realities of the modern labor market. The relevant question is not only whether a lead firm directly places a worker on its payroll, but whether it exercises sufficient control over the work being performed or possesses the ability to influence these terms and conditions in which that work occurs. The Proposed Rule's narrow approach fails to account for these realities and would make it substantially more difficult for workers to enforce their statutory rights in increasingly common employment arrangements.

Growth of Temporary Work/Fissured structures

The Proposed Rule fails to account for the steady growth of temporary staffing, labor contracting, subcontracting, and other fissured employment arrangements that characterize large portions of the modern labor market.

Labor market data demonstrate the continued prevalence of fissured employment structures. The Bureau of Labor Statistics found that approximately 6.9 million workers held contingent jobs in 2023, representing 4.3 percent of all employed workers. The same survey found that 16.2 million workers, or 10.2 percent of the workforce, worked in alternative employment arrangements, including temporary help work, contract firm employment, and on-call work.¹

¹ U.S. Bureau of Labor Statistics, *Contingent and Alternative Employment Arrangements Summary, July 2023* (Nov. 8, 2024), <https://www.bls.gov/news.release/pdf/conemp.pdf>

The staffing industry remains a substantial component of the US labor market. According to the American Staffing Association, staffing agencies hired 12.7 million temporary and contract workers per week in 2025.² These firms continue to play a particularly significant role in sectors such as warehousing, transportation, manufacturing, hospitality, and event services, where employers frequently rely on labor intermediaries to meet operational demands. Employment in warehousing and storage more than doubled over the last decade, increasing from approximately 668,000 workers in 2013 to more than 1.9 million workers in 2024.³ Much of this growth has occurred alongside the expansion of subcontracting and third-party logistics arrangements that allow lead firms to distance themselves from direct contact with workers. In today's labor market, we can see control exercised through digital surveillance systems, productivity metrics, algorithmic management, performance benchmarks, supply-chain expectations, and more. A company may not directly supervise a worker in the traditional sense while still determining the pace, structure, and conditions of their shifts.

Fair Labor Standards Act

The Proposed Rule ignores that Congress intended the Fair Labor Standards Act (FLSA) to be read broadly to cover a range of employment relationships.

The Fair Labor Standards Act's definitions of covered employment and employers have not changed since the law's enactment in 1938, and companies have been operating under these rules for over 80 years. The legislative history of the FLSA demonstrates Congress' intent "to cover businesses that allow work to be done on their behalf and" have the power to "prevent wage and hour abuses, regardless of indirect business relationships and business formalities."⁴ To meet these goals, Congress adopted expansive definitions of "employer," as "any person acting directly or indirectly in the interest of an employer in relation to the employee," and "employ," "to suffer or permit to work."⁵ Indeed, the Supreme Court observed that the "striking breadth" of the express meaning of "employ" under the statute "stretches the meaning of 'employee' to include 'some parties who might not qualify as such under a strict application of traditional agency law principles.'"⁶ Appellate courts have consistently held the same. Therefore, the

² American Staffing Association, *Staffing Employment and Sales Rebound in Fourth Quarter* (Mar. 30, 2026), <https://americanstaffing.net/posts/2026/03/30/employment-and-sales-rebound-in-q4/>

³ U.S. Department of Transportation, Bureau of Transportation Statistics, *May 2024 U.S. Transportation Sector Unemployment (5.5%) Rises Above the May 2023 Level (3.6%) and the Pre-Pandemic May 2019 Level (4.3%)* (June 7, 2024), <https://www.bts.gov/newsroom/may-2024-us-transportation-sector-unemployment-55-rises-above-may-2023-level-36-and-pre>

⁴ *New York v. Scalia*, 490 F. Supp. 3d 748, 780 (S.D.N.Y. 2020).

⁵ 29 U.S.C. § 203(d), § 203(g).

⁶ *Nationwide Mut. Ins. Co. vs. Darden*, 503 U.S. 318.

Rutherford Food Corp. v. McComb, U.S. 331 U.S. 722, 728 (1947)).

Proposed Rule’s narrow reading of what entities will and will not qualify as an “employer” contradicts the plain language of the Fair Labor Standards Act and Congress’s intent.

The Proposed Rule wrongly rejects the well-established “economic reality” test for determining an employment relationship adopted by the Supreme Court, appellate courts, and DOL for decades.

The Proposed Rule also ignores decades of controlling Supreme Court precedent, circuit court authority and longstanding DOL policy. Whether an employer-employee relationship under FLSA “does not depend on... isolated factors but rather upon the circumstances of the whole activity.”⁷ This is known as the “economic reality” test, which looks to multiple factors “rather than ‘technical concepts’” to determine if an employment relationship exists under the FLSA.⁸ The vast majority of circuits have adopted this multi-factor approach. DOL itself has, for decades, also has recognized the “economic reality” test as the appropriate standard, in light of Congress’s intent and the rapidly evolving variety of employment relationships in today’s labor market.

The Proposed Rule does not acknowledge the prevalence of workplace fissuring or its harms to workers, it also departs from these longstanding interpretive principles and instead adopts a narrower, four-factor test: whether the putative joint employer (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. These are the same four factors from the 2020 Final Rule that the *Scalia* court rejected as “impermissibly narrow.”⁹

While the above standard applies to determining “vertical” joint employment, where a worker performs labor for an intermediary entity, such as a subcontractor or franchisee, that also benefits another entity or entities—we note that the Proposed Rule’s directives with respect to “horizontal” joint employment also are insufficient. In the horizontal model, a worker performs labor for two or more associated companies in the course of a single work week; where those entities are deemed to be joint employers, the worker’s hours are combined, as if the labor were performed for a single entity. The Proposed Rule’s horizontal joint employment standard lists just three factual scenarios that warrant the conclusion that employers are “sufficiently associated” to be deemed joint employers. But this list is unduly limited, because it does not even mention that DOL has enumerated no fewer than nine additional categories of relevant evidence in showing joint employment, including administrative intermingling of the employers’

⁷ *Scalia*, 490 F. Supp. 3d 759, quoting *Rutherford Food*, 331 U.S. 730.

⁸ *Scalia* 40 F. Supp 4d 758.

⁹ 490 F. Supp. 3d at 786.

operations, the sharing of clients or customers, and the existence of any agreements between the potential joint employers.

The Proposed Rule fails to adequately account for contemporary forms of control that are increasingly common in today's modern labor market.

In today's economy, employers are increasingly surveilling workers through different mechanisms and technologies, such as productivity quotas, scheduling, monitoring systems, algorithmic management, workflow design, and contract standards. Importantly to the Proposed Rule, employee surveillance has created a layer of separation between employer and employee. Therefore, employers using surveillance technology have indirect control over their employees. Worker surveillance is a term with wide and varied definitions. One definition that appears in various forms in relevant literature is: "the monitoring of employees and collection of employee data, identifiable or not, for the purpose of influencing and managing the behavior of those being monitored."¹⁰ The types of technologies that enable this surveillance include: handheld devices, point-of-sale systems, mobile phones, fingerprint scanners, fitness and wellness apps, cameras, microphones, body sensors, keycards, electronic communication monitoring, geolocation tracking, collaboration tools, and customer review solicitation.¹¹ While intrusive surveillance of worker activity has a long history in the United States, the advent of new technologies make it easier for employers to keep close tabs on workers and simultaneously disengage from modes of management that, in a pre-digital world, would likely have been indicators of a joint employer relationship.

The Case of Amazon and Subcontractors

Amazon is a prime example of an employer who needs an appropriate and broad joint employer standard, Amazon workers risk their safety and will experience harm if the Proposed Rule remains as is. Amazon heavily utilizes subcontractors, particularly in its delivery network through their Delivery Service Partner (DPS) program. Under this model, Amazon contracts with independent contractors who hire drivers to deliver packages, allowing Amazon to manage logistics while avoiding direct employment liabilities.¹² Amazon insists that its DPS delivery

¹⁰ United Tech and Allied Workers, "Employee Surveillance," <https://utaw.tech/surveillance/what-is-employee-surveillance>

This definition is a variation on a definition of "surveillance" which has permeated the literature. See, e.g., Kirstie Ball, European Commission, Electronic Monitoring and Surveillance in the Workplace, <https://publications.jrc.ec.europa.eu/repository/handle/JRC125716> quoting David Lyon, Surveillance Society: Monitoring Everyday Life (2001).

¹¹ Aiha Nguyen, "The Constant Boss: Work Under Digital Surveillance," Data & Society, May 2021 https://datasociety.net/wp-content/uploads/2021/05/The_Constant_Boss.pdf.

¹² Mimi Whittaker and Dan Ocampo, "As a Delivery Worker Union Campaign Takes Off, Amazon Tries to Dodge Labor Law," National Employment Law Project, November 22, 2024, <https://www.nelp.org/as-a-delivery-worker-union-campaign-takes-off-amazon-tries-to-dodge-labor-law/>

drivers are not Amazon employees. However, these workers deliver Amazon packages, in Amazon trucks, wearing Amazon uniforms, and their work is heavily controlled by the company. For example, Amazon determines the daily routes drivers are assigned to, the number of deliveries to be completed each day, and delivery deadlines, while communicating this information directly to drivers through an app. This direct (and indirect) control makes Amazon a joint employer under federal law.¹³

In October 2024, hundreds of Amazon's subcontracted delivery drivers marched with the Teamsters union to make demands for better working conditions and securing their first bargaining contract with Amazon. In June 2026, The National Relations Board and Amazon agreed to a settlement that resolves their ongoing joint-employer case involving these DSP unionized drivers, requiring Amazon to provide back pay to these workers. However, "the settlement avoided any formal ruling or precedent on the joint employer issues that might have reshaped Amazon's labor model."¹⁴ Without a broad joint employer standard, billion dollar companies will continue to skirt labor law and harm the workers it so clearly employs. This would negatively affect the local economies, communities and families of the estimated 390,000 subcontracted workers.

The Case of Temporary Staffing Agencies: New Orleans Mardi Gras Cleanup

Nearly 2.2 million people are employed by temporary staffing agencies in the United States at any given time, however because of the short-term and precarious nature of these jobs; staffing agencies actually hire about 11 to 15 million temporary and contract employees through the course of a single year.¹⁵ Temporary contract work is characterized by its short-term nature and lack of a standard employee-employer relationship. In the U.S., thousands of employers use subcontracted work to extract short-term labor from millions of workers, using staffing agencies as intermediaries. Temporary workers hired through staffing agencies typically earn less than direct-hire employees. In fact, the wage penalty for temp workers is more than 21 percent in manufacturing jobs, more than 33 percent in security jobs, and more than 47 percent in teaching jobs.¹⁶ Due to the lack of a strong joint employer labor standard, temporary workers often

¹³ *Ibid.*

¹⁴ Katherine Alvarez, "Amazon Avoids Classification as Joint Employer But Must Provide Back Pay in NLRB Settlement," Staffing Industry Analysts, June 10, 2026, <https://www.staffingindustry.com/news/global-daily-news/amazon-avoids-classification-as-joint-employer-but-must-provide-back-pay-in-nlrb-settlement>

¹⁵ American Staffing Association, "Staffing Industry Statistics," 2025, <https://americanstaffing.net/research/fact-sheets-analysis-staffing-industry-trends/staffing-industry-statistics/>

¹⁶ CLASP analysis of Occupational Employment and Wage Statistics, 2025, <https://www.bls.gov/oes/>.

perform the same type of work as those who were hired directly. However, the key difference is their working conditions are severely worse: less pay, few benefits, and little to no job security.¹⁷

In the case of New Orleans, the city routinely hires temporary workers to clean, secure, and manage the public space impacts of Mardi Gras. As the city continues to engage in large-scale public operations under tight timeframes, workers often face ambiguous employment relationships, limited documentation, and fragmented accountability. Due to the lack of a strong and broad joint employer standard, temporary workers are not protected due to labor law loopholes, weak labor enforcement, and the ambiguity around which employer – a staffing agency or host company – is ultimately liable. In a CLASP research study, we found that temporary workers who work in Mardi Gras cleanup are systemically excluded from core protections (equal pay, benefits, credible oversight) because they are subcontracted, misclassified, or inserted into opaque employment chains. We also found that employers shift risk onto workers by withholding documentation (pay stubs), eliminating consistent oversight, and exploiting gaps in record retention and transparency. If enacted, the Proposed Rule would perpetuate these dynamics, harm the purposes of the Department of Labor, and harm the workers the agency claims to protect.

Family Medical Leave Act

The Proposed Rule would undermine access to Family and Medical Leave Act (FMLA) protections, an approach inconsistent with both the purpose of the FMLA and the realities of today's labor market, where workers increasingly perform labor within complex employment arrangements involving staffing agencies, contractors, subcontractors, franchise systems, and other intermediary entities.

Congress enacted the FMLA to help workers balance work and family responsibilities by providing eligible employees with job-protected leave for serious health conditions, childbirth, caregiving responsibilities, and other qualifying circumstances. The statute recognizes that workers should not be forced to choose between maintaining employment and addressing significant personal or family health needs. For these protections to be meaningful, however, workers must be able to identify an employer capable of providing leave rights and enforcing statutory obligations.

For decades, the Department has recognized that FMLA rights cannot be effectively protected without accounting for joint employment relationships. Existing FMLA regulations expressly contemplate situations in which a worker may be employed by multiple entities simultaneously

¹⁷ Lulit Shewan, “The Exploitative Mechanisms of Precarious Work,” The Center for Law and Social Policy, February 2026, <https://www.clasp.org/publications/report/brief/exploitative-precarious-work-national-insights-new-orleans/>

and establish responsibilities for both primary and secondary employers. This framework reflects an important reality: workers' employment relationships frequently extend beyond the entity that formally issues a paycheck. In many industries, staffing agencies recruit workers, while host employers direct day-to-day work, establish schedules, determine staffing needs, and control workplace conditions. The FMLA's joint employment provisions help ensure that workers do not lose access to leave protections simply because their labor is supplied through an intermediary arrangement.

Migrant and Seasonal Agricultural Worker Protection Act

Applying the Proposed Rule under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) would be detrimental to workers in the agricultural industry and to the agricultural industry at large.

Established in 1982, the MSPA provides employment-related protections to migrant and seasonal agricultural workers. The law replaced the Farm Labor Contractor Registration act, which omitted the responsibilities and obligations of agricultural employers to assure that migrant and seasonal agricultural workers receive important transportation, housing, and employment protections. Under MSPA, every non-exempt farm labor contractor, agricultural employer, and agricultural association who “employs” workers must:

- Provide written disclosure of the terms and conditions of employment;
- Post information about worker protections at the worksite;
- Pay workers the wages owed when due and provide an itemized statement of earnings and deductions;
- Comply with terms of any working arrangement made with the workers; and
- Make and keep for three years payroll records for each employee.

The Proposed Rule would directly contradict why MSPA was enacted in the first place. These workers are some of the lowest-paid, most vulnerable, and mistreated with respect to wages and terms of employment. Agricultural work is one of the most physically demanding and hazardous occupations, and women farmworkers face distinct barriers and occupational stressors. These workers often face challenges related to their working conditions and employment status, including inadequate and inequitable wages, job instability, and irregular working hours and encounter hazardous working conditions including toxic chemicals and heat exposure, which further contribute to their vulnerability. Seasonal and migrant agriculture workers often work in fissured work systems through subcontracting, temporary staffing agencies and migrant-worker programs. Agricultural employers do not hire or pay workers directly. Instead, they contract with Farm Labor Contractors (FLCs) to provide seasonal worker crews. This indirect employment

insulates agricultural firms from direct responsibility regarding wage theft, safety and health violations or poor housing conditions. The nature of migrant work visas and lack of labor standards enforcement causes these poor conditions and precarious nature of farmwork. Migrant workers often enter the United States through temporary guest-worker programs, such as the H-2A visa program; these visas are usually tied to a single employer. Because their legal right to remain in the country depends on that specific employer, employers can escape accountability by using FLCs. Due to a strong joint labor standard, these FLCs are not required to raise pay, benefits, or housing standards. The Proposed Rule would undermine congressional intent and legal authority by enabling the agriculture industry to more easily disclaim responsibility for farmworkers thus depriving them of these vital protections.

Conclusion

This proposed rule is inconsistent with the broad statutory definitions of employment contained in the FLSA, FMLA, and MSPA. It also fails to account for the realities of the modern labor market, where businesses increasingly rely on intermediary employment structures while maintaining substantial control over working conditions. Robust joint employer standards remain necessary to ensure that all entities exercising control over workers are held accountable for complying with labor protections.

Sincerely,

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