



441 G St. N.W.  
Washington, DC 20548

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February 3, 2020

The Honorable Lamar Alexander  
Chairman  
The Honorable Patty Murray  
Ranking Member  
Committee on Health, Education, Labor, and Pensions  
United States Senate

The Honorable Robert C. "Bobby" Scott  
Chairman  
The Honorable Virginia Foxx  
Ranking Member  
Committee on Education and Labor  
House of Representatives

Subject: *Department of Labor, Wage and Hour Division: Joint Employer Status Under the Fair Labor Standards Act*

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the Department of Labor (the Department), Wage and Hour Division entitled "Joint Employer Status Under the Fair Labor Standards Act" (RIN: 1235-AA26). We received the rule on January 17, 2020. It was published in the *Federal Register* as a final rule on January 16, 2020. 85 Fed. Reg. 2820. The effective date of the rule is March 16, 2020.

The final rule revises the Department's interpretation of joint employer status under the Fair Labor Standards Act. In the joint employer scenario where another person is benefitting from the employee's work, the Department is adopting a four-factor balancing test to assess whether the other person: (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. Under the rule, no single factor is dispositive in determining joint employer status, and the appropriate weight to give each factor will vary depending on the circumstances.

The Congressional Review Act (CRA) requires a 60-day delay in the effective date of a major rule from the date of publication in the *Federal Register* or receipt of the rule by Congress, whichever is later. 5 U.S.C. § 801(a)(3)(A). The final rule was published in the *Federal Register* on January 16, 2020. 85 Fed. Reg. 2820. The House of Representatives received the final rule on January 23, 2020. 166 Cong. Rec. H631 (daily ed. Jan. 28, 2020). The *Congressional Record* does not reflect the date of receipt by the Senate. The rule has a stated effective date of March 16, 2020. Therefore the final rule does not have the required 60-day delay in its effective date.

Enclosed is our assessment of the Department's compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. If you have any questions about this report or wish to contact GAO officials responsible for the evaluation work relating to the subject matter of the rule, please contact Janet Temko-Blinder, Assistant General Counsel, at (202) 512-7104.

signed

Shirley A. Jones  
Managing Associate General Counsel

Enclosure

cc: Amy DeBisschop  
Division of Regulations, Legislation,  
and Interpretation  
Wage and Hour Division  
Department of Labor

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE  
ISSUED BY THE  
DEPARTMENT OF LABOR  
WAGE AND HOUR DIVISION  
ENTITLED  
“JOINT EMPLOYER STATUS UNDER THE  
FAIR LABOR STANDARDS ACT”  
(RIN: 1235-AA26)

(i) Cost-benefit analysis

The Department of Labor (the Department) described the economic impacts of this final rule. The Department determined that the rule will impose direct costs on private businesses and state and local government entities by requiring them to review the new regulation. The Department estimates that the lower bound of regulatory familiarization cost range is \$324.2 million, and the upper bound, \$416.7 million. Additionally, the Department estimated average annualized costs of this rule over 10 years and in perpetuity. The Department estimated that over 10 years, this rule would have an average annual cost of \$43.1 million to \$55.4 million, calculated at a 7 percent discount rate (\$36.9 million to \$47.4 million calculated at a 3 percent discount rate). In perpetuity, the Department estimated this rule would have an average annual cost of \$21.2 million to \$27.3 million, calculated at a 7 percent discount rate (\$9.4 million to \$12.1 million calculated at a 3 percent discount rate).

The Department agreed with some commenters that because this rule provides new criteria for determining joint employer status under the Fair Labor Standards Act (FLSA), in some cases it may reduce the number of businesses currently found to be joint employers from which employees may be able to collect back wages due to them under FLSA. According to the Department, this may reduce the amount of back wages that employees are able to collect when their employer does not comply with FLSA—for example, their employer is or becomes insolvent. However, the Department stated that it lacks data on the current number of businesses that are in a joint employment relationship and cannot estimate the financial capabilities (or lack thereof) of these businesses. Therefore it is unable to estimate the magnitude of a decrease in the number of employers liable as joint employers.

(ii) Agency actions relevant to the Regulatory Flexibility Act (RFA), 5 U.S.C. §§ 603-605, 607, and 609

The Department prepared a Final Regulatory Flexibility Analysis which included (1) the objectives of, and need for the final rule; (2) the agency’s response to public comments; (3) a description of the number of small entities to which the final rule will apply; (4) costs for small entities affected by the final rule, and (5) an analysis of regulatory alternatives.

(iii) Agency actions relevant to sections 202-205 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1532-1535

The Department determined that this final rule includes a federal mandate that is expected to result in increased expenditures by the private sector of more than \$165 million (\$100 million adjusted for inflation) in at least one year, but the rule will not result in increased expenditures

by state, local, and tribal governments, in the aggregate, of \$165 million or more in any one year. The Department prepared a statement under the Act which included (1) the authorizing legislation, (2) an assessment of quantified costs and benefits, (3) responses to comments, and (4) the least burdensome option explained.

(iv) Other relevant information or requirements under acts and executive orders

Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*

On April 9, 2019, the Department published a notice of proposed rulemaking. 84 Fed. Reg. 14043. The Department stated it received and reviewed comments on the proposed rule. The Department addressed comments in the final rule.

Paperwork Reduction Act (PRA), 44 U.S.C. §§ 3501-3520

The Department determined that this final rule does not contain a collection of information under the Act.

Statutory authorization for the rule

The Department promulgated this final rule under the authority of sections 201 to 209 of title 29, United States Code.

Executive Order No. 12,866 (Regulatory Planning and Review)

The Department determined that the final rule is economically significant under the Order. The Office of Management and Budget reviewed the rule.

Executive Order No. 13,132 (Federalism)

The Department determined that this final rule would not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.