

EPI comments regarding the Department of Labor's proposed joint-employer standard

Public Comments • By [Celine McNicholas](#) and [Heidi Shierholz](#) • June 25, 2019

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

Re: Proposed Rule: Joint Employer Status Under the Fair Labor Standards Act (RIN 1235-AA26)

Dear Ms. DeBisschop:

The Economic Policy Institute (EPI) is a nonprofit, nonpartisan think tank created in 1986 to include the needs of low- and middle-income workers in economic policy discussions. EPI conducts research and analysis on the economic status of working America, proposes public policies that protect and improve the economic conditions of low- and middle-income workers, and assesses policies with respect to how well they further those goals.

EPI strongly opposes the Department of Labor's (DOL's) proposed rulemaking regarding the joint-employer standard under the Fair Labor Standards Act (FLSA/Act). The proposed rule dramatically narrows the set of circumstances whereby a firm can be found to be a joint employer under the FLSA. The FLSA is our nation's fundamental worker protection statute, providing wage and hour protections to the vast majority of U.S. workers. It was drafted broadly, creating employer coverage to ensure that companies that use staffing, temp, or subcontractors in their business operations are held accountable for complying with the

FLSA's basic provisions, including minimum wage, overtime, and child labor protections. The proposed rule will make it nearly impossible for many workers to enforce these rights and will completely take away the ability of workers to recover unpaid wages from firms who use undercapitalized contractors in their work. It is contrary to the statute and contrary to precedent and we estimate that, if implemented, this rule would cost workers more than \$1.0 billion annually.

Flawed legal analysis

The proposed rule is contrary to the FLSA. It ignores the statutory definition of “employ” contained in §203(g) of the Act. Furthermore, DOL misapplies the definition it does consider in §203(d). The “suffer of permit” language contained in §203(g) and the cases interpreting that provision of the Act must be considered in making determinations of employer status. Instead, DOL simply states, incorrectly, that its proposed narrow set of four factors is consistent with §203(d) of the Act and with case law interpreting that provision and is therefore an appropriate standard for determining joint employment under the FLSA.

In reaching its misguided conclusion, DOL cherry-picks case law, ignoring relevant Supreme Court precedent on determining employer status.¹ Further, DOL is misguided in its adoption of the factors for determining joint employer status discussed in *Bonnette v. California Health & Welfare Agency*.² *Bonnette* is not the only test for employer status; only the First and Third Circuits explicitly use *Bonnette* as their test. And even if *Bonnette* were the exclusive test, DOL misapplies and significantly narrows the *Bonnette* test.

In *Bonnette*, the U.S. Court of Appeals for the Ninth Circuit found that “regardless of whether the appellants are viewed as having had the power to hire and fire, their power over the employment relationship by virtue of their control over the purse strings was substantial.” Therefore, if the employer had the authority to hire and fire, it was a joint employer, whether or not that authority was ever actually exercised. Under the proposed rule, the right to hire and fire cannot be a “reserved” power or contractual right. The proposed rule states, “Only *actions taken* with respect to the employee’s terms and conditions of employment, rather than the theoretical ability to do so under a contract, are relevant to joint employer status under the Act.” The proposed rule thereby narrows the set of factors for determining joint employment such that employers will be able to evade responsibility under the FLSA by contracting out work. This was never the intention of the nation’s foundational worker protection statute.

Indeed, the proposed rule narrows the FLSA test for employer to a standard narrower than the common-law test. The FLSA’s coverage is broader than common law. The Supreme Court has recognized that the scope of employment under the FLSA is the “broadest definition that has ever been included in any one act.”³ Narrowing coverage and prohibiting the fact-finder from determining the critical aspects of an employment relationship is contrary to the statute.

DOL's advancement of a standard that fails to consider contractually reserved control in the assessment of a joint-employment relationship is particularly devastating to outsourced workers in high-growth sectors with high rates of wage theft. The proposed rule will result in further decreased employer accountability to the FLSA's basic protections. Consider that employers increasingly outsource various functions to contractors and subcontractors, resulting in a "fissuring" of the workplace.⁴ This means that two or more firms often control the terms and conditions of employment (such as pay, scheduling, and job duties). These arrangements enable employers to limit and evade liability for violations of worker protection laws. Often, large corporate employers insist on complicated contracts with these intermediary firms, contracts that allow the large corporations to restrict the subcontractors' discretion in compensating workers or in instituting changes in the workplace. As a result, in order for the FLSA to provide workers with meaningful protections, the law must provide a means to hold accountable those large corporations that reserve contractual control and/or indirectly control the terms and conditions of employment, as well as holding the subcontractors accountable.

In spite of this reality, under DOL's proposed joint-employer standard, a subcontractor would be solely responsible for violations of the FLSA. As a result, small businesses would be negatively affected. Further, the proposed rule creates an incentive for more corporations to outsource to temp and staffing companies without compliance concerns. This narrowed joint-employer standard serves only the interests of large corporations, enabling them to escape responsibility under the FLSA—the law DOL is bound to effectuate and enforce for our nation's workers.

Flawed economic analysis

DOL continues its misguided evaluation of the likely impacts of the proposed joint employer-standard in its economic impact analysis. DOL has a responsibility to consider all relevant data in advancing this regulatory standard, but it fails to do so. DOL states that the proposed rule would have "no impact on workers' wages *due under the FLSA* [emphasis added],"⁵ and it implies that this means there would be no transfers from workers to employers. However, even if the proposed rule would not change the wages *due* to a worker under the FLSA, as DOL asserts, this does not mean that the proposal will not result in transfers between employers and employees. In implying that the rule would not result in transfers, the Department ignores the reality of the modern workplace in at least two ways.

First, this rule would incentivize workplace "fissuring," i.e., employers increasing their reliance on contractors, temporary help agencies, and franchises rather than hiring employees directly. Research (described below) shows that these business models suppress wages. In other words, while DOL states that it "does not expect this rule to generate transfers...from workers that *currently* have one or more joint employers [emphasis added],"⁶ it neglects to account for the reduction in wages that would result as more employers are incentivized to, for example, boost their reliance on domestic outsourcing. We conservatively estimate that in the long run, the increase in workplace

fissuring as a result of the rule would result in a transfer of at least \$954.4 million from workers to employers annually. This calculation is discussed in depth below.

Second, this rule would increase losses due to wage theft by employers. The Department hints that it understands that this is a potential issue when it states that “assuming that all employers always fulfill their legal obligations under the Act, [this rule] would not result in any reduction wages received by the employee.”⁷ However, rather than performing a careful analysis of the situations in which the assumption that all employers always fulfill their legal obligations under the FLSA does *not* hold, and then estimating how the rule will impact workers in this regard, the Department remarkably ends any discussion of the impact of wage theft with the assumption that it does not occur.⁸ We conservatively estimate that an increase in losses due to wage theft as a result of the rule will result in a transfer of at least \$138.6 million from workers to employers annually. This calculation is discussed in depth below.

Putting together these two estimates—more than \$954.4 million lost by workers as a result of the rule due to an increase in workplace fissuring and more than \$138.6 million in losses by workers as a result of wage theft—we estimate that each year workers will lose more than a billion dollars as a result of this rule if it is finalized.

Quantifying the transfers from workers to employers due to an increase in fissuring

According to data from the Bureau of Labor Statistics’ 2017 Contingent Worker Supplement (CWS), there are 933,000 workers who work for contract firms and 1,356,000 workers who work for temporary help agencies.⁹ However, the CWS undercounts these workers. This is due in part to the fact that workers self-report what kind of firm they work for and may erroneously report that they work for the company where they are *doing* their work instead of for the contract firm or temporary help agency that placed them at that site. Establishment surveys—where the firm, not the worker, does the reporting—get around this problem. High-quality establishment data on employment in contract firms do not exist to our knowledge, but there are excellent establishment data on employment in temporary help agencies from the Bureau of Labor Statistics’ Current Establishment Survey (CES). These data show that there were 2.94 million workers in temporary help agencies in 2017, *more than double* (2.17 times) what is reported in the CWS. Adjusting the number of contract workers by the same multiple (2.17) results in an adjusted-for-self-reports estimate of the number of contract workers of $933,000 * 2.17 = 2.02$ million.

It is important to note that we believe this estimate still undercounts contract workers, because the CWS includes only one very specific type of contract worker in its count of workers employed by contract firms—workers who are usually assigned to only one client and usually work at the client’s worksite. That excludes the many contract workers who work for multiple clients (e.g., janitorial workers or IT consultants) or offsite (e.g., call center workers or industrial laundry workers). We do not attempt to quantify this undercount.

Another important form of fissuring in the workplace is the increasing reliance on franchising models. Data from the ADP Research Institute shows that franchise employment in 2018 was 8.85 million.¹⁰ Putting this all together, we conservatively estimate that there are a total of 13.8 million employees working in “fissured establishments”—working for temporary help agencies (2.94 million), working for contract firms (2.02 million), or working for franchises (8.85 million). It is important to note the degree to which this estimate of the fissured workplace is likely an undercount. David Weil has estimated that in 2017, 18.9 percent of private-sector production and nonsupervisory workers—19.4 million workers—were in highly fissured industries, and that if additional fissured workers in occupations and in industries with mixed use of practices were included, that number could easily double.¹¹

Because the rule would mean that employers would be able to avoid liability for FLSA violations for many workers in fissured establishments while still substantially controlling the wages and working conditions of those workers, companies will be incentivized to restructure and outsource parts of their business. Research shows that the wage losses associated with this kind of domestic outsourcing are substantial, on the order of 10 percent relative to jobs that are not outsourced.¹² Thus the rule will result in a substantial transfer away from workers whose firms decide, as a result of the rule, to outsource the work that they do.

CES data show that the average weekly earnings of production and nonsupervisory workers in temporary help services in 2018 was \$598. A 10 percent penalty (noted above) for working in a fissured workplace implies that these workers would be earning \$664 if they were directly hired, a difference of \$66 per week. Combined with our estimate of 13.8 million employees working for fissured establishments, we find that every percent increase in fissuring as a result of the rule would, in the long run, lead to a wage loss of \$477.2 million annually.¹³ That means that an increase in domestic outsourcing of *just 2 percent* as a result of the rule—an implausibly conservative increase considering employers would newly be able to avoid liability for FLSA violations while still substantially controlling the wages and working conditions of domestically outsourced workers—would lead to a transfer of \$954.4 billion annually from workers to employers. Further, it is important to note that using the broader estimate, described above, of 19.4 million private-sector production and nonsupervisory workers in the fissured workplace, that number would be \$1.3 billion.

Quantifying the transfers from workers to employers due to an increase in wage theft

Wage theft—the practice of employers failing to pay workers the full wages to which they are legally entitled—is a widespread and deeply rooted problem that directly harms millions of U.S. workers each year. Employers refusing to pay promised wages, paying less than legally mandated minimums, failing to pay for all hours worked, or not paying overtime premiums deprives working people of billions of dollars annually. It also leaves hundreds of thousands of affected workers and their families in poverty.¹⁴ Wage theft does

not just harm the workers and families who directly suffer exploitation; it also weakens the bargaining power of workers more broadly and puts downward pressure on hourly wages in affected industries and occupations. For many low-income families who suffer wage theft, the resulting loss of income forces them to rely more heavily on public assistance programs, unduly straining safety net programs and hamstringing efforts to reduce poverty.

A 2017 EPI study found that one particular form of wage theft, paying workers less than the minimum wage, impacts around 17 percent of low-wage workers in the 10 most populous states (California, Florida, Georgia, Illinois, Michigan, New York, North Carolina, Ohio, Pennsylvania, and Texas) and costs workers in those states around \$8 billion per year. Should these findings hold true nationally, it is reasonable to assume that minimum wage violations alone are costing workers at least \$15 billion per year. This means that stolen wages represent far more than FBI estimates of the total annual value of all robberies, burglaries, larceny, and motor vehicle theft in the United States, at \$12.7 billion.¹⁵

In 2008, Bernhardt et al. surveyed front-line workers in low-wage industries in the cities of Chicago, Los Angeles, and New York and found that two-thirds (68 percent) of these workers experienced at least one pay-related violation in any given week.¹⁶ The researchers estimated that the average cost to these workers over a year was \$2,634 out of a total earnings of \$17,616—15.0 percent of their wages. This adds up to a total of nearly \$3 billion annually stolen across all forms of wage theft among these workers in 2008. Generalizing the 2008 results nationwide and updating the numbers to reflect nominal wage growth and employment growth from 2008 to 2018, we estimate that low-wage workers in the U.S. lost more than \$57 billion to all forms of wage theft in 2018.¹⁷

The proposed rule would increase losses due to wage theft by employers in at least three ways. Each of these impacts will be particularly acute in industries in which there is high reliance on subcontracting, temporary work, and other alternative work arrangements where there is already a disproportionate occurrence of wage theft.¹⁸

First, the proposal would severely limit the ability of millions of workers to get justice when they are victims of wage theft. By limiting workers' ability to recover wages from firms that contractually have the right to act with respect to the terms and conditions of employment, DOL is depriving workers of long-held rights to recover unpaid wages from their employers.

Second, there will be a reduction in wage theft deterrence caused by the reduction, as a result of the rule, of workers' ability to recover wages. This reduction in wage theft deterrence will likely lead to an increase in wage theft.

Third, by allowing firms that hire contractors to avoid legal liability for wages, the rule would give these firms greater incentive to award contracts to undercapitalized firms that are more likely to have low bids on the basis of not paying their workers what they are owed. And, absent the legal liability stemming from being a joint employer, if the contractor goes out of business, the lead business is not liable for the lost wages of the workers. In other words, this rule would increase the incentive for firms to seek out undercapitalized contractors who will provide lower bids to the companies that use

them—bids that are able to be so low *because* the contractors plan to steal from their workers (by underpaying them or not paying them at all).¹⁹

As described above, an estimated \$57 billion was lost by low-wage workers to all forms of wage theft in 2018. We use several sources of data to estimate how much of that \$57 billion was lost by workers in fissured establishments. As noted above, we conservatively estimate that there are a total of 13.8 million employees working in “fissured establishments”—in temporary help services (2.94 million), working for contract firms (2.02 million), or working for franchises (8.85 million).

To determine how many of these 13.8 million workers are low-wage, we turn to CWS data, which include both employment and wages in contract firms and temporary help services. Using CWS data, we find that the share of all workers in contract firms or in temporary help services who are low-wage—defined here as earning no more than \$12 per hour—is 36.3 percent. Franchise workers are not identified in the CWS, so we simply assume that the share of workers in franchise firms who are low-wage is the same as the share of workers who are low-wage in contract firms and temporary help services. Multiplying 36.3 percent by our estimate of 13.8 million total workers in fissured establishments, we estimate that there are 5.0 million low-wage workers in fissured establishments.

CWS data show that there are a total of 41.4 million workers who make less than \$12 an hour in the U.S. labor market, which means that 12.1 percent (5.0 million/41.4 million) of low-wage workers are in fissured establishments. Assuming that the incidence of wage theft among low-wage workers is no higher in fissured establishments than in traditional establishments (an extremely conservative assumption), we can simply multiply this 12.1 percent by the total amount of wage theft from low-wage workers—\$57 billion—to estimate the amount of wage theft in fissured establishments. This comes out to \$6.93 billion.

Annual wage theft of \$6.93 billion in fissured establishments means that every percent increase in losses due to wage theft would lead to an aggregate transfer from workers to employers of \$69.3 million annually. This means that an increase in losses due to wage theft of *just 2 percent* as a result of the rule—an implausibly conservative increase considering many former joint employers would newly be able to avoid liability for FLSA violations—would lead to an aggregate transfer from workers to employers every year of \$138.6 million. Further, it is important to note that using the broader estimate described above of 19.4 million private-sector production and nonsupervisory workers in the fissured workplace, that number would be \$194.7 million.

Conclusion

DOL’s proposed rule is based on a flawed legal analysis and, if implemented, its impact on working people will be negative and significant. The proposed rule would incentivize the further “fissuring” of the workplace, putting strong downward pressure on wages, and it would make it nearly impossible for millions of workers to get justice when they are the victims of wage theft. Conservatively, we estimate that, if implemented, this rule would cost

workers more than \$1.0 billion annually—more than \$954.4 million due to wage suppression from an increase in workplace fissuring and more than \$138.6 million from an increase in wage losses due to wage theft by employers. We urge DOL to abandon this flawed rulemaking and ensure a meaningful joint-employer standard under the FLSA, our nation’s fundamental worker protection law.

Sincerely,

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Endnotes

1. *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947).
2. *Bonnette v. California Health & Welfare Agency*, 704 F. 2d 1465 (9th Cir. 1983).
3. *U.S. v. Rosenwasser*, 323 U.S. 360, 363 n.3 (1945) (quoting from statement of Senator Black on Senate floor at the time of the passage of the FLSA). Also, in *Sec’y of Labor v. Lauritzen*, 835 F.2d 1529, 1543 (7th Cir. 1987), the courts states that “[t]he definition, written in the passive, sweeps in almost any work done on the employer’s premises, potentially any work done for the employer’s benefit or with the employer’s acquiescence.”
4. David Weil, *The Fissured Workplace: Why Work Became So Bad and What Can Be Done to Improve It* (Cambridge, Mass.: Harvard Univ. Press, 2014).
5. 84 Fed. Reg. at 14053.
6. 84 Fed. Reg. at 14054.
7. 84 Fed. Reg. at 14054–14055.
8. The absurdity of this assumption is underscored by data from DOL’s own website (<https://www.dol.gov/whd/data/datatables.htm>) showing back wage collections from 2018 from industries that have high levels of subcontracting: agriculture, \$4.2 million; apparel manufacturing, \$1.5 million; construction, \$38.8 million; guard services, \$10.0 million; hotel and motel, \$9.3 million; janitorial, \$5.6 million; landscaping, \$1.1 million; temporary help, \$3.9 million.
9. Bureau of Labor Statistics, “Table 5. Employed Workers with Alternative and Traditional Work Arrangements by Selected Characteristics, May 2017,” *Contingent and Alternative Employment Arrangements, May 2017*.
10. ADP Research Institute, *National Employment Report: National Franchise Report, May 2019* [downloadable Excel file].
11. David Weil, “Understanding the Present and Future of Work in the Fissured Workplace Context,”

Working Paper, Brandeis University, May 2019.

12. Deborah Goldschmidt and Johannes F. Schmieder, “[The Rise of Domestic Outsourcing and the Evolution of the German Wage Structure](#),” *Quarterly Journal of Economics* 132, no. 3 (August 2017): 1165–1217; Arindrajit Dube and Ethan Kaplan, “[Does Outsourcing Reduce Wages in the Low-Wage Service Occupations? Evidence from Janitors and Guards](#),” *ILR Review* 63, no. 2 (January 2010): 287–306.
13. \$477.2 million = 13.8 million * \$66 * 52 weeks in a year * 0.01%.
14. David Cooper and Teresa Kroeger, *Employers Steal Billions from Workers’ Paychecks Each Year: Survey Data Show Millions of Workers Are Paid Less Than the Minimum Wage, at Significant Cost to Taxpayers and State Economies*, Economic Policy Institute, May 2017.
15. David Cooper and Teresa Kroeger, *Employers Steal Billions from Workers’ Paychecks Each Year: Survey Data Show Millions of Workers Are Paid Less Than the Minimum Wage, at Significant Cost to Taxpayers and State Economies*, Economic Policy Institute, May 2017.
16. Annette Bernhardt et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America’s Cities, 2009*, Center for Urban Economic Development, National Employment Law Project, and UCLA Institute for Research on Labor and Employment, 2009.
17. This was updated to 2018 using the same methodology described in endnote 5 in Celine McNicholas, Celine, Zane Mokhiber, and Adam Chaikof, [Two Billion Dollars in Stolen Wages Were Recovered for Workers in 2015 and 2016—and That’s Just a Drop in the Bucket](#), Economic Policy Institute, December 2017, except that here we use CES employment growth rather than employment growth from SSA (Social Security Administration) data, since SSA data were not available for 2018 at the time of writing. For additional information on wage theft and its links to fissured workplace relationships, see Daniel Galvin, “Deterring Wage Theft: Alt-Labor, State Politics, and the Policy Determinants of Minimum Wage Compliance,” *Perspectives on Politics* 14, no. 2 (June 2016): 324–352. On the ongoing problem of wage theft, see Jeffrey Clemens and Michael Strain, “Understanding Wage Theft: Evasion and Avoidance Responses to Minimum Wage Increases,” Working Paper, American Enterprise Institute, March 11, 2019.
18. Annette Bernhardt et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America’s Cities, 2009*, Center for Urban Economic Development, National Employment Law Project, and UCLA Institute for Research on Labor and Employment, 2009.
19. This is an argument made by Judge Easterbrook in *Reyes v. Remington Hybrid Seed Co.* 495 F.3d 403 (7th Cir. 2007). In that decision, Easterbrook notes, “If Zarate [the labor broker in the case] had been solvent, Remington [the lead business in the case] would have to offer him enough that he could pay all the workers’ wages (including the minimum wage and any overtime premium), cover the costs of fringe benefits such as housing, and still be able to make a profit. But when a contractor has no business or personal wealth at risk, he may be tempted to stiff the workers (as Zarate did) and then treating the principal firm as a separate employer is essential to ensure that the workers’ rights are honored.”