

United States Senate

WASHINGTON, DC 20510

September 28, 2018

The Honorable R. Alexander Acosta
Secretary
United States Department of Labor
200 Constitution Ave NW
Washington, DC 20210

Subject: Modernization of 29 Code of Federal Regulations [CFR] 791.1 and 791.2 - Joint Employer Status

Dear Secretary Acosta:

We request that the U.S. Department of Labor develop rulemaking to clarify the current standard for determining Joint Employer Status under the Fair Labor Standards Act (FLSA). The conflicting and outmoded FLSA standards for joint employment have contributed to overly costly litigation for small businesses. This is not a cost that most Main Street businesses can bear, and it is very important that unnecessary lawsuits be curbed through clear and reasonable rulemaking.

As you know, the FLSA regulations were written nearly 70 years ago and are badly in need of clarification. In fact, while the two Code of Federal Regulations sections dealing with joint employer are dated 1958 and 1961, the language of the interpretation was actually issued in two bulletins dated 1939 and 1940. The current regulations have not been updated at all since a 1961 interpretation in a footnote. In addition, both the current interpretive language and the 1961 footnote were published as a “statement of general policy or interpretation not directly related to regulations” without notice or public comment. As a result, it relies on court cases from the 1940s and 1950s and does not reflect current case law.

More importantly, differing tests of joint employer status under the FLSA have developed in the federal circuit courts over time. While some circuits have adhered to a common law agency test or the economic realities test when evaluating joint employment cases, most circuits have gradually chosen to mix and match factors from both tests into various formulations depending on the statutory scheme they are analyzing. The most egregious standard may have been established by the Fourth Circuit’s 2017 decision in *Hall v. DirecTV, LLC*, 846 F.3d 757 (4th Cir. 2017), in which the court held that two or more persons or entities may be found joint employers so long as they are “not completely disassociated” with respect to a relevant worker. Businesses and employees in different states deserve to be subject to the same standard of joint employment liability, and this confusion could be significantly resolved by a new federal regulatory standard.

The FLSA’s joint employment requirements need to be modernized and harmonized to limit needless litigation against small businesses, as many different business formats are threatened by expensive lawsuits against multiple business partners for alleged wrongdoing against only one

entity. We therefore respectfully request the Department of Labor propose and finalize a rulemaking to clarify the joint employment standard under the FLSA. It is not an exaggeration that the future success of many small businesses in the United States rests upon the clarification of the joint employer issue.


Sincerely,



Johnny Isakson
United States Senator



Tom Cotton
United States Senator




Ron Johnson
United States Senator



Mitch McConnell
United States Senator



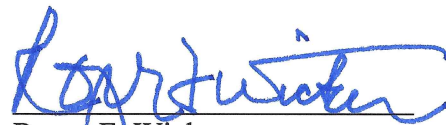
James M. Inhofe
United States Senator



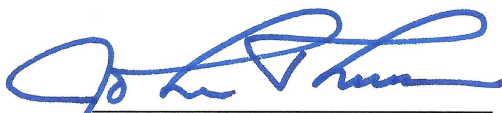
John Boozman
United States Senator



Ted Cruz
United States Senator



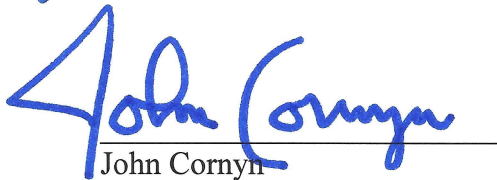
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Steve Daines
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