Colorado AFL-CIO

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The Proposed Rule in Colorado Overtime & Minimum Pay Standards Order No. 36, 7 CCR 1103-1, will protect vulnerable workers and ensure that businesses operating in compliance with wage-and-hour laws are not at a competitive disadvantage with unscrupulous employers. The Proposed Rule is of critical importance to workers, especially in a suffering economy where it may be even more difficult for workers to recover unpaid wages from labor market intermediaries that may be struggling financially. It's essential that these workers be able to recover unpaid wages from the large corporations that profit off their labor.

The definition of “employer” in the Proposed Rule is especially critical to workers in today's economic climate. Employers frequently attempt to insulate themselves from liability for mistreatment of workers through the use of labor market intermediaries — like labor brokers, staffing agencies, subcontractors, and franchisees — that are the purported direct employer. The problem is that the middle man is very often thinly capitalized and may even be put into a position by the higher-up employer that makes it difficult to comply with wage-and-hour laws, even while the higher-up employer profits off the labor of the workers.

The joint employment test set forth in the Proposed Rule rule ensures that employers making decisions about their company are responsible for the employees who work there, no matter how they were retained. Without this rule, employers can evade responsibility by using temporary staffing agencies, labor brokers, or subcontractors to shirk responsibility for workplace safety and stymie attempts to collectively bargain. The Proposed Rule simply memorializes the principle that employers cannot use intermediaries to absolve them of responsibility for workplace compliance.

According to the National Employment Law Project, more and more corporations — especially those in lower-wage industries — are using labor intermediaries such as temp and staffing firms. Temp workers — who are disproportionately Black and Latinx — are paid substantially less than permanent workers, have almost non-existent benefits, and face high rates of wage theft. Further, Latinx and Black workers are overrepresented in subcontracted work with the lowest job quality — temporary help agency work. While Black workers constitute 12.1 percent of the overall workforce, they make up 25.9 percent of temporary help agency workers; Latinx workers are 16.6 percent of all workers, but 25.4 percent of temporary help agency workers.(America's Nonstandard Workforce Faces Wage, Benefit Penalties, According to US Data).

Corporate leaders’ decisions to contract-out labor-intensive aspects of their businesses is common in many service sector jobs today, including construction, janitorial, hospitality, warehousing, poultry and home care. While the reasons for the fissuring of jobs vary — from legitimate needs to pare down multi-faceted business priorities to more brazen desires to skirt labor and employment and safety net protections — the multiplicity of entities and potentially-responsible players too often results in lower wages, more dangerous workplaces, and less employer accountability for working conditions, especially in the lower-paid sectors in our economy.

The joint employment factors in the Proposed Rule have been adopted by the United States District Court for the District of Colorado. Derived in part from Salinas v. Commercial Interiors, Inc., 848 F.3d 125 (4th Cir. 2017), the District of Colorado has explicitly evaluated alternative joint employment tests and rejected them in favor of Salinas. In Merrill v. Pathway Leasing Ltd. Liab. Co., Civil Action No. 16-cv-02242-KLM, 2018 U.S. Dist. LEXIS 80775, at *17 (D. Colo. May 14, 2018), the District Court was presented with both the "economic realities" test and the Salinas test for joint employment to determine which should control. In the absence of binding precedent in the 10th Circuit, the District Court held that "the test enunciated by

the Fourth Circuit in Hall and Salinas is appropriate and should be used here." Id. at *17; see also Sanchez v. Simply Right, Inc., No. 15-cv-00974-RM-MEH, 2017 U.S. Dist. LEXIS 77513, at *20 n.13 (D. Colo. May 22, 2017) (demonstrating a preference for the Salinas test). Accordingly, there is substantial legal authority in the 10th Circuit supporting application of the Proposed Rule's joint employment analysis.

The Colorado AFL-CIO supports the rules proposed by the Colorado Department of Labor & Employment with no changes. Thank you for your commitment to labor laws that reward high-road employers and protect workers in the most vulnerable sectors of our economy.