



May 20, 2020

Colorado Division of Labor Standards and Statistics
Attention: Michael Primo (michael.primo@state.co.us)
633 17th Street, Suite 600
Denver, Colorado 80202

RE: Comment re Notice of Proposed Joint Employment Rule Amending the COMPS Order #36

To Whom It May Concern:

On behalf of the Colorado Competitive Council (“C3”) and its members, and following up on verbal comments proffered at the May 15, 2020, hearing, I submit written comments to detail concerns regarding the Colorado Division of Labor Standards and Statistics’ (the “Division”) proposed rulemaking on joint employment in the COMPS Order #36. C3 is a coalition of employers, associations and chambers of commerce who advocate to keep Colorado’s business climate competitive and has the following concerns regarding the Division’s proposed rule.

First, Colorado’s employers need clarity and certainty on what does and does not constitute a joint employment relationship, and do not need an expansion of the joint employment doctrine. However, the proposed rule does not provide clarity or certainty. Rather, it is expansive and is not tethered to an established standard, but is a broad hybrid of standards, including being based on withdrawn federal government guidance and a Fourth Circuit opinion that is based on a now-withdrawn federal interpretive regulation. Moreover, this newly articulated standard is different from the prior standard applied by Colorado courts evaluating joint employment under Colorado’s wage law and the FLSA; is different than the standard that Colorado’s public employers are and would be subject to (creating two classes of joint employment considerations in this state); and is a unique standard that employers in all other jurisdictions would not be subject to. The standard is broad, and application of the factors as drafted appear to render most staffing, services, temporary agency, and franchise relationships to be joint employment relationships, and will necessarily result in well-meaning employers stumbling into joint employment relationships.

Second, this proposed rule’s timing is concerning on many levels. The proposed rule could and should have been included as part of the COMPS Order #36 notice and comment rulemaking process, particularly given that joint employment is not a new emergency; joint employment is not part of the legislative history that justified the amended definition of employer as promulgated by the legislature in HB19-1267 (titled “Concerning Criminal Offenses for Failure to Pay Wages, and in Connection Therewith, Implementing Recommendations from the

Colorado Human Trafficking Council,” which provided law enforcement with more resources to fight human trafficking by rendering wage theft a felony); the new federal interpretive regulation on joint employment had been percolating since at least April 2019, when the Notice of Proposed Rulemaking was published; and many stakeholders are working on related issues in the worker misclassification taskforce. For these reasons, to push through a rulemaking that changes and expands the joint employment standards in Colorado during a global pandemic feels like another “gotcha” for well-meaning employers.

Third, the proposed rule tends to include a lot of information about what constitutes joint employment, but provides no information about what would not joint employment, nor compliance assistance to help Colorado’s well-meaning employers ensure compliance.

For the above reasons, the timing and process of this rulemaking feels all wrong when the focus of the state should be on economic recovery, particularly for small businesses and startups who will necessarily need to use staffing agencies, temp agencies, independent contractors, and subcontractors to ramp back up and dig out of the financial hole that this global pandemic has caused, and will inevitably get caught in one of the many overlapping and expansive factors contained in the Division’s proposed rule.

To the extent this Division is committed to working on this issue, we respectfully request that it wait and undertake a more full and comprehensive rulemaking at a later time when employers and employees alike are not completely and understandably distracted by the greatest economic hit since the Great Depression.

Sincerely,

A handwritten signature in black ink that reads "Lauren Masias". The signature is written in a cursive, flowing style.

Lauren Masias