

COLORADO DIVISION OF LABOR  
STANDARDS AND STATISTICS PUBLIC MEETING

May 15, 2020

SCOTT MOSS, Division Director  
MIKE PRIMO, DLSS Rules Coordinator  
ELIZABETH FUNK, Labor Standards Administrator  
SAIDA MONTOYA, Investigations Manager  
ERIC YOHE, Labor Standards Outreach Manager  
EVE POGORILER, Senior Hearings Officer  
ASHLEY BOOTHBY, Senior Policy Advisor

1                                   P R O C E E D I N G S

2                   MR. PRIMO: Good afternoon--or good morning,  
3 everybody. This public hearing is conducted in accordance  
4 with Colorado Administrative Procedure Act, Colorado Revised  
5 Statute 24-4-101 and Colorado Open Meetings Law, Colorado  
6 Revised Statute 24-6-401. This public hearing, along with  
7 chats received during the public hearing, is being recorded  
8 for the Division's rulemaking administrative record.

9                   If you plan to testify, if you are attending this  
10 hearing by Internet and would like to testify, please note  
11 that using the Google Meet Chat feature, and we call on you  
12 in the order in which we receive the chats. If you are  
13 attending this hearing by phone, we will provide you with an  
14 opportunity to testify after we are finished with the  
15 testimony from those participating using the Internet.

16                   If you RSVP'd we've already got your information,  
17 so no need to chat me that information.

18                   If you would like to provide your name and  
19 information for the record, regardless if you testify or  
20 not, please email me at michael.primo@state.co.us after this  
21 hearing; or you can fill out the Division's RSVP form found  
22 on our website at [www.colorado.gov/cdle/ProposedRules-Labor](http://www.colorado.gov/cdle/ProposedRules-Labor).  
23 We will add your contact information to our rulemaking  
24 contact list, and we will note your attendance at this  
25 hearing for the record.

1           Written comments can also be submitted into record  
2 today by either using Google Meet Chat feature or by  
3 emailing them directly to me. The deadline to submit  
4 written comments 6:00 p.m. on Wednesday, May 20th.

5           For those of you joining via Google Meet, please  
6 pin the presenter to your screen by clicking the "pin"  
7 button on the presenter's icon. The presenter will be Scott  
8 Moss.

9           Please hold all your testimony until prompted. If  
10 you need help during the public hearing, please use the  
11 Google Meet Chat feature to contact myself as I'll be  
12 monitoring all incoming chats.

13           For testimony, once we call your name, please  
14 unmute yourself before speaking. Please state your full  
15 name and describe, as much as you can, your job and your  
16 role. Please also state the organization you're  
17 representing if applicable. Please limit your testimony to  
18 five minutes. After you are done speaking, the Division may  
19 ask you a question related to your testimony. Afterwards,  
20 please mute yourself so others may testify.

21           If you need to remain anonymous to exercise your  
22 right of confidentiality under the Wage Protection Act 4.7  
23 and Colorado Revised Statute 7 CCR 1103-7, you can give just  
24 your first name or a pseudonym or describe as much of your  
25 job or role as you can.

1           These instructions will be posted throughout the  
2 hearing, and all the information will also be provided on  
3 there for my contact as well. Please begin muting yourself  
4 as Scott is going to begin presenting.

5           MR. MOSS: Thank you, Michael.

6           Good morning, everyone, my name is Scott Moss.  
7 I'm the Director of Division of Labor Standards and  
8 Statistics in the Colorado Department of Labor and  
9 Employment. The time is 9:07 a.m. on Friday, May 15th.  
10 This is a public rulemaking hearing being held at the  
11 Division of Labor Standards and Statics at 633 17th Street  
12 in Denver with participants listening and speaking by  
13 Internet and phone. The hearing is being recorded and will  
14 be added to our administrative record.

15           Thank you, Mike, for reading the instructions, and  
16 thank you all for joining us.

17           With me in attendance today are the following  
18 Division officials here virtually: Liz Funk, Labor Standards  
19 Director; Saida Montoya, Investigations Manager; Eric Yohe,  
20 Labor Standards Outreach Manager; Eve Pogoriler, Senior  
21 Hearing Officer; and Ashley Boothby, Senior Policy Advisor;  
22 as well as Michael Primo, Rulemaking Coordinator and  
23 Operations Director.

24           In a few minutes we'll begin accepting testimony  
25 for the following proposed rules: Colorado Overtime and

1 Minimum Pay Standards, Order No. 36; the Wage Protection Act  
2 Rules; and the Wage and Hour Direct Investigation Rules.  
3 The notice of public hearing and rulemaking documents were  
4 filed with the Secretary of State on April 15th. That same  
5 day all rulemaking documents were posted on our website with  
6 documents circulated by email to our contact list of over  
7 300 stakeholders and associations.

8           Before we begin, I'll reiterate a couple rules for  
9 Mike but also some others. During this hearing we are  
10 accepting oral testimony as well as written comments through  
11 the chat window available to anyone joining by Internet.  
12 The same administrative record as always will include oral  
13 testimony and written comments. In the context of today,  
14 that includes oral testimony, written comments submitted by  
15 email or other means, as well as written comments submitted  
16 through the chat window. All such testimony and comments  
17 are reviewed by the same Division officials. Accordingly,  
18 while you are free to testify by whatever means you prefer,  
19 there is no need to repeat points in multiple forms of  
20 testimony and comment submission.

21           I anticipate that the time allotted for today's  
22 hearing will be sufficient to hear all testimony on the  
23 proposed rules. If additional time is needed or if we have  
24 technical difficulties, then we will continue this hearing  
25 on another date which we will announce by the end of today's

1 hearing. As of now we have seven folks slated to speak, so  
2 there is plenty of time if others want to join with that  
3 few.

4           If you are attending by Internet and would like to  
5 testify, please say so using the chat feature as several of  
6 you already have, and you've been added to the list. Thank  
7 you. We will call you in the order in which we received the  
8 request to speak.

9           If you are attending by phone, we will provide an  
10 opportunity after the testimony for those participating by  
11 Internet just because anyone participating solely by phone  
12 can't be sending us a chat. So we will ask at the end the  
13 various folks appearing by phone.

14           Please keep your computer or phone on mute. Thank  
15 you so far for doing so because we're not getting feedback  
16 which is great. If you're testifying, please still stay on  
17 mute until we call your name, and then please unmute  
18 yourself just to speak and go mute afterwards. As Mike  
19 noted, please state your name and role and affiliation as  
20 much as possible unless you choose to remain anonymous which  
21 is, of course, your right.

22           Please speak in a clear, slow voice so you could  
23 be heard and the proceedings transcribed as accurately as  
24 possible. I may interrupt only if I need to ask you to  
25 repeat anything or if the audio quality is unclear.

1           Please limit your testimony to five minutes. If  
2 you need more time, you can ask as five minutes ends. After  
3 you finish speaking, we may ask follow-up questions or may  
4 not. Afterwards, please mute yourself.

5           If you'd like to provide your name and information  
6 for the record, whether you testify or not, it will be just  
7 like a sign-up sheet at an in-person hearing. It is  
8 optional but encouraged. Please email or chat your  
9 information using the chat window or to Mike Primo, again,  
10 whose email is on the instruction page that you should be  
11 seeing soon. And the email and address--the email address  
12 for Mike Primo and the web link are also on the instruction  
13 sheet that will be visible on the screen. We will note your  
14 attendance in the record if you so choose.

15           Written comments may be introduced into the record  
16 today by the chat feature or by email, but the deadline for  
17 comments is 6:00 p.m., Wednesday, May 20th.

18           Thank you all for taking the time to attend and  
19 for participating in our rulemaking process. We will now  
20 proceed with oral testimony starting with those who signed  
21 up in advance. If you'll give me a moment before we start.

22           (Pause.)

23           I just wanted to make sure the instructions were  
24 appearing on the screen. We will start with those who've  
25 signed up to testify in advance, then we will proceed to

1 anyone who says they'd like to testify afterwards, ending  
2 with those by phone who will get a chance. We will start  
3 first with Tony Gagliardi.

4           You may begin, Tony. You may still be on mute.  
5           (Pause.)

6           Tony, are you there? Tony, I think you're on  
7 mute.

8           MR. GAGLIARDI: Okay. Now can you hear me?

9           MR. MOSS: Yes. Got it.

10          MR. GAGLIARDI: Thank you.

11          MR. MOSS: We can. Ready. No problem.

12          MR. GAGLIARDI: Just had to find the right button.

13          MR. MOSS: Of course.

14          MR. GAGLIARDI: Good morning, Mr. Moss, and  
15 members present. My name is Tony Gagliardi, and I'm the  
16 Colorado State Director--excuse me--for the National  
17 Federation of Independent Business. NFIB is an  
18 incorporated, nonprofit association with about 300,000  
19 members across America. NFIB protects and advances the  
20 ability of Americans to own, operate, and grow their  
21 businesses, and in particular insures that the government of  
22 the United States and the states hear the voice of small  
23 business as they formulate public policies.

24                 Because the proposed Joint Employer Rule being  
25 added to the Colorado Overtime and Minimum Pay Standards



1 Order, COMPS Order No. 36, applies to many small businesses  
2 including many involved in franchisor/franchisee, labor  
3 supplier/labor user, contractor/subcontractor,  
4 lessor/lessee, and similar relationships that the joint  
5 employer doctrine may affect, NFIB and its members have a  
6 substantial interest in the proposed rule.

7 Business owners already face a multitude of  
8 factors which will impact the prospect for survival such as  
9 the continuing health and safety factors of the COVID-19  
10 pandemic, the various closure orders around the state of  
11 Colorado, and other issues such as getting employees to  
12 return to work, and most recently an unemployment trust fund  
13 which will become insolvent in the very near future.

14 We are requesting to allow for an extended comment  
15 period, convene a larger stakeholder group, allow business  
16 owners to ascertain just how this rule change will affect  
17 their business. First notice of the proposed rule was  
18 issued on April 15th, 2020. At that time the Colorado  
19 business community was facing the first of many executive  
20 orders concerning the COVID-19 pandemic. Great uncertainty  
21 for business owners dominated their every thought, questions  
22 such as: would their businesses be forced to close, would  
23 their businesses be classified as essential, and what would  
24 become of their employees should the business be forced to  
25 close.

1           It is the opinion of NFIB the new rule will have  
2 the following impacts on our members. It will discourage  
3 larger firms from working with smaller firms. It will upend  
4 legitimate franchising arrangements. And it does not make  
5 sense. Basically, it does not make sense to hold Business A  
6 liable for Business B's mistake, that Business A was not  
7 actively controlling Business B's employees.

8           It is our intention to file more substantial,  
9 written comments during the comment period, so I will  
10 include my comments at this time. Thank you very much.

11           MR. MOSS: Thank you, Mr. Gagliardi.

12           Next we have Lauren Masias.

13           (Pause.)

14           Lauren, if you are there, if you could take  
15 yourself off mute.

16           (Pause.)

17           Can you see if Lauren is there?

18           Lauren, I think you're still on mute if you are  
19 there.

20           MS. MASIAS: Okay. Great.

21           MR. MOSS: Great.

22           MS. MASIAS: Hi, can you hear me?

23           MR. MOSS: I hear you now. Great. You can go  
24 ahead.

25           MS. MASIAS: Perfect. Thank you.

1           Good morning. My name is Lauren Masias, and I am  
2 the Director of the Colorado Competitive Council, a  
3 coalition of employers, association, and chambers of  
4 commerce who advocate to keep Colorado's business climate  
5 competitive. The Colorado Competitive Council will be  
6 submitting detailed, written comments as will the Denver  
7 Metro Chamber of Commerce, but we want to take this  
8 opportunity to put a few concerns on the record verbally.

9           First, employers need clarity and certainty on  
10 what is and what is not a joint employment relationship.  
11 However, the rule does not provide that clarity or certainty  
12 and tends to include a lot of information about what is  
13 joint employment but no information about what is not joint  
14 employment. The rule creates an entirely new test that is  
15 tethered neither to Colorado case law nor to any other  
16 jurisdiction, and that will likely render most relationships  
17 to be joint employment.

18           Second, this rule could have and should have been  
19 included as part of the COMPS notice and comment and the  
20 House Bill 19-1267 timeline. To push this rule through in  
21 emergency rulemaking feels like another gotcha for  
22 well-meaning employers. There is no evidence that joint  
23 employment is not a significant problem in Colorado, and the  
24 courts are capable of continuing to navigate the issue.

25           Last, the timing and process of this rulemaking

1 feels all wrong when the focus of the state should be on  
2 economic recovery, particularly for small businesses and  
3 start-ups who will need to use staffing agencies, temp  
4 agencies, independent contractors, and subcontractors to  
5 ramp back up and dig out of the financial hole that this  
6 global pandemic has caused.

7           If this is an issue the Department wants to work  
8 on, we ask that they wait and undertake a more full and  
9 comprehensive rulemaking at the time when employers aren't  
10 completely and understandably distracted by the greatest  
11 economic hit since the Great Depression.

12           Thanks for your time.

13           MR. MOSS: Thank you.

14           We'll now take David Seligman.

15           MR. SELIGMAN: Hi. Can you hear me?

16           MR. MOSS: Yes.

17           MR. SELIGMAN: Great. Thank you.

18           Hi. So I'm David Seligman. I'm an attorney and  
19 the Director of Towards Justice, a nonprofit, workers'  
20 rights law firm based in Denver. I'd like to comment  
21 briefly on the proposed clarification of the Joint  
22 Employment Standard but we'll also be submitting broader,  
23 written comments.

24           First of all, I remain a little confused by the  
25 suggestion that this--that the proposed rule creates a

1 dramatic change in law. From my perspective, this is a  
2 codification of, you know, ongoing principles of Joint  
3 Employment which have been in place certainly under federal  
4 law and, you know, under state law for several years,  
5 certainly after HB 1267 tethered Colorado law to the federal  
6 standard. From my perspective it is important for the  
7 Agency to do rulemaking, and especially rulemaking now in  
8 light of the confusing erosion of the Federal Joint  
9 Employment Standard proposed by the Trump administration, a  
10 proposed rule that this state is suing over as we speak.

11           So contrary to the suggestion that the standard  
12 isn't tethered to any law anywhere, it's actually quite  
13 explicitly tethered to several frameworks including the  
14 Salinas case from the 4th Circuit which has served as a  
15 framework for the Joint Employment Standard around the  
16 country, including in the 10th Circuit and in the District  
17 of Colorado, and the administrator's interpretation from the  
18 Obama administration. The framework is built on the  
19 fundamental policy that when workers are underpaid that, you  
20 know, very often that's opposed to worker having to bear the  
21 costs of their underpayment, it makes sense to force  
22 employers, those who are in the best position to avoid that  
23 cost and those who profit off of the labor of the employees,  
24 to bear the cost of the underpayment.

25           I also don't think that there's any reason to

1 postpone the rule because of the pandemic. You know, I  
2 think that I would have more sympathy for that argument if  
3 there was a--if the proposed rule was a change in  
4 requirements placed on businesses. But that's not at all  
5 what's happening here. In fact, this is just codifying a  
6 status quo, and it's not changing any requirements on  
7 business. All it has to do with, right, is who pays off of  
8 the cost of an underpayment of wages.

9 I also understand that many small businesses may  
10 be under strain now. Well, let's be clear that the  
11 opposition to this rule is not based at all on a desire to  
12 protect small businesses. This is based on the desire to  
13 protect very large corporations, lead contractors, franchise  
14 owners, and others who may profit off the work of employees,  
15 will still--you know, not wanting to be held accountable for  
16 their underpayment even when they're in a position to avoid  
17 that underpayment, and even when they profit off of the  
18 labor of those employees.

19 Thanks so much.

20 MR. MOSS: Thank you.

21 We'll next take Kjersten Forseth. Ms. Forseth had  
22 wanted to appear and has oral testimony that she asked to be  
23 read into the record which we're happy to do since at the  
24 last minute she couldn't come. So Kjersten Forseth will be  
25 played by Liz Funk.

1 MS. FUNK: Good morning. My name is Kjersten  
2 Forseth, and I am testifying on behalf of the Colorado  
3 AFL-CIO. The Colorado AFL-CIO represents approximately 180  
4 affiliate unions whose members are a total of more than  
5 130,000 working Coloradans. The Joint Employer Rule is  
6 vitally important to the industries we represent, from  
7 janitors to construction. This rule profoundly impacts  
8 workers and is extremely important to preserve.

9 The Joint Employer Rule ensures employers making  
10 the decision about their company are also responsible for  
11 the employees who work there no matter how they are paid.  
12 Without this rule, employers can evade responsibility by  
13 using temporary staffing agencies or labor brokers to shirk  
14 responsibility for workplace safety and to halt attempts to  
15 collectively bargain. The CDLE rule is simply keeping this  
16 principle in place to prevent intermediaries from taking all  
17 the responsibility for workplace compliance.

18 According to the National Employment Law Project,  
19 more and more corporations, especially those in lower-wage  
20 industries, are using labor intermediaries such as temp and  
21 staffing firms. Temp workers who are disproportionately  
22 black and Latinx are paid substantially less than permanent  
23 workers, have almost nonexistent benefits, and face high  
24 rates of wage theft. Further, black and Latinx workers are  
25 overrepresented in some subcontracted work with the lowest

1 job quality temporary help agency work. While black workers  
2 constitute 12.1 percent of the overall workforce, they make  
3 up 25.9 percent of temporary help agency workers. Latinx  
4 workers are 16.6 percent of all workers but 25.4 percent of  
5 temporary help agency workers.

6 Corporate leaders' decisions to contract out  
7 labor-intensive aspects of their business is common in many  
8 service sector jobs today including construction,  
9 janitorial, hospitality, warehousing, poultry, and home  
10 care. While the reasons for the fissuring of jobs vary from  
11 legitimate needs to power down multifaceted business  
12 priorities, to more brazen desires to skirt labor and  
13 employment and safety net protections, the multiplicity of  
14 entities and potentially responsible players too often  
15 result in lower wages, more dangerous workplaces, and less  
16 employer accountability for working conditions, especially  
17 in the lower-paid sectors in our economy.

18 The Colorado AFL-CIO supports the rules proposed  
19 by the Colorado Department of Labor with no changes. Thank  
20 you for your dedication to fair and just laws for the least  
21 powerful in our workforce.

22 MR. MOSS: Thank you, Kjersten.

23 Next up is Michael Gifford.

24 MR. GIFFORD: Thank you. Am I now on?

25 MR. MOSS: Yes.



1 MR. GIFFORD: Okay. Thank you very much.

2 My name is Michael Gifford. I am CEO for  
3 Associated General Contractors. We're a Colorado-based  
4 trade association for commercial construction firms, general  
5 contractors, specialty contractors, suppliers. And also  
6 wanted to say that we are signatory with three of the  
7 building trades: the carpenters, laborers, and (inaudible).  
8 But we also have members who are not signatory as well.

9 So we come to these comments that I will be making  
10 from a very centrist point in working with both labor and  
11 management. And we have additionally been involved in the  
12 executive order of Governor Hickenlooper in December of 2018  
13 called the Employee Misclassification and Payroll Fraud Task  
14 Force for the construction industry. And we have been  
15 faithfully, ethically, and in good faith participating in  
16 that effort with the Department and the Carpenter's Union.

17 And I will say that this has been a topic--part of  
18 these proposed rules and the COMPS order have been a topic  
19 of that effort. So we were, I wouldn't say surprised, but  
20 we were interested to see it come up in this format. We  
21 were dealing with it in another CDLE format at the same  
22 time. So that being said, we just want to get on the record  
23 the very significant efforts that we've been making in this  
24 regard.

25 And then, finally, I agree with the comments from

1 NFIB and C3, so I won't repeat those except to underscore  
2 that this is a very stressful time for our industry, and we  
3 are working hard to keep 180,000 construction employees  
4 employed in the state. And I think we're doing a very good  
5 job at that. And we appreciate the support of the state in  
6 terms of our designation as a critical business, and the  
7 public health orders from CDPHE which have allowed us--and  
8 when I say "us," labor and management together--to continue  
9 working for the good of the state of Colorado.

10           So with that we would formally request that least  
11 the Joint Employer Rule portion of this rulemaking be  
12 delayed so there is more time to talk about that. And the  
13 Department already knows a lot of our thoughts as well as  
14 labor because we've been talking about it since December of  
15 2018 in the governor-caused executive order that asked us to  
16 talk about it. So with that we'll be turning in some more  
17 detailed comments, and I believe Todd Fredrickson  
18 (inaudible) represent us will have some more detailed  
19 comments today.

20           And then finally, we'll say we really enjoy  
21 working with the Colorado Department of Labor and Employment  
22 because they have a history of these stakeholder meetings  
23 and getting to very, very good results. So we look forward  
24 to any future stakeholder meetings that there could to  
25 discuss the Joint Employer Rule.

1           And with that I'll conclude my comments, and thank  
2 you very much, Mr. Moss.

3           MR. MOSS: Thank you. Next is Nick Hoover.

4           MR. HOOVER: Hello. Can you hear me?

5           MR. MOSS: Yes. Thank you.

6           MR. HOOVER: Great. Thank you, Director Moss, for  
7 allowing me to testify in this hearing today.

8           My name is Nick Hoover. I'm the Manager of  
9 Government Affairs for the Colorado Restaurant Association.  
10 The Colorado Restaurant Association represents roughly 3,000  
11 restaurants in the state of Colorado who employ almost  
12 300,000 people in the state of Colorado. We're here today  
13 testifying on the Joint Employer Rule.

14           First, we do plan on putting together more  
15 comprehensive comments around these proposed rules and  
16 submitting them to the Division by the end of the comment  
17 period. Without restating a lot of what was said by  
18 previous testifiers, we find it very concerning that this  
19 rule is coming forward at the time that it is.

20           Colorado restaurants are experiencing an  
21 unprecedented business uncertainty or insecurity because of  
22 COVID-19. Restaurants in the state of Colorado have been  
23 closed down for in-dining servicing which has caused many  
24 restaurants in this state to have to lay off almost all of  
25 their employees if not all of their employees. And already

1 many of them have closed because of the pandemic.

2           The uncertainty about when we are going to be able  
3 to reopen, the uncertainty at how we're going to be able to  
4 reopen, not knowing what our requirements, what our future  
5 costs are going to be is already going to cause problems  
6 with the economic recovery that is going to be needed to  
7 bring this state back and allow for these businesses to  
8 continue to provide jobs, provide support for their  
9 communities when this is all done. When I say "this is all  
10 done," I mean the pandemic.

11           This rule, in our opinion, and I will be  
12 submitting more comprehensive comments as to why it makes  
13 that economic recovery more uncertain, it--this rule creates  
14 more confusion, more unknown going into one of the largest  
15 economic recoveries anyone on this phone call has ever seen  
16 that we are going to need to get back. We do not believe it  
17 is the right time. We believe that this rule will stifle  
18 future investment in the state of the Colorado for a  
19 business community that is truly suffering in a way that we  
20 have not seen in a long time.

21           We humbly request that these rules be delayed; a  
22 further or a more comprehensive stakeholder process take  
23 place at a later date. That--that's our request. Thank you  
24 very much.

25           MR. MOSS: Thank you.

1                   We'll next take Todd Fredrickson.

2                   MR. FREDRICKSON: Good morning, Director Moss.

3 Can you hear me?

4                   MR. MOSS: Yes. Thank you.

5                   MR. FREDRICKSON: Thank you for setting this up  
6 today and also for your work to date on (inaudible) issues.  
7 I'm getting a little bit of feedback. I'm not sure why that  
8 is. Am I coming clearly--coming through clearly to you,  
9 Scott?

10                  MR. MOSS: I can hear you.

11                  But I'll ask that if anyone else who isn't on mute  
12 can go on mute, that will decrease the odds of feedback.

13                  So you can go ahead. I think we can hear you  
14 fine, though.

15                  MR. FREDRICKSON: Okay. Thanks.

16                  So I have a number of points that I want to make,  
17 but first, let me quickly introduce myself. My name is Todd  
18 Fredrickson. I'm a partner with the law firm of Fisher  
19 Phillips which is a national labor and employment law firm.  
20 And I'm a 29-year practicing labor and employment attorney  
21 in Colorado. I'm speaking on behalf of the Associated  
22 General Contractors as well as the Rocky Mountain Mechanical  
23 Contractors Association. I also serve as association  
24 counsel for the Colorado Restaurant Association.

25                  The first concern that I have about the proposed

1 rule is as Mr. Seligman even mentioned earlier, the Joint  
2 Employer Rule, at least on the federal level, is the subject  
3 of some pretty significant litigation of which our state's  
4 attorney general is a party along with other states'  
5 attorneys general. And my concern related to that is that  
6 if that litigation is unsuccessful, it would make most if  
7 not all of what our state Department of Labor and Employment  
8 is doing either unlawful, obsolete, or mute. So I think it  
9 makes good sense and it's prudent to wait for the results of  
10 that litigation before the Agency engages in rulemaking that  
11 goes to the heart of that issue.

12 I also want to dig a little deeper into some of  
13 the issues that I see in the proposed rule as it exists if  
14 the Agency decides to forge ahead. First and foremost, the  
15 rule is very--more theoretical than practical. And what I  
16 mean by that is that it focuses on the power of authority to  
17 control or direct workers, hire and fire, set pay,  
18 discipline, engage in performance evaluation as opposed to  
19 the actual engaging of those activities which I think is a  
20 significant departure, not only from state and federal wage  
21 and hour law, but other statutes that opine on things like  
22 joint employer status, single employer status, or as the  
23 test is referred to under Title VII and even the Colorado  
24 Anti-Discrimination Act, the single integrated enterprise  
25 test.

1           Common to all of those tests is the actual  
2 performance of the sorts of functions that are listed in  
3 proposed Rule 1.6.1. In particular, the first and second  
4 paragraphs or factors that have been set out by the CDLE,  
5 they talk about the power to exercise those types of  
6 functions as opposed to actually exercising those functions.

7           As proposed, they would render virtually any  
8 contractor to subcontractor relationship open to a Joint  
9 Employer argument by a number of constituencies, not the  
10 least of which is the plaintiff's bar using this as a tool  
11 to expand litigation from the employer who's responsible for  
12 wage and hour failures or wage and hour payment failures to  
13 other parties that really have no say in what the actual  
14 employer does. And so I know that you have tried to craft  
15 around that, largely through the language about general  
16 oversight of contracts.

17           But our position at AGC and RMMCA, and I think  
18 CRA, the Colorado Restaurant Association, would agree with  
19 this, is that factors one and two should be modified to  
20 account for this actual exercise issue that I've identified.  
21 And it seems to me that it can be done pretty easily.  
22 Instead of focusing on the power to exercise that, I can  
23 simply say that an employer that exercises the power to hire  
24 and fire or who actually supervises or controls is an  
25 employer that can be held responsible under the state's new

1 test.

2 I do take issue with the comment earlier that this  
3 is merely a clarification. The states' rule is a  
4 consolidation of a number of tasks, and as a result it is a  
5 new rule. And so I would suggest that we proceed carefully  
6 in making sure that this rule accomplishes what it attempts  
7 to accomplish, and that is to go after employers that  
8 actually perform functions as an employer.

9 The last thing that I wanted to say is that there  
10 are some terms in the proposed rule that require further  
11 definition or examples. Just by way of illustration,  
12 there's use of the word "disassociated" in the introductory  
13 paragraph 1.6.1. I think that that needs further definition  
14 as what it means to be disassociated as to workers who  
15 perform work for potentially multiple employers or putative  
16 employers.

17 In 1.6.1(a)(1), there's mention of this point I  
18 alluded to a little while ago, this reasonable degree of  
19 general oversight of contract performance. And that's not  
20 defined anywhere. So I think to the extent that the CDLE is  
21 trying to carve out the situation that I alluded to before  
22 which is, you know, just, again, by way of example, a  
23 general contractor and its subcontractor or subcontractors  
24 that are both performing diligently their responsibilities  
25 when it comes to state and federal wage and hour law, that



1 examples like that be included in the rule.

2           And then last but not least, I'm not sure if  
3 Martine Wells from Brownstein is on the call and intends to  
4 offer comments, but I do know that she had concerns about  
5 the language in 1.6.1(a)(3) about what it means to be  
6 integral to the business of the putative joint employer. We  
7 submit that that requires further definition and examples as  
8 well.

9           Thanks very much for allowing me to comment.

10          MR. MOSS: Thank you.

11          With that we've finished with testimony from  
12 everyone who has appeared previously by requesting to speak  
13 before the hearing and those who chatted that they wanted to  
14 speak during the hearing.

15          Is there anyone else appearing by Internet who  
16 wishes to speak? If so, you can chat right now that you  
17 would like to speak. If not, we'll move on to folks on the  
18 phones to give them a chance to jump in.

19          (Pause.)

20          Having given it a long pause, we'll now invite  
21 anyone on the phone to speak. Let's do it like this. There  
22 are a number of folks appearing by phone. And if you're  
23 here just to listen, that's fine. Let me just ask if  
24 there's anyone who wants to speak, and if we get a cacophony  
25 of multiple voices, then we will start calling on folks one

1 by one by phone number. Is there anyone appearing by phone  
2 who wishes to speak?

3 (Pause.)

4 I'll give it a couple more seconds.

5 (Pause.)

6 Be sure to unmute yourself if you are on the phone  
7 and intending to say, yes, I would like to speak. Because  
8 if you're speaking to the mute button saying you'd like to  
9 speak, I will not know.

10 (Pause.)

11 It's been 30 seconds. I'll give it another 30  
12 seconds in case someone is trying to find the unmute button.

13 (Pause.)

14 Okay. We've all enjoyed the sounds of silence for  
15 over a minute now, so I'll just give a last call. Is there  
16 anyone else, whether by Internet or phone or looking outside  
17 the door of my office, who would like to speak right now?

18 (Pause.)

19 Hearing no further intent to speak, we're  
20 concluding the hearing. I will add and reiterate the  
21 meeting instruction that if you wish to submit comments, it  
22 is just the same as testifying. If you email or submit  
23 comments to us by any other means, the email address is  
24 michael, M-I-C-H-A-E-L, .primo@state.co.us.

25 I do want to say just to give a chance to anyone

1 by phone in case you're fumbling with mute, you press star  
2 six to unmute I'm told. So if you have been furiously  
3 pushing buttons to try to unmute, it's star six. And as I  
4 keep telling for the next ten seconds, you should feel free  
5 to just interrupt to say, yes, I've been trying to speak.

6 With that, our web page, [coloradolaborlaw.gov](http://coloradolaborlaw.gov), has  
7 on the left link for proposed rules. If you click on that,  
8 then you will see the notice of proposed rulemaking here  
9 that has the link for comments to submit either via link,  
10 via email, or in hard copy if you so choose. The deadline,  
11 again, is 6:00 p.m. on May 20th.

12 With that I am hearing no further desire to speak.  
13 Last call. We'll do a countdown in ten.

14 (Pause.)

15 All right. With that, we are concluding the  
16 hearing. The time is 9:43. Testimony lasted from 9:12 to  
17 9:38. Have a good day.

18 (Whereupon, the meeting was concluded.)

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TRANSCRIBER'S CERTIFICATE

I hereby certify that the foregoing has been transcribed by me to the best of my ability, and constitutes a true and accurate transcript of the mechanically recorded proceedings in the above matter.

Dated at Aurora, Colorado, this 21st day of May, 2020.

/S/Patti Petersen  
Patti Petersen  
Federal Reporting Service, Inc.  
17454 East Asbury Place  
Aurora, Colorado 80013  
(303) 751-2777

Good morning everyone. My name is Scott Moss. I'm the Director of the Division of Labor Standards & Statistics in the CO Dept of Labor & Emp.

The time is \_\_\_ a.m. on Friday, May 15th. This is a public rulemaking hearing, being held at the Division of Labor Standards and Statistics, with participants listening and speaking by internet and phone. This hearing is being recorded, & will be added to our administrative record.

Thank you, Mike, for reading today's instructions. & thank you all for joining us. With me in attendance today are the following Division officials:

- Mike Primo, our DLSS Rules Coordinator;
- Liz Funk, Labor Standards Director;
- Saida Montoya, Investigations Manager;
- Eric Yohe, Labor Standards Outreach Manager;
- Eve Pogoriler, Senior Hearings Officer; and
- Ashley Boothby, Senior Policy Advisor.

In a few minutes, we will begin accepting testimony for the proposed:

- [Colorado Overtime & Minimum Pay Standards \(COMPS\) Order #36](#)
- [Wage Protection Act Rules](#), and
- [Wage and Hour Direct Investigation Rules](#)

The Notice of Public Hearing, and associated rulemaking documents, were filed with the Secretary of State on Apr.15th. That same day, the Division posted all rulemaking documents on our website, and circulated the documents by email to our contact list of over 300 stakeholders.

Before we begin, I need to state a few rules and guidelines for the record.

During this hearing, the Division is accepting oral testimony, as well as written comments through the chat window available to anyone joining by internet. The same administrative record will include all oral testimony, all comments submitted through the chat window, and all written comments submitted outside this hearing. All such testimony and comments are reviewed by all the same Division officials. Accordingly, while you are free to testify by whatever means you prefer, there is no need to repeat points in multiple forms of testimony & comment submission.

I anticipate that the time allotted for today's hearing will be sufficient to hear all testimony on the proposed rules. However, if additional time is needed, or if we have technical difficulties, this hearing may be continued to another date, which we will announce at the end of today's hearing.

If you are attending this hearing by Internet, and would like to testify, please say so using the Google Meet Chat feature, and we will call on you in the order in which we receive the chats.

If you are attending this hearing by phone, we will provide an opportunity to testify after the testimony from those participating by Internet.

Please keep your computer or phone on mute. If you are testifying, still keep your phone on mute, until we call your name, and then please unmute yourself before speaking. Please state your full name, and describe, as much as you can, your job, and role. If you need to remain anonymous to exercise your right to confidentiality under Wage Protection Act Rule 4.7, within 7 CCR 1103-7, just say your first name,

or a pseudonym, and describe as much of your job and role as you can.

Please speak in a clear, slow voice so your testimony can be transcribed as accurately as possible. We may interrupt to ask you to repeat anything if the audio quality is unclear.

Please limit your testimony to 5 minutes. After you finish speaking, the Division may ask follow-up questions. Afterwards, please mute yourself so that others may testify.

If you would like to provide your name and information for the record, whether you testify or not, please email Mike Primo at [michael.primo@state.co.us](mailto:michael.primo@state.co.us) after this hearing, or fill out the Division's RSVP form found on the "Proposed Rules" link on our website, [www.coloradolaborlaw.gov](http://www.coloradolaborlaw.gov). This email address and the web link are also on the "instructions" sheet visible to those who are joining this hearing by internet. We will note your attendance in our record.

Written comments may be introduced into the record today, by either using the Google Meet Chat feature, or by emailing Mike Primo. The deadline to submit written comments is 6:00 pm on Wednesday, May 20th.

Thank you again for taking the time to attend this public hearing, and to participate in our rulemaking process. We will now proceed with oral testimony. We will start with those who have signed up to testify in advance, then proceed to those who want to testify and are participating by internet, and then we will solicit comments by those on the phones.

## **START OF HEARING: 9:07**

### **TESTIFY**

1. Tony Gagliardi, NFIB. 9:12. requests a longer comment period, & convening a larger stakeholder group. but dislikes the rule generally. doesn't make sense to hold business A liable for business B's mistakes, if A doesn't control B's employees. will submit written comment.
2. Lauren Masias, Colorado Competitive Council. 9:16. will submit written comment. rule is a new test that isn't clear enough. It should've been part of COMPS months ago. There's no evidence joint employment is a significant problem in Colorado. We should do a more comprehensive rulemaking later.
3. David Seligman, Towards Justice. 9:18. will submit written comment. believes this codifies longstanding joint employment rules, is faithful to 19-1267, & respects that CO is suing to stop the federal rule. no reason to postpone, since this is a "status quo" rule, & no new requirement.
4. Kjersten Forseth, read by Liz Funk. 9:21. AFL-CIO supports. joint employment responsibility "is vitally important"; "profoundly impacts workers" from "janitors to construction" & "is extremely important to preserve."
5. Michael Gifford (noted on chat). 9:24. 180,000 currently employed in construction. agree w/ NFIB & CCC's oral comments, delay at least the joint employment part of this rule, which we've been talking about since 2018. will submit written comment.
6. Nick Hoover (noted on chat). 9:28. almost 300,000 workers. will submit written comment. bad time & very concerning given how uncertain restaurants are

and the economic recovery will be. will stifle investment. delay for more comprehensive stakeholder process.

7. Todd Fredrickson (noted on chat). 9:31. speaking for AGC & RMMCA. also serves as ass'n counsel for Colorado Restaurant Ass'n. Litigation vs fed rule - if it loses, that'd undercut this effort, so let's wait for that case outcome. Rule too "theoretical" re employer "power" to do acts (factors 1-2) they don't "actually" do -- a significant departure. Could generate lawsuit vs any contractor relationship, including parties with "no say" in what the employer does." Knows the "general oversight" factor tries to avoid that problem, but factors 1-2 need modification to account for "actual exercise" not "power to." Also, this is a consolidation of multiple old tests so it's really a new rule. Rule should serve its purpose: "go after employers that actually perform functions as an employer." Also: "disassociated" in 1st paragraph isn't clear; "reasonable degree of general oversight of contract performance" -- should define that too, since the goal is to carve out compliant general contractors & subcontractors; Martine also concerned re "integral to the business" requiring clarity too.

**END OF TESTIMONY: 9:38**

**END OF HEARING: 9:43**

**IN ATTENDANCE (Total "individual people" in attendance = 31. Tried to count only once those logged in by Internet and by phone, if known)**

1. Michael Gifford, AGC Colorado
2. Todd Fredrickson, Fisher Phillip (logged on twice)
3. Nick Hoover (720\*\*\*43 and by Internet)
4. Melissa Emery, RMHS
5. Siegel Public Affairs
6. Tony Gagliardi, NFIB
7. Martine Wells, Brownstein
8. Josh Kirkpatrick
9. Jessica Reed-Baum
10. Abigail Wallach
11. Jeff Weist
12. Steve ?
13. David Willner
14. David Seligman
15. Virginia Morrison
16. Mauricio Henderson
17. Jeannie Valliere
18. Lauren Masias (303\*\*\*\*41 and by Internet)
19. Matthew Forstie
20. John Crone
21. Kjersten Forseth - Not in attendance but testimony read by Elizabeth Funk