



May 20, 2020

DEPARTMENT OF LABOR AND EMPLOYMENT

Division of Labor Standards and Statistics

COLORADO OVERTIME AND MINIMUM PAY STANDARDS ORDER (COMPS ORDER) #36

7 CCR 1103-1

Re: Comments in Response to Notice of Proposed Rule Making titled "Colorado Overtime and Minimum Pay Standards Rules, the Wage Protection Act and the Direct Investigation Rules."

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

NFIB is an incorporated nonprofit association with about 300,000 members across America. NFIB protects and advances the ability of Americans to own, operate, and grow their businesses and, in particular, ensures that the governments of the United States and of the fifty states hear the voice of small businesses, including many involved in franchisor-franchisee, labor-labor supplier-labor user, contractor-subcontractor, lessor-lessee and similar relationships that the joint employer doctrine may affect, NFIB and its members have a substantial interest in the proposed rule.

DELAY RULE IMPLEMENTATION, CONVENE LARGER STAKEHOLDER GROUP, EXTEND COMMENT PERIOD.

First notice of the proposed rule was issued on April 15, 2020. At that time, the Colorado business community was facing the first of many executive orders concerning the COVID-19 pandemic. Great uncertainty for business owners dominated their every thought. Questions such as would their business be deemed unessential and forced to close, would their business be classified as an essential business, and what would become of their employees should the business be forced to close?

It is the opinion of NFIB the new rule will have the following impacts on our members: It will discourage larger firms from working with smaller firms, it will upend legitimate franchising arrangements, and it does not make sense to hold Business A liable for Business B's mistake if Business A was not actively controlling Business B's employees.

PROPOSED RULE IS INCONSISTENT

The proposed rule already has seven factors to consider. That should be sufficient but by stating that *factors to consider include but are not limited to those factors* increases the likely hood of inconsistent decisions by Division Auditors.

1.6.1 Small and independent businesses need standards for determining joint employer status that are easier to understand, and simpler and less expensive to administer, that the proposed standards. Small and independent businesses cannot afford the lawyers, accountants, and clerks that larger companies use to decipher the regulations; small and independent businesses mostly engaged in do-it-yourself-compliance. The owner of a small independent business who concludes incorrectly that the business is not the joint employer with respect to the employees of another business faces significant adverse consequences. Among other things, the owner faces the risk of personal liability for the wages owed to the employees but the other business.<sup>1</sup>

1.6.1 A (1); make it clear if the control is to maintain system standards, activities to maintain the quality of goods or services to protect companies trademark rights, those activities do not establish Joint Employment.

1.6.1 A (4) It is very common that a worker for an independent contractor would come onto the premises to do the work. That is not an indication of Joint Employment.

1.6.1A(6) Should not apply to a franchise relationship.

WAGE PROTECTION ACT RULES

7CCR 1103-7

The proposed rule already has seven factors to consider. That should be sufficient but by stating that *factors to consider include but are not limited to those factors* increases the likely hood of inconsistent decisions by Division Auditors.

**Anthony F. (Tony) Gagliardi**

NFIB State Director

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<sup>1</sup> See *Acosta v. At Home Personal Care Services, LLC*, 2019 WL 1601997 (E.D. Va. April 15, 2019)

