May 13, 2020

Scott Moss, Director
Division of Labor Standards and Statistics
Colorado Department of Labor and Employment
633 17th Street, Suite 600
Denver, CO 80202

Dear Director Moss:

The undersigned, representing employers in a broad range of industry sectors, employing hundreds of thousands of Colorado employees, write today to express our significant concerns with the amendments to Colorado Overtime & Minimum Pay Standards (COMPS Order) #36 proposed by the Department of Labor and Employment published on April 25, 2020 (the "Proposed Order").

Specifically, we are deeply concerned with the substance of the Proposed Order, its potentially profound economic negative impact on Colorado employers (and, by extension, workers), the process by which it is being considered, and its timing. We urge the Department to delay consideration of the Proposed Rule to allow for full consideration of public comment, a full understanding of structural flaws in the Proposed Rule, and a more robust analysis of the dramatic impact the Proposed Rule will have on employers in the State of Colorado.

The Proposed Rule's Analysis of Joint Employment is Flawed and Relies on Factors Not Relevant to a Putative Joint Employment Relationship. Foremost, we are concerned that the Proposed Rule will inject significant uncertainty into the relationships nearly all businesses that contract with third party vendors, suppliers, and businesses will have. By adopting a new and expanded definition of "joint employer," the Proposed Rule will provide a substantially different definition of "employer" under state wage and hour law than that under the federal Fair Labor Standards Act (the substance of which was adopted via the Colorado state legislature only a year ago).

The Proposed Rule gives no consideration to the structure of the business relationships (franchise, dealership, licensure, and other business-to-business relationships) entered into by countless Colorado employers. Making the focus of the joint employment inquiry the "economic realities" of a specific business relationship leaves Colorado businesses in a morass of uncertainty with respect to every relationship they have with any other business or service provider.

Moreover, the multi-factor test set forth in the Proposed Rule conflates the analysis for whether a worker is an employee or an independent contractor with a joint-employer analysis, relying on factors that have nothing to do with whether one or more employer is a joint employer of that worker. For example, there is simply no rational basis to consider whether a worker is in a lower skilled position for purposes of determining whether one or more companies is that worker's "employer" under state wage and hour law. Similarly, the fact that an employee may be

economically dependent on their direct employer has no bearing on the question of whether another entity jointly employs that worker.

The Proposed Rule's Profound and Negative Economic Impact. We are also gravely concerned with the economic impact an expanded joint-employer rule will have on employers, insofar as it places undue emphasis on the potential or reserved right of one employer to control another employer's workers, even where that control is unexercised. An economic analysis conducted by the International Franchise Association and the U.S. Chamber of Commerce in 2019 concluded that the National Labor Relations Board's joint-employer standard (which focused on indirect control, or the reserved right of one employer to control another's employees) cost the franchising sector alone as much as $33.3 billion annually, and over 375.000 lost job opportunities. And this was in a time of national robust economic growth, record low unemployment, and burgeoning job opportunities.

The Proposed Rule Raises Process Concerns, and Comes at a Uniquely Precarious Time. We are likewise concerned that the Department's effort undermines the will of the state's legislature. Less than one year ago, the Colorado legislature enacted HR 19-1267, which expressly provides that the definition of "employer" under state law mirrors the federal definition of employer under the federal Fair Labor and Standards Act. While we recognize the Department's authority to promulgate regulations regarding wage and hour laws, to do so in a manner that undermines the will of the state's elected officials is deeply troubling.

Finally, we respectfully submit that it goes without saying that pushing through these changes at this particular time could not be more ill-conceived. The Proposed Rule was published on April 15, 2020, for thirty days of public review, in the midst of a national pandemic representing the most dire public health emergency in the last century, one has wrought unprecedented economic damage nationwide the likes of which have not been seen since the Great Depression. Colorado employers are facing the most dire economic situation they have faced in our lifetime, and as the state begins the slow and daunting task of safely resuming economic activity, the threat of expanded and unclear liability for wage and hour violations is likely to grind this already arduous process to a halt.

For all of these reasons, we respectfully request that the Department reconsider moving forward on the Proposed Rule at least until such time as a more fulsome economic analysis of its potential effects can be completed, and that policymakers and stakeholders who are all presently engaged in crisis mode in near every waking hour are afforded the opportunity to raise all relevant concerns to the attention of the Department.

Thank you for your consideration of this request.

Sincerely yours,

Rich Wilson
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Paul Davis Restoration

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