

May 20, 2020

Via Email

Scott Moss
Director
Division of Labor Standards and Statistics
Colorado Department of Labor and Employment

RE: Comments Regarding Proposed Joint Employer Rules

Dear Director Moss:

Towards Justice submits these comments in response to the Division of Labor Standards and Statistics Proposed rules regarding the definition of “employer” in the Colorado Minimum Pay Standards (COMPS) Order. We appreciate all the thought your agency has put into developing the proposed rule. It is broad, flexible, and consistent with the definition of employer in Colo. Rev. Stat. § 8-4-101.

To be clear, the definition of “employer” in Colorado wage law is already substantially better for workers than the test set out in President Trump’s rule regarding the definition of “employer” in the Fair Labor Standards Act. Joint Employer Status Under the Fair Labor Standards Act, 85 FR 2820-00 (Jan. 16, 2020). As you know, Colorado has sued the Department of Labor over that rule, arguing that it is *ultra vires* and inconsistent with the language of the Fair Labor Standards Act. Neither the agency nor, as far as we are aware, any of the relevant stakeholders have recommended that the agency adopt the Trump rule.

Nor could the agency adopt the Trump rule. Colorado’s statutory language codifies the definition of employer in the Fair Labor Standards Act as of 2019, long before the Trump Administration’s proposed rule went into effect. Instead, consistent with federal law from 2019, Colorado courts have applied tests like those articulated by the Fourth Circuit in *Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125, 151 (4th Cir. 2017), which examine a putative employer’s authority to control employees, not merely the actual control exerted by the employer over those employees.

For several reasons, however, we think even the broad, flexible tests articulated in *Salinas* do not go far enough. It is essential that workers be able to recover unpaid wages those who have profited off their work and been in a position to control it. For this reason, while Colorado law on this issue is already better than federal law on the definition of “employer,” we think improvements are necessary, and the proposed rule is a critical step in the right direction.

Thank you for your review of this matter.

Sincerely,

David Seligman, Esq.
Executive Director