The Honorable Dr. David Weil
U.S. Department of Labor
Administrator, Wage and Hour Division
Frances Perkins Building
200 Constitution Avenue, NW
Washington, DC 20210

Re: Administrator's Interpretation No. 2016-1: Joint employment under the Fair Labor Standards Act and Migrant and Seasonal Agricultural Worker Protection Act.

Dear Administrator Weil:

On behalf of the National Small Business Association, the nation's oldest nonpartisan small-business advocacy organization, representing more than 65,000 small businesses nationwide, I write to express my concerns with the Wage and Hour Division (WHD) of the U.S. Department of Labor Administrator's Interpretation (AI) on joint employment under the Fair Labor Standards Act (FLSA) and Migrant and Seasonal Agricultural Worker Protection Act (MSPA). Under the new interpretation, thousands of businesses will now be found responsible for the working conditions of employees of other firms they do business with and will be liable for breaches. We believe this interpretation is a significant regulatory action that is covered by the Regulatory Flexibility Act and the Paperwork Reduction Act.

Today's evolving workforce presents a plethora of staffing options not routinely used in the past. Third-party staffing companies, management companies, professional employer organizations, and independent contractors all present a variety of staffing options for contemporary workplaces. Co-location, offsite or flexible work arrangements enable employees to work for multiple employers, sometimes without knowledge by all those employees. While NSBA understands one of the WHD's goals is to aggregate employees' hours of work for joint employers for determining whether overtime compensation is due and to hold multiple employers jointly and severally liable for compliance with the FLSA and MSPA, the effect of being considered a joint employer is significant and can lead to expansive liability, especially for small businesses.

If joint employment is found, both entities may be held responsible for compliance with all applicable laws, including wage and hour and other employment protection laws. All hours an employee works each week for *each* joint employer will be aggregated "and considered as one employment, including for purposes of calculating whether overtime pay is due." If during the same week an employee works 10 hours for one joint employer and 35 for another, that employee has worked a total of 45 hours during the work week and is entitled to overtime pay. Additionally, each joint employer is jointly and severally liable for unpaid overtime and full compliance with the FLSA by all joint employers. Thus, if one joint employer fails to pay overtime

compensation, any of the other joint employers can be held responsible for the unpaid overtime and any penalties.

The AI would, for example, make a business that hires a security company responsible for the security company's policies and vice-versa. This raises a significant operational issue for the employers, who must work together to ensure compliance with the law. Small businesses will have to keep additional records for those affected employees and adjust scheduling—all of which adds to administrative costs. This broadened interpretation will result in the comprehensive restructuring of many business relationships, likely resulting in higher costs, fewer new businesses, less growth, and fewer new jobs. NSBA members oppose expanding the definition because it is unfair to make one company liable for violations of another. A small business' ability to operate efficiently and free of unnecessary regulatory burdens is critical for it to compete and create jobs across the country.

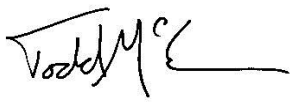
For employers covered by MSPA, both employers are liable for ensuring necessary disclosures of the terms and conditions of employment, and payment of wages are made, as well as maintaining required written payroll records. A joint employer could also find itself named as a co-defendant in a tort liability suit brought against the "primary actor" employer.

Under this interpretation, joint employment also applies for determining eligibility and coverage under the Family and Medical Leave Act (FMLA). This is critical as smaller employers with less than 50 employees may think they are free of any FMLA obligations, only to find that they meet the coverage threshold if they are deemed to be a joint employer with another entity, such as a staffing agency that provides them with additional workers, or a custodial company. Similarly, joint employer status could affect compliance under the Affordable Care Act.

NSBA fears that this AI may mean that many companies will now face potential worker-related liability that they sought to eliminate by outsourcing certain functions. With these risks in mind, companies now must be prepared to defend against potential suits and reevaluate their vendor relationships with the view that the DOL's new "economic realities" test could be applied.

This interpretation has made it far more difficult for independent business owners to build sustainable, profitable local businesses, and this additional liability will only lead to large corporations dominating Main Street. Small businesses need a clear and simple definition of "joint employer" in federal labor law that protects them and their employees. This new interpretation, by contrast, adds confusion, paperwork burdens and regulatory risks. It should be reworked to eliminate these problems.

Sincerely,



Todd McCracken
President & CEO