

December 11, 2020

RE: IDOL proposed amendment to the Part titled Minimum Wage Law (56 IAC 210; 44 Ill Reg 8472)

Dear JCAR Members,

The National Federation of Independent Business (NFIB) submits these comments in response to the Illinois Department of Labor's (IDOL) proposed rule on joint employers. NFIB requests the Committee to Object and Suspend the proposed rule and require that IDOL perform analysis as required by the Illinois Administrative Procedure Act (IAPA).

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 federal and state governments hear the voice of small business as they formulate public policies. Because the Illinois Minimum Wage Law applies to many small businesses, including many involved in franchisor-franchisee, labor supplier-labor user, contractor-subcontractor, lessor-lessee, and similar relationships that the joint employer doctrine may effect, NFIB and its members have a substantial interest in the proposed rule. If IDOL adopts the proposed rule it will result in a significant economic impact on small businesses, lead to business uncertainty and greater compliance costs.

IDOL's proposal violates the Illinois Administrative Procedure Act

The IAPA requires agencies to take particular notice of the impact a proposed rulemaking has on small businesses, small municipalities, and non-profit organizations and to attempt to minimize the economic burden the rulemaking may impose on these entities. An agency, the Joint Committee on Administrative Rules, the Governor, an affected local government, 25 interested individuals, or an association representing at least 100 interested persons may request that the Department of Commerce and Economic Opportunity perform an analysis of the proposed rulemaking to determine this impact. Agencies must state on the proposed rulemaking's Notice Page whether the rulemaking impacts these entities and provide a final analysis to JCAR at Second Notice.

IDOL's notice of proposed rule published on May 22, 2020, provided the following determinations:

13) Initial Regulatory Flexibility Analysis:

A) Types of small businesses, small municipalities and not-for-profit corporations affected: None

B) Reporting, bookkeeping or other procedures required for compliance: None

C) Types of professional skills necessary for compliance: None

14) Small Business Impact Analysis: No adverse impact

NFIB finds it inconceivable that IDOL could make such a determination without any sort of analysis or outreach to affected entities as required under IAPA. When the U.S. Department of Labor conducted its recent joint employer rulemaking it received over 12,000 comments and performed an initial regulatory flexibility analysis and a final regulatory flexibility analysis pursuant to the Administrative Procedure Act. IDOL likewise must fulfill its obligations under IAPA and determine the impact of the proposed rule on Illinois' small businesses.

IDOL's proposal conflicts with the U.S. Department of Labor's clear, four-factor joint-employer test and would increase uncertainty for small businesses.

IDOL's proposal would eradicate the certainty provided by the U.S. Department of Labor (DOL)'s January 12, 2020 Final Rule on the topic of joint employment.

DOL's rule clarified the situations in which DOL will find companies to be "joint employers" equally responsible for a worker's wages and overtime pay required by the Fair Labor Standards Act (FLSA). The rule provided updated guidance for determining joint employer status when an employee performs work for his or her employer that simultaneously benefits another individual or entity such as is the case in franchisor-franchisee relationships or for companies that outsource or contract workers for various services. Effective March 16, 2020, the new rule is the first significant change to the joint employer criteria since the 1950s.

Small and independent businesses need a standard for determining joint-employer status that is easier to understand, simpler, and less expensive to administer. Small and independent businesses cannot afford the lawyers, accountants, and clerks that larger companies use to decipher complex regulations and implement costly business systems necessary to comply with the regulations. DOL's new joint-employer rule provided much-needed clarity by setting forth such a standard that helps alleviate small business owners' uncertainty and decrease compliance costs.

In the new rule, DOL offered a four-factor balancing test for determining joint-employer status in situations where an employee performs work for one employer that simultaneously benefits another person. The balancing test examines whether the potential joint-employer:

- hires or fires the employee;
- supervises and controls the employee's work schedule or conditions of employment to a substantial degree;
- determines the employee's rate and method of payment; and
- maintains the employee's employment records.

Unfortunately, IDOL's proposal would conflict with DOL's straight-forward four-factor test. This conflict will result in uncertainty for employers and workers and increased compliance and litigation costs.

In conclusion, NFIB requests that the Committee take immediate steps to stop the proposal. The economic impact of COVID-19 on the small business sector has been devastating. New labor laws will only add to an already dismal economic outlook and create greater uncertainty at a time when small businesses need certainty.

Thank you for the opportunity to submit these comments.

Sincerely,

Mark Grant

Mark Grant
NFIB/Illinois State Director

Cc: Jason Keller, Assistant Director IDOL