April 29, 2019

Melissa Smith
Director of the Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor
Room S-3502
200 Constitution Avenue, N.W.
Washington, D.C. 20210

RIN 1235-AA26

Dear Director Smith:

On behalf of the National Multifamily Housing Council (NMHC) and the National Apartment Association (NAA), we are writing to offer comments regarding the Department of Labor's (DOL) April 2019 proposed rule regarding joint employer status under the Fair Labor Standards Act (FLSA).

NMHC and NAA are pleased that the DOL has proposed to update its joint employment rule for purposes of the FLSA. We believe that the DOL's proposed rule and the four-factor test it would establish would provide multifamily firms certainty with respect to whether they have entered into a joint employment relationship with another entity and are, therefore, jointly and severally liable for wages under the FLSA. Multifamily firms often work with subcontractors, suppliers, vendors, and temporary staffing entities, and it is critical that industry participants understand when they may be considered to be a joint employer. Multifamily industry firms take the FLSA and its requirements seriously and support having objective standards determining their FLSA obligations.

By way of introduction, for more than 20 years, NMHC and NAA have partnered to provide a single voice for America's apartment industry. Our combined memberships are engaged in all aspects of the apartment industry, including ownership, development, management and finance. NMHC represents the principal officers of the apartment industry's largest and most prominent firms. As a federation of more than 160 state and local affiliates, NAA encompasses over 75,000 members representing 9.25 million apartment homes globally.

The DOL's currently prevailing "not completely disassociated" standard for determining joint employer status can be difficult to apply and may lead to significant uncertainty as to whether an entity is a joint employer. As the DOL itself correctly observes in its *Highlights of the Notice of Proposed Rulemaking (NPRM): Joint Employer Status under the Fair Labor Standards Act*:

> Under the current regulation in part 791, multiple persons can be joint employers of an employee if they are "not completely disassociated" with respect to the employment of the employee. However, part 791 does not adequately explain what it means to be "not completely disassociated" in those situations where an employee performs work for an employer, and that work simultaneously benefits another person (for example, where the employer is a subcontractor, and the other person is a general contractor). In that scenario, the employer and the other person are almost never "completely disassociated." Part 791's "not completely disassociated" standard may therefore suggest—contrary to the Department's longstanding position—that this situation always results in joint liability.

The multifamily industry is pleased that DOL is proposing to meaningfully update the current regulation for the first time since 1958. We believe that the proposed four-factor test for establishing a

joint employment relationship is objective and easy to apply in that it assesses whether a potential joint employer has the authority to:

- hire or fire the employee;
- supervise and control the employee's work schedules or conditions of employment;
- determine the employee's rate and method of employment; and
- maintain the employee's employment records.

We also strongly support DOL's clarification that additional factors may be considered but only to the extent that they determine whether a potential joint employer is: (1) exercising significant control over the employee's work; or (2) otherwise acting directly or indirectly in the interest of the employer in relation to the employee. These clarifications should serve to ensure the rule is applied in a manner that effectuates its purpose and limits joint employment liability to situation in which an entity is truly acting as an employer.

Additionally, NMHC and NAA strongly endorse two additional clarifications DOL has made in its proposed rule, namely those explaining that:

- the ability, power, or reserved contractual right to act in relation to the employee is not relevant for determining joint employer status; and
- certain business agreements—for example, requiring an employer to institute workplace safety measures, wage floors, or sexual harassment policies—do not make joint employer status more or less likely.

These are common-sense allowances that should be retained in a final rule. An entity should be required to actually act in relation to an employee before it is considered a joint employer. The ability or right to do so, standing alone, is simply insufficient. Similarly, many widely used contractual agreements pertaining to employment practices should not automatically trigger a joint employment relationship without actual exercise of control over an employee.

Examples in the proposed rule illustrating these points are particularly helpful and relevant to the multifamily industry that often contracts with other entities to provide services. We ask that these examples be retained in a final rule.

Example three of an office park that hires a janitorial service to clean is particularly poignant as it clarifies that the office park is not a joint employer even though it reserves the right to supervise janitorial employees. Similarly, example 4 describing a country club and landscape firm elucidates when an entity begins to exercise sufficient control over another entity's employers that it becomes a joint employer. Finally, we greatly appreciate example seven that clarifies that a joint employment relationship is not triggered when a large company requires that its contractors meet certain business agreements (i.e., a wage floor and a requirement to comply with federal, state, and local laws).

In sum, the multifamily industry believes that DOL's proposed rule provides a solid framework for determining whether an entity should be considered a joint employer for FSLA purposes. We strongly support DOL's effort to provide businesses, including multifamily firms, an objective method of assessing their potential status as a joint employer and their resulting FLSA obligations. Replacing the current outdated rule is long overdue and should help to resolve situations in which multifamily firms may wonder whether they have inadvertently become a joint employer due to the potential broad reading of the current rule. The multifamily industry takes the FLSA seriously and supports DOL's efforts to ensure firms can correctly assess their obligations.

Thank you for considering our views, and please feel free to contact Cindy Chetti, NMHC's Senior Vice President of Government Affairs, at 202-974-2300 or Greg Brown, NAA's Senior Vice President of Government Affairs, at 703-518-6141, should you have any questions.

Sincerely,

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