



STATEMENT OF BASIS, PURPOSE, SPECIFIC STATUTORY AUTHORITY, AND FINDINGS

Colorado Wage Protection Act (WPA) Rules, 7 CCR 1103-7 (2020), as adopted May 25, 2020

I. BASIS: The Director (“Director”) of the Division of Labor Standards and Statistics (“Division”) has authority to adopt rules and regulations on wage-and-hour and workplace conditions, under the authority listed in Part II, which is incorporated into Part I as well.

II. SPECIFIC STATUTORY AUTHORITY: The Director is authorized to adopt and amend rules and regulations to enforce, execute, apply, and interpret Articles 1, 4, and 6 of Title 8, C.R.S. (2020), and all rules, regulations, investigations, and other proceedings of any kind pursued thereunder, by the Administrative Procedure Act, C.R.S. § 24-4-103, and provisions of Articles 1, 4, and 6, including C.R.S. §§ 8-1-101, 8-1-103, 8-1-107, 8-1-108, 8-1-111, 8-1-130, 8-4-111, 8-6-102, 8-6-104, 8-6-105, 8-6-106, 8-6-108, 8-6-109, 8-6-111, 8-6-116, 8-6-117, and 8-12-115..

III. FINDINGS, JUSTIFICATIONS, AND REASONS FOR ADOPTION. Pursuant to C.R.S. § 24-4-103(4)(b), the Director finds as follows: **(A)** demonstrated need exists for these rules, as detailed in the findings in Part IV, which are incorporated into this finding as well; **(B)** proper statutory authority exists for the rules, as detailed in the list of statutory authority in Part II, which is incorporated into this finding as well; **(C)** to the extent practicable, the rules are clearly stated so that their meaning will be understood by any party required to comply; **(D)** the rules do not conflict with other provisions of law; and **(E)** any duplicating or overlapping has been minimized and is explained by the Division.

IV. SPECIFIC FINDINGS FOR ADOPTION. Pursuant to C.R.S. § 24-4-103(6), the Director finds as follows.

(A) Rule 2.6: Definition of Employee

The prior Wage Protection Act (“WPA”) Rules used the “employee” definition of C.R.S. § 8-4-101(5), but Colorado H.B. 19-1267 (approved May 16, 2019, and effective January 1, 2020) changed that definition. These rules therefore use the new § 8-4-101(5) “employee” definition adopted by H.B. 19-1267.

(B) Rule 2.7: Definition of Employer

Colorado H.B. 19-1267 changed not only the “employee” definition (noted above), but also the § 8-4-101(6) “employer” definition. These rules therefore use the new § 8-4-101(6) “employer” definition.

(C) Not Adopted — Proposed Rule 2.7.1: Joint Employment

It is well-established in wage law that, in some situations, two or more employers are legally deemed to jointly employ the same worker, even if the employers deem the worker to be employed by only one (or neither) employer. The Supreme Court so held in 1947,¹ with many similar court decisions in the decades since,² and the United States Department

¹ [*Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 \(1947\)](#) (holding that under federal wage law, meat-packing workers were employees of both the meat company and the slaughterhouse that provided meat to that meat company).

² No Colorado state court decision has expressly analyzed joint employment under Colorado wage law, and thus no specific joint employment test has been established—but various federal and state courts have assumed multiple employers *may* be jointly liable for unpaid wages under Colorado law, and federal courts have actually analyzed Colorado wage claims against joint employers. *Pinkstaff v. Black & Decker Inc.*, 211 P.3d 698, 703 (Colo. 2009) (reversing decision striking an Answer, noting that one problem with striking the Answer was that defendants “will be unable to contest ... Black & Decker’s status as an alleged joint employer”); *Solis v. Circle Grp., LLC*, No. 16-cv-01329-RBJ, 2017 WL 1246487, at *4 (D. Colo. Apr. 5, 2017) (holding on Colorado Wage Claim Act (CWCA) claim, “the Colorado Supreme Court would recognize a CWCA claim against a joint employer, so plaintiffs have stated a plausible claim for relief on that basis,” and noting that *Evans*, another recent District of Colorado decision, “construed the CWCA to encompass joint employment”) (citing *Evans v. Loveland Auto. Inv., Inc.*, No. 13-CV-2415-WJM-KMT, 2015 WL 161295, at *3-4 (D. Colo. Jan. 13, 2015) (entering judgment for plaintiffs “impos[ing] joint and several liability on all three Defendants” as employers, including on both CWCA and FLSA claims)); *Kazazian v. Vail Resorts, Inc.*, No. 18-cv-00197-MEH, 2018 WL 2445832, at *7 (D. Colo.

of Labor (USDOL) adopted a rule further defining joint employment in 1958.³ While joint employment relationships have long existed, the USDOL found an increase in recent years. A 2016 “Administrator’s Interpretation” by the Wage and Hour Division of USDOL — an issuance that, though officially announcing agency policy and legal interpretation, was not binding law like a rule is — noted not only that it “regularly encounters situations where more than one business is involved in the work being performed and where workers may have two or more employers,” but also that such situations have been increasing: “More and more, businesses are varying organizational and staffing models.... As a result, the traditional employment relationship of one employer employing one employee is less prevalent.... The growing variety and number of business models and labor arrangements have made joint employment more common.”⁴ Comments the Division received, and finds credible, corroborate that this national phenomenon and trend, which USDOL found in 2016, is still occurring, and most importantly remains significant here in Colorado, today.⁵

Joint employment is entirely permissible, as long as it does not diminish wage law compliance. Two issues have warranted federal and state labor agency action on the subject, though. First, a subset of joint employment situations require wage law enforcement, *e.g.*, when each employer claims only the other (or neither) is responsible for unpaid wages, or when multiple employers deem only one under-capitalized person or entity the sole one responsible for unpaid wages.⁶ Second, the field is the sort of legally and factually complex one in which a labor agency could add clarity. The 2016 Administrator’s Interpretation offered guidance tailored to different types of joint employment, “[g]iven the potential complexity of employment relationships.”⁷ Then in 2017, a federal appellate decision, *Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125 (4th Cir. 2017), stated a somewhat different standard that (to date) has been deemed the appropriate

May 31, 2018) (though not using the term “joint employment” in the analysis, analyzing whether plaintiff was employed only by “The Vail Corporation” (“TVC”) or by both TVC and “Vail Resorts, Inc.” (“VRI”); dismissing claim that VRI “was Ms. Kazazian’s employer for purposes of the FLSA. Similarly, I find that Ms. Kazazian fails to plead facts supporting an employment relationship between her and VRI under the CMWA” due to insufficient allegations “that VRI exercised control over Ms. Kazazian’s employment”).

³ [29 C.F.R. § 791.2 \(1958, as amended in 1961; effective through Mar. 15, 2020\)](#). This rule was replaced by the [new 29 C.F.R. § 791, adopted by USDOL on January 16, 2020, with an effective date of March 16, 2020](#).

⁴ USDOL Wage & Hour Division, [Administrator’s Interpretation No. 2016-1 \(Jan. 20, 2016\)](#), p.1.

⁵ Comment by Colorado AFL-CIO, May 18, 2020 (asserting that a joint employment definition “is especially critical to workers in today’s economic climate” because some employers “attempt to insulate themselves from liability for mistreatment of workers through the use of labor market intermediaries ... that are the purported direct employer.... [T]he middle man is very often thinly capitalized and may even be put into a position by the higher-up employer that makes it difficult to comply with wage-and-hour laws ... result[ing] in lower wages, more dangerous workplaces, and less employer accountability for working conditions, especially in the lower-paid sectors”); Comment by Southwest Regional Council of Carpenters, May 18, 2020 (“Throughout Colorado we have seen a proliferation of labor brokers whose model is to exploit and traffic workers, cutting corners in the name of profit.”).

⁶ *E.g.*, *Greenawalt v. AT&T Mobility LLC*, 642 F. App’x 36, 37-38 (2d Cir. 2016) (holding that security guards who performed security services at AT&T stores, who alleged they were not paid overtime and were paid nothing for a one-month period, provided sufficient evidence that AT&T and the security firm were their joint employers; the security firm went defunct before a liability determination was possible); *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 64 (2d Cir. 2003) (reversing district court’s order granting summary judgment in favor of a garment manufacturer as to the joint employment relationship between the manufacturer and garment workers who were directly employed by the manufacturer’s contractors to assemble and sew the manufacturer’s final products; the contractors “either could not be located or have ceased doing business”); *Ansoumana v. Gristede’s Operating Corp.*, 255 F. Supp. 2d 184, 187 (S.D.N.Y. 2003) (holding that retail stores where work was done, and labor agents who procured the workers, were joint employers of hundreds of “on foot” delivery workers, “mainly unskilled immigrants, mostly from West Africa,” who “provided services in the stores and made deliveries from the stores, and, despite working eight to eleven hours a day, six days a week, were paid a flat rate of between \$20–\$30 per day, well below minimum wage” and without overtime pay), *later opinion*, No. 00 CV 253, 2004 WL 504319, at *2 (S.D.N.Y. Jan. 7, 2004) (noting that the “viable defendant[s]” did not include a group of “labor agent” defendants that were among the joint employers; “the collectability of a recovery against the Bauer defendants was problematic”).

⁷ USDOL, Wage & Hour Division, [Administrator’s Interpretation No. 2016-1 \(Jan. 20, 2016\)](#), p.2 n.7.

joint employment test by all later federal court decisions in Colorado that have considered it.⁸ Then USDOL adopted a different joint employment rule, [29 C.F.R. § 791.2, 85 Fed. Reg. 2820-62](#), on January 16, 2020, effective March 16, 2020.

The Colorado statute defining who is an “employer” for wage law purposes is C.R.S. § 8-4-101(6), which was amended by [H.B. 19-1267 \(May 16, 2019\)](#), which declared that the then-existing wage law definition of “employer” had been too narrow, and accordingly adopted the broader federal definition with a specific statutory reference: “‘Employer ... has the same meaning as set forth in the federal ‘Fair Labor Standards Act,’ 29 U.S.C. Sec. 203(d)’” (the “FLSA”).

Some comments to the Division advocated adopting neither a test based on *Salinas* nor (as the Division proposed) a mix of *Salinas* and other sources, but instead the new rule that USDOL finalized and adopted on January 16, 2020, exactly eight months after Colorado enacted H.B. 19-1267 on May 16, 2019. The new USDOL rule implemented in 29 C.F.R. § 791.2 creates a new test derived from *Bonnette v. California Health and Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983), but it significantly narrows what constitutes “joint employment.” The new rule no longer applies a totality-of-circumstances examination of economic realities, but instead applies four specific factors:

Whether the purported joint employer:

- hires or fires the employee;
- supervises or controls the employee’s work schedules or conditions of employment;
- determines the employee’s rate and method of payment; and
- maintains the employee’s employment records (however, maintenance of employment records alone does not demonstrate joint employer status).

Id. § 791.2(a)(1). The rule also narrows what “control” is relevant: “The potential joint employer *must actually exercise* — directly or indirectly — one or more of these [four] indicia of control [A]bility, power, or reserved right to act in relation to the employee may be relevant ... , but such ability, power, or right alone does not demonstrate joint employer status without some *actual exercise of control*. Standard contractual language *reserving a right to act* ... is alone *insufficient*” *Id.* § 791.2(a)(3)(i) (emphasis added). The rule also significantly limits what qualifies as “indirect control”: only “mandatory directions to another employer that directly controls the employee. But the direct employer’s voluntary decision to grant the potential joint employer’s request, recommendation, or suggestion does not constitute indirect control.” *Id.* § 791.2(a)(3)(ii). The Division analyzed the new USDOL rule closely and found several reasons it would not be appropriate to adopt it as the test of what does and does not constitute joint employment under Colorado law.

First, the new USDOL rule did not change Colorado’s statutory “employer” definition. On May 16, 2019, in [H.B. 19-1267](#), Colorado declared that under state wage law, the “employer” definition was too narrow, and thus replaced it with the broader federal statutory definition: “‘Employer’ ... has the same meaning as set forth in the federal ‘Fair Labor Standards Act,’ 29 U.S.C. Sec. 203(d).” Two statutory construction rules mandate continuing to apply the § 203(d) “employer” definition as it existed, and was interpreted by caselaw and rules, as of the 2019 date that Colorado adopted it.

(1) Colorado statutes make clear *which* later developments automatically modify one statute that adopts

⁸ *Merrill v. Pathway Leasing LLC*, No. 16-cv-02242-KLM, 2018 WL 2214471, at *6 (D. Colo. May 14, 2018) (“[T]he Court agrees ... [that] [t]he *Hall-Salinas* test properly determines whether more than one person or entity are putative joint employers.... The Court therefore utilizes the *Hall-Salinas* test ... in determining whether Defendants are joint employers.”) (citing *Sanchez v. Simply Right, Inc.*, No. 15-cv-00974-RM-MEH, 2017 WL 2222601, at *6-7 (D. Colo. May 22, 2017)); *Sanchez*, 2017 WL 2222601, at *7 n.13 (“If the Court were writing on a clean slate, ... the Court likely would be persuaded to adopt the test recently pronounced by ... *Salinas* ... because it agrees with the Fourth Circuit that the test set forth in *Salinas* focuses upon the relevant relationship”; but noting that “*Salinas* was decided after [defendant’s] motion ... was filed,” so the parties did not brief it, and it would therefore not apply to the motion at hand); *Valverde v. Xclusive Staffing, Inc.*, No. 16-cv-00671-RM-MJW, 2017 WL 3866769 (D. Colo. Sept. 5, 2017) (citing only *Salinas* as joint employment authority, framing the issue as follows: “if Defendants are joint employers and if such joint employment renders them jointly and severally liable, *see Salinas*”) (emphases in original).

To date, no post-*Salinas* federal or state decisions in Colorado have considered but rejected the *Salinas* test on the merits. The last decisions in Colorado *not* deeming *Salinas* the preferred test date to 2017 (the year of *Salinas*), and all decided motions (mainly ones filed and fully briefed before *Salinas*) in which no party’s filing mentioned *Salinas*, and the court then did not mention *Salinas* either. *Solis v. Circle Grp., LLC*, No. 16-cv-01329-RBJ, 2017 WL 1246487, at *1 (D. Colo. Apr. 5, 2017) (motion fully briefed before *Salinas*); *Coldwell v. Ritecorp Env’tl Prop. Sol’ns*, No. 16-cv-01998-NYW (May 4, 2017) (motion fully briefed before *Salinas*); *Fuentes v. Compadres, Inc.*, No. 17-cv-01180-CMA-MEH, 2017 WL 6335669 (D. Colo. Dec. 12, 2017), *report & rec. adopted in part, rejected in part*, 2018 WL 1444209 (D. Colo. Mar. 23, 2018) (motion filed months after *Salinas* in 2017, with no filings mentioning *Salinas*).

another: “A reference to any portion of a statute applies to all reenactments, revisions, or amendments thereof.” C.R.S. § 2-4-209 (emphases added). Thus, even if that Colorado statute can adopt future federal statutory amendments,⁹ H.B. 19-1267 referenced and adopted only a federal statute, so it incorporates only “revisions, or amendments,” to that statute. Because later federal administrative rules (like USDOL’s) are not “reenactments, revisions, or amendments,” to federal statutes, they are not incorporated. Further, interpreting federal executive acts as automatically changing state statutes would be improper,¹⁰ even if the state statute expressly references federal “rules and regulations”¹¹ — unlike H.B. 19-1267, which expressly referenced only one federal statute, not federal regulations as well.

(2) The federal authority that *does* apply is the referenced federal statute, and caselaw interpreting it, as of when H.B. 19-1267 was enacted — here, *Salinas* and the caselaw applying it through May 16, 2019. “Courts presume that the General Assembly knew and considered relevant judicial precedent when it enacted legislation. This is true [e]ven in the absence of demonstrative legislative history.”¹²

⁹ Colorado appears not to have decided this issue. For other state caselaw, see, e.g., *Mich. Prot. & Advocacy Serv. v. Caruso*, 581 F. Supp. 2d 847, 852–53 (W.D. Mich. 2008) (state statute could not be interpreted to incorporate future federal statutory amendments: “As the Michigan Supreme Court has held, statutes that incorporate existing federal statutes by reference are valid and constitutional.... But State legislation that adopts by reference ‘future legislation, rules, or regulations, or amendments thereof, which are enacted, adopted, or promulgated by another sovereign entity, constitutes an unlawful delegation of legislative power.... When a Michigan statute adopts by reference a federal law that is subsequently amended, but the Michigan statute remains unchanged, the courts are constitutionally required to construe the statute as continuing to refer to the original federal enactment before amendment.”) (quoting *Radecki v. Dir. of Bur. of Worker's Disab. Comp.*, 526 N.W.2d 611, 613-14 (Mich. 1994) (same)); *Clemons v. Harvey*, 525 N.W.2d 185, 188-89 (Neb. 1994) (same; “adoption of an act of Congress to be passed in the future would be an unconstitutional attempt ... to delegate legislative authority to Congress”); *State v. Gill*, 584 N.E.2d 1200, 1202 (Ohio 1992) (same, despite state statute incorporating federal statute “as amended,” since adopting future federal law would unconstitutionally delegate state legislative power to federal authorities; state “may update and revise [state statute] to incorporate amended versions of the federal [law]”); *Wallace v. Comm'r of Taxation*, 184 N.W.2d 588 (Minn. 1971) (same; “state legislature may not delegate its legislative powers to any outside agency, including the Congress”); *State v. Julson*, 202 N.W.2d 145, 151 (N.D. 1972) (same, to avoid “unlawful delegation of legislative power”); *Holgate Bros. v. Bashore*, 200 A. 672, 678 (Pa. 1938) (same; state statutory incorporation of later federal authorities would “hand over to Federal authority — whether Congress, executive commission, or other agency ... — plenary power to regulate working hours in Pennsylvania”).

¹⁰ *State v. Rodriguez*, 365 So. 2d 157, 160 (Fla. 1978) (construing state statute as intended only “to incorporate federal law and regulations in effect at the time ... [it] was enacted”; “to adopt in advance any federal act or ruling of any federal administrative body which may be adopted in the future would amount to an unlawful delegation of legislative authority”); see *Advocates for Effective Regulation v. City of Eugene*, 981 P.2d 368, 379 (Or. App. 1999) (“[A] state statute ... cannot incorporate future federal regulations not yet promulgated at the time of enactment; the effect of doing so is to delegate the power to amend the statute to the federal regulatory authority”); *Brizzee v. Fred Meyer Stores, Inc.*, No. CV04-1566-ST, 2006 WL 2045857, at *11-12 (D. Or. July 17, 2006) (state statute “cannot incorporate future federal regulations not yet promulgated at the time of the enactment”; state legislature would not be presumed to have “empower[ed] the [US]DOL to fill in any gaps in the [state statute]. Instead, it authorized ... the Oregon Bureau of Labor and Industries”); *Holgate Bros.*, 200 A. at 678 (rejecting “attempts to hand over to Federal authority—whether Congress, executive commission, or other agency not yet appearing—plenary power to regulate working hours in Pennsylvania”).

Moreover, as noted above, not only was the new USDOL rule just a proposal in non-final form until January 16, 2020, but also, [USDOL extended the comment period on the proposed rule until June 25, 2020](#) (and received almost 13,000 total comments), then actually changed the rule between proposal and final adoption. [85 Fed. Reg. at 2838, 2841, 2842, 2845, 2846, 2847](#) (each page noting one or more changes from proposed rule to final rule). Thus, the specific rule USDOL adopted in January 2020, to take effect in March 2020, did not exist as of May 16, 2019, the date Colorado adopted the FLSA statutory “employer” definition.

¹¹ *Rodriguez*, 365 So. 2d at 159; *Advocates for Effective Regulation*, 981 P.2d at 371 (express reference to federal agency promulgation).

¹² *The Triple Crown at Observatory Vill. Ass'n v. Vill. Homes of Colo., Inc.*, 328 P.3d 275, 278 (Colo. App. 2013) (citing *Rauschenberger v. Radetsky*, 745 P.2d 640, 643 (Colo. 1987) (“Even in the absence of demonstrative legislative history, the General Assembly is presumed cognizant of the judicial precedent in a particular area when it enacts legislation in that area.”) (other citation omitted); see *Przekurat v. Torres*, 428 P.3d 512, 515-16 (Colo. 2018) (“We must presume that the General Assembly was aware of *Dickman*’s [1994] holding ... when it amended the statute in 2005”) (citing *Vaughan v. McMinn*, 945 P.2d 404, 409 (Colo. 1997) (“The legislature is presumed to be aware of the judicial precedent in an area of law when it legislates in that area ... [and] is presumed to adopt the construction which prior judicial decisions have placed on particular language when such language is employed in subsequent legislation.”)).

Second, the rule is inconsistent with how the existing FLSA “employer” definition has been applied. As of May 16, 2019, courts in Colorado were not applying the *Bonnette* joint employment test that USDOL adopted with substantial narrowing. The most recent Tenth Circuit decision citing *Bonnette* was a 25-year-ago rejection of it,¹³ and in the nearly 40 years since *Bonnette*, no Colorado state court has relied on it.¹⁴ Rather, *Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125 (4th Cir. 2017), had become the leading joint employment case,¹⁵ including in Colorado, where (as noted above) it has been deemed the appropriate joint employment test by all subsequent federal court decisions in Colorado that have considered it; no post-*Salinas* federal or state decisions in Colorado have considered but rejected the *Salinas* test on the merits; and the last decisions in Colorado *not* approvingly citing *Salinas* date to 2017 (the year of *Salinas*) because they decided motions (mainly ones filed and fully briefed before *Salinas*) in which no filing by either party mentioned *Salinas*.¹⁶

Third, the rule defines joint employment more narrowly than *Bonnette*, the case USDOL based its rule upon. The first *Bonnette* factor examined potential *and reserved* control—*i.e.*, whether an employer “*had the power to hire and fire the employees,*” 704 F.2d at 1470 (emphasis added)—yet the new rule examines only whether the putative joint employer *actually exercises* the power to “[h]ire[] or fire[] employees,” and states that an employer’s “right to act ... is alone insufficient.” 29 C.F.R. § 791.2(a)(2). Also, while *Bonnette* “inherently focused” on employee “economic dependence on that asserted joint employer,”¹⁷ USDOL stated that despite basing its rule on *Bonnette*, “whether the employee is economically dependent on the potential joint employer is *not relevant* for determining the potential joint employer’s liability” at all, and it excluded consideration of factors bearing on economic dependency from its rule (85 Fed. Reg. at 2821). Finally, *Bonnette* instructed that joint employer analysis should not be limited to a narrow set of particular factors (as the new rule does), stating that its four listed factors “provide a *useful framework* for analysis *in this case, but they are not etched in stone* and will *not be blindly applied*. The ultimate determination *must be based ‘upon the circumstances of the whole activity’* A court should consider all those factors which are ‘*relevant to [the] particular situation*’ in evaluating the ‘*economic reality*’ of an alleged joint employment relationship.” *Bonnette*, 704 F.2d at 1470 (emphases added) (quoting *Rutherford Food Corp.*, 331 U.S. at 730). The new rule asserts that “[a]dditional factors may be relevant for determining joint employer status,” yet allows examining such factors “*only if* they are indicia of whether the potential joint employer *exercises significant control* over the terms and conditions of the employee’s work.” 29 C.F.R. § 791.2(b) (emphasis added). Thus, an “additional” factor can be considered only if it shows “control,” which already is the second listed factor; if an “additional” factor matters only if already part of an existing factor, it is not an “additional” factor.

Fourth, the rule narrows joint employment responsibility further by asserting that only the “employer” definition is relevant to the joint employment inquiry, and that the statutory “employee” and “employ” definitions are to be disregarded (85 Fed. Reg. at 2821), yet extensive caselaw has held that joint employment must be analyzed in light of the FLSA’s broad definition of “employ,” because that verb is highly relevant to making sense of the “employer” definition: “An entity ‘employs’ an individual under the FLSA if it ‘suffer[s] or permit[s]’ that individual to work.”¹⁸

¹³ “We have not adopted the *Bonnette* test in this circuit.” *Johns v. Stewart*, 57 F.3d 1544, 1559 (10th Cir. 1995).

¹⁴ Only one Colorado court has cited *Bonnette*, and only for a minor, different point. *Am. Water Dev. v. Alamosa*, 874 P.2d 352, 384 (Colo. 1994) (citing *Bonnette* as one of several cases holding “reconstructed time records ... adequate to establish time expended”).

¹⁵ The Supreme Court denied certiorari in a joint employment case applying *Salinas*. *DirecTV, LLC v. Hall*, 138 S. Ct. 635 (2018).

¹⁶ See note 8.

¹⁷ Thomas Marcey, “‘Joint Employment’ and the Independent Contractor Doctrine in Light of the Fourth Circuit’s *Salinas* Decision,” *Construction Briefings*, 2017-4 NL 1 (Apr. 2017).

¹⁸ *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 66-69 (2d Cir. 2003) (“Measured against the expansive [FLSA] language ... , the four-part test [derived from *Bonnette*] ... is unduly narrow, as it focuses solely on the formal right to control ... physical performance.... That right is central to the common-law employment relationship However, the four-factor test cannot be reconciled with the ‘suffer or permit’ language ... [that] reaches beyond traditional agency law”) (citing Restatement (First) of Agency § 220(1) (1933); quoting 29 U.S.C. § 203(g)); see *Rutherford Foods*, 331 U.S. at 728-29 (expressly referring to FLSA “employ” definition in determining whether workers were jointly employed); *Goldberg v. Whitaker House Co-op., Inc.*, 366 U.S. 28, 31-32 (1961) (applying definitions of “employee,” “employer,” and “employ” to determine whether entity was an “employer”); *Salinas*, 848 F.3d at 135 (“Congress repeatedly has affirmed that the FLSA’s definition of ‘employ,’ ‘employee,’ and ‘employer’ dictate that two or more entities can constitute ‘joint employers’ for purposes of the FLSA”); *Zheng*, 355 F.3d at 66 (relying on “employ” and “employee” definitions in joint employer analysis); *Reyes v. Remington Hybrid Seed Co.*, 495 F.3d 403, 408-410 (7th Cir. 2007) (same); Goldstein et al., *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46

Fifth, while the narrowness of the new rule may, as USDOL acknowledged, “reduce the number of persons who are joint employers in one scenario and as a result, employees will have the legal right to collect wages due under the Act from fewer employers,” resulting in monetary “transfers from employees to employers,” USDOL failed to analyze the extent of this significant effect on employees, asserting that it “lacks the data needed to calculate the potential amount or frequency of these transfers.” 85 Fed. Reg. at 2853. The Economic Policy Institute, in an analysis co-authored by the former Chief Economist of USDOL, estimates that nationally, the new rule could cost workers over a billion dollars a year, because by narrowing when employers are responsible for wage compliance as joint employers, the new rule incentivizes more of the sort of outsourcing that can weaken workers’ ability to recover unpaid wages.¹⁹ Having carefully reviewed that analysis, the Division finds it credible, and therefore finds that it agrees with a comment focused on the impact of the USDOL rule in Colorado: that it “will severely narrow joint employer responsibility and increase wage theft.”²⁰

Sixth, the purpose and effect of the new USDOL rule are expressly to adopt a *narrower* definition of employee rights to hold employers jointly accountable for unpaid wages. Colorado wage law includes an express provision instructing that interpretations, by rule or otherwise, should be liberal rather than narrow: C.R.S. § 8-6-102 (“Whenever this article or any part thereof is interpreted by any court, it shall be liberally construed by such court.”) The FLSA, in contrast, has no such liberal construction provision. Accordingly, even if the new USDOL rule is a permissible construction of the FLSA, it still would not be a permissible construction of Colorado wage law.

Overall, the new USDOL rule rejected the test that had been used in Colorado (*Salinas*), and declined to apply the test from the case it chose instead (*Bonnette*), by narrowing that case’s analysis in significant ways. That not only resulted in an entirely new test (and some comments to the Division criticized the unpredictability of adopting an entirely new test by rule), but also admittedly narrowed joint employer responsibility, which will cause substantial wage losses, according to both a national analysis and comments from Colorado labor organizations.²¹ For similar reasons, and due to procedural deficiencies in USDOL’s rulemaking, [the State of Colorado filed a federal lawsuit against USDOL](#), in collaboration with 17 other states, arguing that the new rule was unlawfully adopted and an unwarranted policy change inconsistent with the statute, and therefore should be enjoined to prevent its alteration of joint employment standards. Thus, the State of Colorado is already on record forcefully opposing the USDOL rule. The Division thus finds that the new USDOL rule would be inappropriate to import into Colorado law, and that doing so would contravene the intent and text of the legislature in H.B. 19-1267, as detailed above.²²

UCLA L. Rev. 983, 1005 (1999) (“Congress gave the circular or vacuous definitions of ‘employer’ and ‘employee’ *substance and enormous breadth* by means of the definition of *the crucial verb* [‘employ’] *connecting the two classes*, on which the national legislature imposed mandatory duties and conferred correlative protections and rights”) (emphases added).

¹⁹ First, this rule would incentivize workplace “fissuring,” ... reliance on contractors, temporary help agencies, and franchises rather than hiring employees directly. Research shows that these business models suppress wages.... [W]hile DOL states that it “does not expect this rule to generate transfers ... from workers that currently have one or more joint employers,” it neglects to account for the reduction in wages ... as more employers are incentivized to ... boost their reliance on domestic outsourcing. We ... estimate that in the long run, the increase in workplace fissuring ... would result in a transfer of at least \$954.4 million from workers to employers annually.... Second, this rule would increase ... wage theft ... [USDOL] hints that it understands that ... when it states that “assuming that all employers always fulfill their legal obligations, ... [the rule] would not result in any reduction in wages received” However, rather than performing a careful analysis of ... [when] the assumption that all employers always fulfill their legal obligations ... does not hold, ... the Department remarkably ends any discussion of the impact of wage theft with the assumption that it does not occur. We conservatively estimate that ... wage theft as a result of the rule will ... transfer at least \$138.6 million from workers to employers annually. Putting together these two estimates — more than \$954.4 million lost ... due to an increase in workplace fissuring and more than \$138.6 million in losses ... as a result of wage theft — we estimate that each year workers will lose more than a billion dollars as a result of this rule....

[Economic Policy Institute, “Comments Regarding Proposed Joint Employer Standard”](#) (June 25, 2019).

²⁰ Comment by Colorado Law Civil Practice Clinic, May 20, 2020.

²¹ See notes 5 and 19.

²² While rejecting the position of one comment that the Division should have adopted its proposed rule because “the tests articulated in *Salinas* do not go far enough,” the Division finds that comment correct in another position it took, that “[n]or could the agency adopt the Trump rule,” for several of the reasons the Division detailed in the above findings. Comment by Towards Justice, May 20, 2020. The Division also finds correct a similar comment that rejecting USDOL rule “is necessary to implement the language and legislative intent of H.B. 19-1267.” Comment by Colorado Law Civil Practice Clinic, May 20, 2020.

Viewing the new USDOL rule as inapt for Colorado law, the Division proposed a new rule aimed at preserving most of the status quo, under which *Salinas* was the applicable test, while also incorporating what the Division saw as useful elements from other sources, most notably the (1) the pre-existing federal rule and (2) the 2016 Administrator’s Interpretation. However, comments received by the Division have persuaded the Division *not* to adopt the rule it proposed. Elements of those two non-*Salinas* sources drew criticism, *e.g.*: (1) the existing regulation used language that risked being misconstrued as implying a high burden to *disprove* joint employment, because it twice used the term “completely disassociated” to describe non-joint employers; and (2) the 2016 Administrator’s Interpretation similarly risked a lack of clarity by applying a large number of factors (16), including some not expressly listed in the USDOL rule in effect as of 2016, such as whether work is “integral” to the potential joint employer’s business.²³

The Division’s goal in proposing a joint employment rule was to add clarity — by codifying a detailed rule on this topic that has seen unhelpful flux in recent years — not to add factors that stakeholders saw as unhelpfully ambiguous and potentially overbroad. Accordingly, the Division is not adopting its proposed rule.

(D) Rule 6.3: New Evidence in Appeals

Rule 6.3 amends when and under what circumstances parties to Division appeals may offer new documentary or other non-testimonial evidence that they had not offered during the investigation stage. Any party to an appeal already, before issuance of the determination they are appealing, had the right to notice and opportunity to be heard at the investigation stage – including a right to present any and all evidence they wish. In the investigation stage, the vast majority of parties do offer arguments and/or evidence, which not only assures their opportunity to be heard, but also helps the investigation. However, a small minority of parties do not offer any arguments or evidence at the investigation stage, yet then appeal an adverse determination and order, supporting their appeal with new arguments and evidence they chose not to present at the investigation stage. Other parties do present evidence and arguments at the investigation stage, yet then present additional evidence and arguments on appeal. The Division wishes to preserve a reasonable opportunity for parties to present new evidence and arguments on appeal, while also clarifying an expectation that parties should submit all their evidence and arguments at the investigation stage, for their own benefit as well as for the benefit of the investigation.

Accordingly, Rule 6.3 provides that new documentary or other non-testimonial evidence may be submitted on appeal only (a) in accordance with deadlines imposed by the Division (which was in the existing rule) and (b) upon showing “good cause,” which may be assessed based on any relevant factors, including several that are delineated in the rule. The list of factors that may constitute “good cause” is long, aiming to include reasonable circumstances in which a party who did not neglect the investigation may still have new evidence to offer on appeal.

The rule does not restrict testimonial evidence, only documentary and other non-testimonial evidence, to assure that restrictions on new evidence do not undercut parties’ rights to present arguments on appeal. However, a party cannot use the lack of a restriction on oral testimony to circumvent an applicable restriction on documentary or other non-testimonial testimony. For example, if a new document is excluded, a party cannot simply read it into the record as oral testimony, because that would not actually be oral testimony, it would be a hearsay presentation of documentary evidence. While hearsay is not categorically excluded in these administrative proceedings, it cannot be a vehicle for circumventing the Division’s evidence deadlines and rules.

This rule that new evidence on appeal requires compliance with applicable deadlines and a “good cause” requirement closely parallels similar rules in the vast majority of courts: That virtually all litigation parties face evidence-production deadlines, in discovery and then as trial approaches – so if they want to produce new evidence after the lapsing of those evidence-production deadlines, they need to show good cause.

One comment detailed concerns about whether the rule might apply too strictly in certain contexts:

For a variety of excusable reasons, a pro se complainant might not provide relevant documentary evidence that could corroborate her or his claims — such as communications, agreements, or pay statements — during the investigation phase. These reasons could include lack of access to relevant documentation, technological complications (*e.g.*, not knowing how to download and send text messages

²³ Comment by Todd Fredrickson, Esq., critiquing these two factors and others, at Division public rulemaking hearing (May 15, 2020).

or recover archived e-mails), or not understanding if or how certain documents might be legally relevant to their claims.... Because employees generally have less legal and technical sophistication than employers, have less access to resources, and do not bear the burden of record retention, the Clinic believes that the “good cause” determination should be interpreted leniently towards employees — and particularly those that were unrepresented at the investigation phase.²⁴

The Division finds many of these concerns credible, with the caveat that parties vary in language skills, resources, and technological sophistication, so they also vary in their abilities to gather evidence during investigations. The Division does not see a need to adopt the three “minor changes” proposed by this comment, but partly because most are consistent with the existing text of the rule and how the Division intends to interpret it. For example, the comment suggests a minor change to assure “that the rule should apply to all new documentary or non-testimonial evidence offered on appeal (including anything attached to the appeal form).”²⁵ The Division agrees, but believes the text of Rule 6.3 does already so provide, because it states *without limitation* that appeal “parties may submit new documentary ... evidence” only “upon showing ‘good cause.’” Accordingly, attaching evidence to the appeal form is not an end-run unfairly allowing only one side—the appellant—an exemption from the Rule 6.3 limitations on submitting new evidence on appeal.

The two other minor changes, motivated by a suggestion to allow leniency where parties have been unrepresented or where unanticipated issues arise during appeals,²⁶ can be accommodated by the text of Rule 6.3, which is far more permissive than the rules in the state and federal courts of appeals in Colorado, in which it is extraordinarily rare for new evidence on appeal to be permitted. Rule 6.3.1-6.3.6 give hearing officers authority to admit new evidence in a variety of situations in which relevant factors so justify, which the Division finds is sufficient to cover situations such as those the comment suggested—for example, if a party was unable to provide certain documentary evidence at the investigation phase due to limited English language skills, limited “access to relevant documentation,”²⁷ or other similar factors.

V. **EFFECTIVE DATE.** These rules take effect on July 15, 2020.



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

May 25, 2020

Date

²⁴ Comment by Colorado Law Civil Practice Clinic, May 20, 2020.

²⁵ Comment by Colorado Law Civil Practice Clinic, May 20, 2020.

²⁶ Comment by Colorado Law Civil Practice Clinic, May 20, 2020.

²⁷ Comment by Colorado Law Civil Practice Clinic, May 20, 2020.