June 24, 2019

Division of Regulations, Legislation, and
Interpretation
Wage and Hour Division
United States Department of Labor
200 Constitution Avenue N.W., Room S-3502
Washington, D.C. 20210

RE: Regulatory Information Number (RIN) 1235-AA26

Dear Wage and Hour Official:

The Association of Farmworker Opportunity Programs (AFOP) is opposed to the United States Department of Labor's "Proposed Rule: Joint Employer Status Under the Fair Labor Standards Act." The rule would reverse longstanding interpretation of the law and the progress made against abusive farming businesses that use farm labor contractors to avoid responsibility for complying with the minimum wage and child labor rules. AFOP strongly encourages the department to withdraw the rule.

AFOP's members provide life-changing job training and housing services to the nation's eligible farmworkers and their families. Because of this work, AFOP members know all too well of the plight of our nation's farmworkers and the abuses they suffer at the hands of unscrupulous businesses and labor contractors.

In many cases, farm operators deny they employ any farmworkers on their farms, contending that the labor contractor is the sole employer. They do so to evade liability for violations of minimum wage and child labor restrictions, which only partially apply to farms; overtime pay does not apply. What is more, farm labor contractors often lack the assets to pay a court judgment. The workers cannot collect back pay and the farm operator gets off scot-free. And if the farm labor contractor goes out of business, the farm operator can easily find another one, perpetuating the abuses.

The Fair Labor Standards Act of 1938 (FLSA) contains very broad language about who is the employer. That language came from state labor laws that evolved to strengthen effectiveness against evasions of the laws during the prior 50 years. The FLSA language has been understood to mean that when two businesses share responsibility for employing a worker, they are "joint employers" and are both responsible for complying with the FLSA. Numerous court decisions have found joint employer status. The law not only protects workers against abuse, but it also protects law-abiding employers against unfair competition by farmers that minimize labor costs through abusive labor contracting.

The proposed rule would adopt an interpretation that would make it exceedingly rare for two businesses to be held to be joint employers. In the agricultural context, the farm labor contractor would likely be held to be the sole employer.

Under the proposal, farm operators could pay a farm labor contractor so little that the workers would not receive the minimum wage, but the farm operator would have no liability. A farm labor contractor could bring under-age children to work full-time on the farm and the farm operator would be able to avoid responsibility. The proposed regulation would encourage lawlessness at the expense of farmworkers and law-abiding employers.

AFOP urges the department to withdraw this likely harmful, ill-advised proposed rule.

Sincerely,

Daniel Sheehan
Executive Director