IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, *et al*,	)	
	)	
Plaintiffs,	)	**Civil Action No. 20-cv-1689 (GHW)**
	)	
vs.	)	
	)	
EUGENE SCALIA, *et al*,	)	
	)	
Defendants.	)	

DEFENDANT-INTERVENORS RESPONSE TO STATE PLAINTIFFS' LOCAL RULE 56.1 STATEMENT OF UNDISPUTED MATERIAL FACT

Pursuant to Local Rule 56.1 of the U.S. District Court for the Southern District of New York, Defendant-Intervenors submit the below response to State Plaintiffs' Statement of Undisputed Facts.

As a threshold matter, Defendant-Intervenors dispute the materiality of any fact contained in State Plaintiffs' Declarations insofar as such fact is not part of the Administrative Record in this case, was not before the Department in the course of the rulemaking, and is thus inadmissible and not relevant to the lawfulness of the Final Rule under the Administrative Procedure Act. A court "reviewing an agency decision is confined to the administrative record compiled by the agency when it made the decision." *Nat'l Audubon Soc'y v. Hoffman*, 132 F.3d 7, 14 (2d Cir. 1997) (citing *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44, 105 S. Ct. 1598, 84 L. Ed. 2d 643 (1985)).

1. Defendant-Intervenors do not dispute State Plaintiffs' Fact No. 1.

2. Defendant-Intervenors do not dispute State Plaintiffs' Fact No. 2.

3. Defendant-Intervenors do not dispute State Plaintiffs' Fact No. 3.

4. Defendant-Intervenors dispute the claim that "the Final Rule will result in decreased tax revenue for the States." The statement is conclusory, speculative, and unsupported by any credible, empirical evidence. *See* Def.-Int. Ex. G, (Bird Decl.) ¶ 8. In addition, the claim of "decreased tax revenue" overwhelmingly relies on the completely unproven claim that revenue will be lost due to increased misclassification of employees under the FLSA "caused by the Final Rule." Ex. 4 (Morris-Hughes Decl. ¶ 11) *see also* Shierholz Decl. ¶ 20, ¶¶ 24-25; and the several other affidavits cited in the State Plaintiffs' statement of fact. Contrary to these statements, the Final Rule has no application to the so-called "misclassification" of employees. 85 Fed. Reg. at 2,821 ("determining whether a worker who is an employee under the Act has a joint employer for his or her work is a different analysis [than determining employee status under FLSA]"). In addition, none of the State Plaintiffs' exhibits contains actual proof that employees are more likely to be misclassified when no joint employer is found to be present. *See* Bird Decl. ¶¶ 6-9, and further discussion of disputed facts below. Finally, the exhibits purporting to support the claim of "decreased tax revenue" caused by the Rule, do not take into account the Rule's likely positive impact of increasing job growth, which will increase tax revenues in every state. *See* Def.-Int. Ex. A (IFA comment) at 16; Bird Decl. ¶¶ 8-9.

Defendant-Intervenors further dispute each of the premises upon which the State Plaintiffs' claims of decreased tax revenue are based. There is no credible, empirical evidence that workers employed by a franchisee operating under a franchise model are more likely to be "misclassified" under the FLSA, nor do the State Plaintiffs offer any evidence to suggest that workers in a franchise model business are at increased risk (or, for that matter, at any particular risk) of "wage theft." Bird Decl. ¶ 5. The State Plaintiffs' analyses do not attempt to quantify the economic impact, in terms of increased revenue to states or wages to workers, where high-skill, highly paid work is

"outsourced" to contracting firms (*e.g.*, the information technology sector). Finally, where State Plaintiffs are able to identify a specific instance of so-called "wage theft," it is singular and anecdotal. *See, e.g.*, Morris-Hughes Decl., Ex. A (citing single, unproven instance of alleged misclassification in construction industry).

5. Defendant-Intervenors dispute that "the States will lose tax revenue as a result of decreased collections of judgments due to the Final Rule," on the ground that the statement is conclusory, speculative, and unsupported by any credible, empirical evidence. *See* Response to Statement No. 4 and Bird Decl.. In addition, it is undisputed that the Final Rule does nothing to change state or local laws regarding joint employment, or to reduce the number of businesses who can be held accountable under such laws. *See* Bird Decl. ¶ 8. The claim also fails to take into account the economic growth that will predictably result from the Final Rule, which will increase state tax revenues by amounts exceeding any speculative decreased collections of judgments.

6. Defendant-Intervenors dispute the claim that "the Final Rule reduces the number of businesses who can be held liable under the Act." (Shierholz Decl. ¶ 6). There is no credible, empirical data on the number of businesses who are currently liable for anything under the Act. In any event, that is not the same as the number of businesses who are joint employers, as to which there is no data either. 85 Fed. Reg. at 2853.

7. Defendant-Intervenors do not dispute the State Plaintiffs' quotation from the Final Rule, 85 Fed. Reg. at 2853; whether the Department's statement is a "concession" is a subjective statement that needs no response.

8. Defendant-Intervenors dispute the claim that "outsourced businesses more often fail to comply with wage laws," and the Declarations relied on for that claim. There is no credible

economic analysis supporting such a claim to a reasonable degree of financial certainty. Bird Decl. ¶ 6.

9. Defendant-Intervenors dispute the claim that the Final Rule "will prevent states like Illinois from collecting unpaid wages it otherwise would have been able to previously." (Carillo Decl. ¶ 15). This claim is conclusory and speculative, and nothing in the Final Rule prevents a state such as Illinois from collecting wages due under state or local wage and hour laws regarding joint employment that it could have collected previously. *See* Bird Decl. ¶ 13 (noting Final Rule merely interprets federal law and in no way changes the law of any state or locality).

10. Defendant-Intervenors dispute the claim that Massachusetts' recovery of unpaid wages against (unspecified) subcontracting entities has been "nearly impossible" "unless a joint employer finding can be made." (Rowe Decl. ¶ 8). The claim is conclusory and speculative, providing no evidence of unpaid wages that could not be collected from any specific subcontractor, with or without findings of joint employer status, nor any data indicating whether such incidents are representative of subcontractors as a whole. Nothing in the Final Rule prevents a state or locality from making "a joint employer finding" under state or local law. *See also* Bird Decl. ¶ 13 (noting Final Rule merely interprets federal law and in no way changes the law of any state or locality).

11. Defendant-Intervenors dispute the claim that because outsourced employers are more typically insolvent, the Final Rule will increase uncollectable judgments against employers who violate the state's workers' compensation laws. (Leland Decl. ¶¶ 13-14). The claim is conclusory and speculative, and offers no specific examples nor proof that any such examples are representative of any industry as a whole. It is also undisputed that the Final Rule does nothing to change state or local laws regarding joint employment, and certainly has nothing to do with state

workers compensation laws. Bird Decl. ¶ 13 (noting Final Rule merely interprets federal law and in no way changes the law of any state or locality).

12. Defendant-Intervenors dispute the claim that "the Final Rule will encourage further fissuring or outsourcing of workplaces located in the States" or that any employers as a result will engage in "increased wage theft." (Leland Decl. ¶ 8). The statement is conclusory and speculative, and there is no credible, empirical evidence that the Final Rule will have any such outcome. At the same time, to the extent the Final Rule leads to increases in the number of jobs, such growth will increase state tax revenues. Bird Decl. ¶ 9; *see also* 85 Fed. Reg. at 2,821 ("determining whether a worker who is an employee under the Act has a joint employer for his or her work is a different analysis [than determining employee status under FLSA]). As the Final Rule explains, there is insufficient data to quantify the extent or cost of increased so-called "fissuring" and "wage theft." 85 Fed. Reg. at 2,853. *See also* Defendant-Intervenors' Response to State Plaintiffs Fact No. 4, *supra.*

13. Defendant-Intervenors dispute the claim that the Final Rule "will also result in decreased contributions to the States' unemployment insurance and workers' compensation funds." (Moss Decl. ¶ 7). The claim is conclusory and speculative, and is based on loss of revenue due to the alleged misclassification of employees, a matter on which the Final Rule has no bearing. *See also* Defendant-Intervenors' Responses to State Plaintiffs' similar statements of facts discussed above.

14. Defendant-Intervenors dispute the claim that the District of Columbia "expects to see increased wage theft and a decreased ability to collect back wages in cases of wage theft because of the Final Rule." (Morris-Hughes Decl. ¶ 8). The claim is conclusory and speculative, and defines "wage theft" to include the misclassification of employees, a matter on which the Final

Rule has no bearing. No credible, empirical data is offered in support of such an "expectation," and there is none. 85 Fed. Reg. at 2,853. *See also* Bird Decl. ¶ 5 (no credible, empirical evidence supporting allegation that narrowing definition of joint employer under FLSA would increase "wage theft"); Defendant-Intervenors' Responses to similar fact statements discussed above.

15. Defendant-Intervenors dispute that "Rhode Island expects increased misclassification among subcontracted businesses resulting in fewer workers above to recover their full wages. (Degnan Decl. ¶ 11). The claim is conclusory and speculative, and defines "wage theft" to include the misclassification of employees under the FLSA, a matter on which the Final Rule has no bearing. No credible, empirical data is offered in support of such an "expectation," and there is none. 85 Fed. Reg. at 2,853; *See also* Bird Decl. ¶ 5 (no credible, empirical evidence supporting allegation that "misclassification" of workers is more prevalent in "fissured" industries).

16. Defendant-Intervenors dispute the repeated claim that the Final Rule "will likely lead to an increase in wage theft in the States," and the speculative estimates of total lost wages. (Shierholz Decl.). The claim is conclusory and speculative, and not supported by any credible, empirical data, as previously discussed. *See* 85 Fed. Reg. at 2,853; Bird Decl. ¶¶ 8-9 The State Plaintiffs' analyses fail to account for increased job growth, increased wages, and increased tax revenue potentially resulting from the Final Rule). *Id*.

17. Defendant-Intervenors dispute the claim that the Final Rule will predictably result in lower wages as outsourced positions pay lower wages than jobs that are not outsourced. (Shierholtz Decl. ¶ 15). This claim is conclusory and speculative, and unsupported by credible, empirical data. The claim also fails to take into account that in the absence of outsourced jobs, outsourcing business may choose not to grow because of higher and unsustainable wage costs,

thereby reducing overall wages and state tax revenues. *See Def.-Int.* Ex. A (IFA comment) at 16; Bird Decl. ¶¶ 8-9 (no credible, empirical data supports allegation that the Final Rule decreases wages or state wage base, or results in lower tax revenue; State Plaintiffs' analyses fail to account for increased job growth, increased wages, and increased tax revenue).

18. Defendant-Intervenors dispute the claim that "fissured workplaces are more likely to misclassify their workers" (Several Decls.), and that the Final Rule will increase outsourcing or decrease contributions to workers compensation and unemployment insurance funds due to misclassifications. (Several Decls.). These claims are conclusory and speculative, and there is no credible empirical date supporting them. *See* Bird Decl. ¶ 6 (no credible empirical basis to conclude that worker "misclassification" is more prevalent in "fissured industries"); *see also* Defendant-Intervenors' Response to similar claims above.

19. Defendant-Intervenors dispute that any "increased wage theft" will be caused by the Final Rule or the conclusory and speculative dollar estimates claimed, for which there is no credible, empirical data support. *See* Defendant-Intervenors' Responses to similar claims above. *See also* Bird Decl. ¶¶ 8-9 (no credible evidence supports allegation that the Final Rule decreases wages or state wage base, or results in lower tax revenue; State Plaintiffs' analyses fail to account for increased job growth, increased wages, and increased tax revenue).

20. Defendant-Intervenors dispute the claim that increased workplace fissuring will result in any losses in contributions in workers' compensation premiums or unemployment insurance funds contributions. (Shierholz Decl. ¶¶ 23, 27). The claims are speculative and conclusory, and are based on the allegation, disputed above, that "increased fissuring" purportedly results in the increased misclassification of employees under the FLSA, 85 Fed. Reg. at 2,853; Bird Decl. ¶¶ 5-6. Finally, State Plaintiffs' allegation of lost contributions also fails to take into

account the potentially increased job growth in sectors where the lack of clarity and the threat of joint employer liability has reduced output and job opportunities, thereby increasing such contributions. *See* Def.-Int. TI Ex. A (IFA comment) at 16.

21. Defendant-Intervenors dispute the claim that the States will incur administrative costs by reviewing and/or retracting their guidance or education of the public. Nothing in the Final Rule requires any entity to review existing guidance, retract or issue new or revised guidance, or develop or disseminate "public education campaigns," and in no way changes state and local laws relating to joint employment. *See* Bird Decl. ¶ 13 (Final Rule in no way changes law of any state or locality, and no credible empirical evidence supports claim that any state need incur additional administrative costs based on Final Rule, except as a matter of self-inflicted choice by state).

22. Defendant-Intervenors dispute the claim that anything in the Final Rule requires any entity to engage in rulemaking or "additional analysis" of "joint employment matters," or promulgate new guidance. (Moss Decl. ¶8). *See* Bird Decl. ¶ 13.

23. Defendant-Intervenors dispute the claim that the Final Rule "may" require Delaware to incur costs in revising its guidance on joint employment. (Boone Decl. ¶ 15). As stated above, nothing in the Final Rule requires any entity to revise its guidance on joint employment, and in no way changes state and local laws relating to joint employment. *See* Bird Decl. ¶ 13.

24. Defendant-Intervenors dispute the claim that the District of Columbia is "required to retract current guidance for any of the stated reasons. (Morris-Hughes Decl. ¶ 14). As previously stated, nothing in the Final Rule requires such actions. *See* Bird Decl. ¶ 13.

25. Defendant-Intervenors dispute the claim that the Final Rule requires the District of Columbia to review, revise, research, draft, publicize or create new guidance, engage in training, or "educate the public" about the Final Rule. (Morris-Hughes Decl. ¶¶ 16-17). As previously

stated, the Final Rule imposes no duties on state governments of any kind, and in no way changes state and local laws relating to joint employment. *See* Bird Decl. ¶ 13.

26. Defendant-Intervenors dispute the claim that Illinois will sustain increased administrative burdens from the Final Rule. (Carillo Decl. ¶¶ 16-10). As stated above, the Final Rule imposes no duties on state governments of any kind, and in no way changes state and local laws relating to joint employment. *See* Bird Decl. ¶ 13.

27. Defendant-Intervenors dispute the claim that Michigan will likely need to revise its policy on joint employment or has been required to do anything else "due to the Final Rule." (Egan Decl. ¶¶ 19-20). As stated above, the Final Rule imposes no duties on state governments of any kind, and in no way changes state and local laws relating to joint employment. *See* Bird Decl. ¶ 13.

28. Defendant-Intervenors dispute the claim that Minnesota will "incur costs to develop guidance and conduct outreach and education" due to the Final Rule. (Blissenbach Decl. ¶ 15). As stated above, the Final Rule imposes no duties on state governments of any kind, and in no way changes state and local laws relating to joint employment. *See* Bird Decl. ¶ 13.

29. Defendant-Intervenors do not dispute that undertaking an unnecessary rulemaking in Minnesota would increase costs to the state. (Blissenbach Decl. ¶ 17). As stated above, the Final Rule imposes no duties on state governments of any kind, in no way changes state and local laws relating to joint employment and that any costs incurred by a rulemaking would be solely of Minnesota's choosing. *See* Bird Decl. ¶ 13 (states need not incur administrative costs based on the Final Rule "except as a matter of self-inflicted choice" by state).

30. Defendant-Intervenors dispute the claim that Oregon "may need to update its guidance on joint employment because of the Final Rule." (Ramirez Decl. ¶¶ 12-13). As stated

above, the Final Rule imposes no duties on state governments of any kind, and in no way changes state and local laws relating to joint employment. *See* Bird Decl. ¶ 13.

31. Defendant-Intervenors dispute the claim that Oregon will have to expend resources to train staff and educate the public because of the Final Rule. (Ramirez Decl. ¶14). As stated above, the Final Rule imposes no duties on state governments of any kind, and in no way changes state and local laws relating to joint employment. *See* Bird Decl. ¶ 13.

32. Defendant-Intervenors dispute the claim that the Final Rule will "cause Rhode Island to incur additional administrative and regulatory costs." (Degnan Decl. ¶15). As stated above, the Final Rule imposes no duties on state governments of any kind, and in no way changes state and local laws relating to joint employment. *See* Bird Decl. ¶ 13.

33. Defendant-Intervenors dispute the claim that the Final Rule requires Virginia to "publish new guidance." (Davenport Decl. ¶14). As stated above, the Final Rule imposes no duties on state governments of any kind, and in no way changes state and local laws relating to joint employment. *See* Bird Decl. ¶ 13.

34. Defendant-Intervenors dispute the claim that the Final Rule requires Washington State to incur costs to "update guidance" on the Final Rule. (Leland Decl. ¶¶ 19, 20). As stated above, the Final Rule imposes no duties on state governments of any kind, and in no way changes state and local laws relating to joint employment. *See* Bird Decl. ¶ 13.

35. Defendant-Intervenors dispute the claim that the Final Rule "curtails enforcement of joint employer liability," will cause increased wage theft, or will cause states to fill in any gaps in enforcement or wage collection. As discussed above in response to several similar claims, this claim is conclusory and speculative and is not supported by any credible, empirical data. 85 Fed. Reg. at 2,853. *See* Bird Decl. ¶¶ 5, 13 (no credible empirical evidence supports claim of increased

likelihood of wage theft or that that any state need incur additional administrative costs based on Final Rule, except as a matter of "self-inflicted choice" by state).

36. Defendant-Intervenors dispute the claim that the Final Rule "facilitat[es] the act of misclassification" in Delaware or imposes any administrative or enforcement costs on that state. (Boone Decl. ¶¶ 13, 16). *See* Defendant-Intervenors' Responses to the similar claims above; and *see* Bird Decl. ¶13.

37. Defendant-Intervenors dispute the claim that the District of Columbia will have any increased enforcement costs (Morris-Hughes Decl. ¶ 13) for the reasons discussed in the responses to the similar claims above. *See* Bird Decl. ¶ 13.

38. Defendant-Intervenors dispute the claim that Illinois will be required by the Final Rule to increase enforcement costs or that the Final Rule will reduce its ability to collect unpaid wages. (Carrillo Decl. ¶7). As stated above, the Final Rule imposes no duties on state governments of any kind, and in no way changes state and local laws relating to joint employment. *See* Bird Decl. ¶ 13.

39. Defendant-Intervenors dispute the claim that the Final rule will cause any increase in wage theft and enforcement challenges in Massachusetts (Rowe Decl. ¶ 10). As stated above, the Final Rule imposes no duties on state governments of any kind, and in no way changes state and local laws relating to joint employment. *See* Bird Decl. ¶ 13.

40. Defendant-Intervenors dispute the claim Michigan will have to fill in any "gap in federal enforcement." Nothing in the Final Rule reduces "federal enforcement" of the FLSA, or requires a state to "fill in the gap … to ensure the current level of protection." (Egan Decl. 23) As stated above, the Final Rule imposes no duties on state governments of any kind, and in no way changes state and local laws relating to joint employment. *See* Bird Decl. ¶ 13.

41. Defendant-Intervenors disputes the speculative and conclusory claim that the Final Rule will result in any "increase in wage and related claims" in New Jersey. (Hirsch Decl. ¶ 21) As stated above, the Final Rule imposes no duties on state governments of any kind, and in no way changes state and local laws relating to joint employment. *See* Bird Decl. ¶ 13.

42. Defendant-Intervenors dispute the claim that Oregon will have to fill in any gap in federal enforcement created by the Final Rule. (Ramirez Decl. ¶ 18). As stated above, the Final Rule imposes no duties on state governments of any kind, and in no way changes state and local laws relating to joint employment. *See* Bird Decl. ¶ 13.

43. Defendant-Intervenors dispute the claim that the Final Rule will result in higher rates of violation in Pennsylvania or that Pennsylvania will incur higher enforcement costs. (Oleksiak Decl. ¶ 14). As stated above, the Final Rule imposes no duties on state governments of any kind, and in no way changes state and local laws relating to joint employment; nor is there any credible, empirical data supporting the claim that the Final will result in higher rates of violation of the FLSA. *See* Bird Decl. ¶¶ 6, 13.

44. Defendant-Intervenors dispute the claim of increased enforcement needs resulting from the Final Rule based upon unsupported claims of increased wage theft, worker misclassification, and payroll fraud. (Degnan Decl. ¶ 14). As stated above, the Final Rule imposes no duties on state governments of any kind, and in no way changes state and local laws relating to joint employment; and the claims of wage theft, misclassification, and fraud are unsupported by an credible, empirical data. *See* Bird Decl. ¶¶ 6, 13.

45. Defendant-Intervenors dispute the claim that Vermont will require additional investigative resources to meet increased enforcement needs. (Anderson Decl. ¶¶ 8-9) As stated

above, the Final Rule imposes no duties on state governments of any kind, and in no way changes state and local laws relating to joint employment. *See* Bird Decl. ¶ 13.

46. Defendant-Intervenors dispute Washington's estimated hiring costs to address additional complaints and investigation because of the Final Rule. (Leland Decl. ¶¶21-22). As stated above, the Final Rule imposes no duties on state governments of any kind, and in no way changes state and local laws relating to joint employment. *See* Bird Decl. ¶ 13.

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Respectfully submitted,

/s/Maurice Baskin

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