COALITION FOR A
DEMOCRATIC WORKPLACE

June 22, 2026

Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor, Room S—3502
200 Constitution Avenue NW
Washington, D.C. 20210

By electronic submission: http://www.regulations.gov

RE: RIN 1235-AA48; Joint Employer Status Under the Fair Labor Standards Act, Family and Medical Leave Act, and Migrant and Seasonal Agricultural Worker Protection Act; Notice of Proposed Rulemaking

These comments are submitted on behalf of the Coalition for a Democratic Workplace ("CDW"), the U.S. Chamber of Commerce ("the Chamber"), and the undersigned organizations[1] (collectively, "the Commenters"), pursuant to the Department of Labor's ("the Department" or "the DOL") Notice of Proposed Rulemaking and Request for Comments regarding Joint Employer Status under the Fair Labor Standards Act, Family and Medical Leave Act, and Migrant and Seasonal Agricultural Worker Protection Act, 91 Fed. Reg. 21878 (April 23, 2026) ("Proposed Rule"). For the reasons outlined below, the Commenters urge the Department to adopt the Proposed Rule with some minor modifications that aim to enhance predictability and stability of the Rule's application.

CDW is a collection of nearly 500 organizations[2] representing the interests of millions of employers nationwide. All of CDW's members are or represent the interests of "employers" as defined by the Fair Labor Standards Act ("the FLSA") and the Family and Medical Leave Act ("FMLA") and are consequently affected by the Proposed Rule. CDW advocates for its members on numerous issues of significance related to federal employment policy and interpretations and applications of the FLSA, FMLA and other labor laws.

The Chamber is dedicated to promoting, protecting, and defending America's free enterprise system and represents more than 3 million businesses of all sizes, sectors, and regions. More than 96 percent of Chamber member companies have fewer than 100 employees, and many of the nation's largest companies are also active members. As a result, the Chamber understands the challenges facing both small businesses and the broader business community nationwide. The Chamber and its members are directly affected by regulations determining when two employers are considered joint employers under the FLSA, FMLA, and MSPA.

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[1] See Appendix of Signees, *infra,* p. 10-11.

[2] A full list of CDW's Members is available at https://myprivateballot.com/about/.

The undersigned organizations represent employers operating in nearly every conceivable industry in all 50 states and many territories. The Commenters are uniquely positioned to provide insight on this proposal as they represent businesses of all types that depend on complex contractual relationships to meet customer and consumer demands, including agreements between licensors and licensees, franchisors and franchisees, and employer entities—such as construction companies, manufacturers, hospitals, wholesalers, retailers, and hotels—and vendors, suppliers, and subcontractors.

Comments

The Department adopted a practical and predictable rule governing joint employment under the FLSA in March 2020 (the "2020 Final Rule"). The 2020 Final Rule resolved a longstanding problem with FLSA enforcement and litigation – an inconsistent patchwork of court-developed legal tests used to determine whether an employee could obtain FLSA relief from multiple entities, rather than his direct employer only. CDW, along with the Chamber, submitted comments in support of the 2020 Final Rule, and stands by those comments today.

The current Proposed Rule maintains most of the important elements of the 2020 Final Rule. Although the Commenters preferred aspects of the 2020 Final Rule, they recognize that the Proposed Rule addresses some of the bases cited by the court in *New York v. Scalia*, 490 F. Supp. 34 748 (S.D.N.Y. 2020) for striking down the rule. The Commenters disagree with the court's decision, but they support the Department's efforts to enact a rule designed to withstand a future legal challenge and create a durable standard that will govern business-to-business partnerships for decades to come.

The Proposed Rule correctly recognizes that joint-employment liability is appropriate only in circumstances where a secondary business regularly directs or supervises the work of another employer's employees on matters that are meaningful to the statutory rights addressed by the FLSA, FMLA, and/or MSPA. Ordinary, arms-length contractual relationships between business partners should not open those partners up to costly lawsuits from another party's employees. The four vertical joint-employment factors articulated by the Proposed Rule form the heart of the analysis to determine whether a business exercises sufficient control over employment conditions to merit redundant employment-law liability.

At the same time, the Proposed Rule recognizes that courts have interpreted the FLSA, FMLA, and MSPA to require consideration of the "circumstances of the whole activity" between a worker and a putative employer to assess potential liability.[3] Under that analysis, courts may consider more than just the four core factors from the 2020 Final Rule. The Proposed Rule treats these "background factors" appropriately – it recognizes their potential relevance in close cases but downplays their decisional significance. The Commenters strongly support the Proposed Rule's conclusion that if the four primary factors weigh against joint employment, then background

[3] *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947).

factors should not change the outcome. Only in rare cases should such factors play a meaningful role in the joint-employment analysis.

1. Businesses Benefit from Predictable and Stable Rules like the Proposed Rule.

The Proposed Rule will foster economic development and business-to-business cooperation that benefits both employers and employees. Several of the Commenters have analyzed the financial impact of the Proposed Rule and anticipate meaningful increases in economic activity. For example, the International Franchise Association and the American Hotel & Lodging Association's analysis indicates that the Proposed Rule would create stability and predictability in employment relationships affecting 8.9 million workers and resulting in $921 billion in economic activity.

2. The Proposed Rule Properly Weighs the Most Relevant Considerations in the Joint Employment Analysis in a Workable and Predictable Manner.

The regulated community desperately needs a consistent, predictable legal test to assess joint-employment liability. The current legal landscape is unworkable because the exact same facts can result in opposite outcomes under the same law. Take, for example, the joint-employment standard under the FLSA. Even courts *within the Fifth Circuit* cannot agree on what test applies—some courts apply the four-factor test advocated by the Proposed Rule, but others still apply an older, five-factor test.[4] The problem is worse across jurisdictions – while several circuits follow tests modelled after *Bonnette v. California Health & Welfare Agency*, others have adopted vastly different standards.[5] These differing legal tests create divergent results based solely on the jurisdiction where work is performed. That presents a problem for nationwide employers seeking predictability and consistency in their business relationships and clearly conflicts with Congress's goal to enact uniform federal labor standards.[6]

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[4] *Compare Gray v. Powers*, 673 F.3d 352 (5th Cir. 2012) *with Wirtz v. Lone Star Steel Co.*, 405 F. 2d 688 (5th Cir. 1968); *see also Arif v. Bashir*, No. 4:20-CV-2704, 2021 WL 1147582, at *5 (S.D. Tex. Mar. 10, 2021) (acknowledging disagreement among district courts on which joint employer test to apply).

[5] *Compare Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983)*; Baystate Alternative Staffing v. Herman*, 163 F.3d 668 (1st Cir. 1998)*; Ivanov v. Sunset Pools Mgmt. Inc.*, 567 F.Supp.2d 189, 194-95 (D.D.C. 2008) *with Zheng v. Liberty Apparel Co.*, 355 F.3d 61 (2nd Cir. 2003) (applying a ten-factor test to determine joint employer status); *In re Enter. Rent-A-Car. Wage & Emp't Practices Litig.*, 683 F.3d 462 (3d. Cir. 2012) (partially adopting *Bonnette*, but emphasizing that *Bonnette* factors are not exhaustive).

[6] H. Rep. No. 2182, 75th Cong., 3d Sess., p. 6-7 ("There are to be no differentials either between sections of the United States, between industries, or between employers. No employer in any part of the United States in any industry affecting interstate commerce need fear that he will be required by law to observe wage and hour standards higher than those applicable to his competitors"); *see also Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of Am.*, 325 U.S. 161, 167, 65 S. Ct. 1063, 1066, 89 L. Ed. 1534 (1945) (finding "Congress intended…to achieve a uniform national policy of guaranteeing compensation for all work or employment engaged in by employees covered by the Act").

The Proposed Rule will encourage the development of a unified standard for evaluating joint employer liability under the FLSA, FMLA, and MSPA or, at the very least, provide employers with certainty regarding when they may face enforcement actions from the Department. The Proposed Rule maintains the spirit and substance of the 2020 Final Rule by identifying the four most important factors in the joint-employment analysis: whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment to a substantial degree, (3) determined the rate and method of payment, and (4) maintained employment records. Almost every joint-employment test in the federal circuits considers these four core factors.[7] As such, the Commenters agree with the Proposed Rule's "common denominator" approach to rulemaking as the most reasonable way to achieve much-needed national uniformity in enforcement.

3. The Proposed Rule Should Specify that the Department Will Not Find Joint Employment if None of the Four Factors Are Present.

Given the importance of the four primary joint-employment factors, the Proposed Rule could be strengthened with a clear statement that if a putative employer does not perform any of those four functions, then it will not qualify as a joint employer. The current draft gets close to that outcome: in §791.115(e), the Proposed Rule states "if the four factors identified in paragraph (a) unanimously indicate joint employment or no joint employment, there is a substantial likelihood that the indicated outcome is correct, and additional factors are highly unlikely, either individually or collectively, to outweigh the combined probative value of the four factors identified in paragraph (a)." The Department should consider a categorical statement that, if a business has no hiring or firing power, does not supervise or control the employee's work schedule or conditions of employment to a substantial degree, does not determine the employee's rate and method of payment, and does not maintain employment records, then it cannot be considered a joint employer under the FLSA, FMLA, or MSPA. This categorical approach will avoid disputes or litigation in cases where the outcome is inevitable. The strong implication from the Proposed Rule is that the complete absence of these four factors dooms a joint employment claim. The Commenters respectfully suggest that the Department should say that directly.

Likewise, the Commenters suggest minor amendments to the "Reserved Control" provisions of §791.115(c). That portion of the Proposed Rule recognizes that reserved-but-unexercised control may be relevant to the joint-employment analysis. This is a significant departure from the 2020 Final Rule, which required actual exercise of control to find a joint employment relationship. If the Department is inclined to consider reserved control as a relevant factor, then it should clarify

[7] *See, e.g., Baystate Alternative Staffing, Inc. v. Herman*, 163 F.3d 668, 675 (1st Cir. 1998); *Zheng v. Liberty Apparel Co. Inc.*, 355 F.3d 61, 68 (2d Cir. 2003); *In re Enter. Rent-A-Car Wage & Hour Emp. Pracs. Litig.*, 683 F.3d 462, 469 (3d Cir. 2012); *Gray v. Powers*, 673 F.3d 352, 355 (5th Cir. 2012); *Morrison v. Int'l Programs Consortium, Inc.*, 253 F.3d 5, 11 (D.C. Cir. 2001); *Moreau v. Air France*, 356 F.3d 942, 951 (9th Cir. 2004). *But see Salinas v. Com. Interiors, Inc.*, 848 F.3d 125, 141 (4th Cir. 2017) (applying different factors).

that it will not normally find joint employment absent evidence of the actual exercise of such control.

The Commenters also propose that the Department make an edit to the second sentence of §791.115(c) to read: "For example, a potential joint employer's contractual authority to supervise, discipline or fire employees is less relevant if in practice the potential employer ***rarely or*** never exercises such authority." One might consider a scenario when a contractor partner has reserved authority to supervise the work of a contractor's employees, and exercises that right on a single occasion based on the temporary absence of one of the contractor's on-site supervisors. Such isolated exercise of control should not meaningfully impact the joint-employment analysis.

4. The Commenters Support the Proposed Rule's Definition of Indirect Control.

The Proposed Rule narrowly defines "indirect control" to cover mandatory directions relayed from a putative joint employer through a direct employer. §791.115. This narrow definition is necessary to avoid inappropriate expansion of the Proposed Rule to cover run-of-the-mill contracting relationships. Multiple courts have recognized the risks associated with an overbroad application of "indirect control" principles. For example, the Eleventh Circuit refused to find joint employment under the FMLA when a direct employer contracted with a business partner, and part of the contract required the direct employer's employees to wear certain uniforms.[8] As the court noted, the direct employer's assent to a contract with certain performance terms is not evidence that the business partner had control over the direct employer's employees – instead, it reflects the direct employer's choice to compel certain conduct by its employees to satisfy its contractual obligations. These types of contracts, in which two independent parties agree to certain terms that will impact one party's employees, are common and do not indicate that both parties are exercising control over the employees' terms and conditions of employment.

Similarly, in the construction contracting or franchising context, general contractors or franchisors might make suggestions to their business partners based on their knowledge or experience. The Proposed Rule encourages that type of business-to-business cooperation without placing the more experienced business at risk of joint-employment liability. The Proposed Rule's recognition that an employer's "voluntary decision to grant the potential joint employer's request, recommendation or suggestion" does not support joint-employment status is consistent with the case law. For example, the Fifth Circuit has held that a franchisor did not exercise sufficient control over employees to become an FLSA employer when the franchisor met with a struggling franchisee and made certain suggestions regarding scheduling and profitability.[9] It is good public policy to encourage this type of business-to-business collaboration, not to punish it.

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[8] *Morrison v. Magic Carpet Aviation*, 383 F.3d 1253, 1256 (11th Cir. 2004).

[9] *Orozco v. Plackis*, 757 F.3d 445, 449 (5th Cir. 2014).

Finally, the Proposed Rule's definition of "indirect control" recognizes that contractors generally maintain the right to make independent business decisions. Contracted entities invest in capital, fire and manage their own workforces and bear profit and loss risk. They make independent business decisions about scaling, investment, workforce size, compensation levels and operation strategy. The availability of a business opportunity through a platform or contract does not negate the contractor's independent business character and right to make its own business decisions. The narrow definition of indirect control respects the reality that contractor's ultimately control their business decisions.

5. The "Additional Factors" Identified by the Proposed Rule are Overinclusive.

The Proposed Rule recognizes that, in close cases where the four core factors are inconclusive, factfinders may resort to consideration of additional factors like the location where the work is performed or control over tangential elements of the employment relationship. Analysis of these additional factors in close cases is consistent with the "circumstances of the whole activity" analysis endorsed by the Supreme Court in *Rutherford*. But some of the other proposed additional factors in the Proposed Rule are not relevant to the joint-employment analysis and inappropriately conflate independent-contractor analysis with joint-employer analysis.

The Department should delete its reference to "economic dependence" from the additional factors section. In practice, it is difficult to see how this factor could ever point *against* vertical joint employment – vertical joint employment almost always arises in the context of business partnerships in which business partners invest in each other. As such, its inclusion improperly tilts the scales in favor of a joint-employment relationship. The preamble to the Proposed Rule recognizes this issue yet includes economic dependence as an "additional factor" anyway.[10] The Department should reconsider that approach.

Take a common business-to-business contracting scenario: a property owner that hires a construction company to build a new facility on the property. The owner pays the construction company to build the facility on a cost-plus basis, and the construction company in turn pays its employees. The construction company hires employees specifically to assign to the project. The property owner has representatives on site to ensure timely and quality completion of the work by the construction company. In that scenario, an employee of the construction company could argue that he is economically dependent on the property owner for his job – but for the property owner, there may be no work for the worker to perform. But that has no significance to whether the property owner influences or affects the employee's day-to-day working conditions or his rights under the FLSA, FMLA, or other employment laws. As a result, including the economic dependence factor serves to discourage this type of business-to-business contracting without

[10] *See* Proposed Rule at 21895-96 (discussing court findings that economic dependence is not an indicator of joint employment).

providing any tangible benefit to the worker, who would still have recourse for any employment-law violations against the party that was actually responsible for them.

The district court in *Scalia* was wrong when it determined the test for "employer" and "joint employer" under the FLSA should be the same.[11] The threshold test to distinguish between an employee and an independent contractor assesses whether a worker has any employment-law recourse at all—if he is found to be an independent contractor, then he has no rights under the FLSA, FMLA, or MSPA and cannot obtain a remedy from anyone. Joint employment, on the other hand, assesses whether the factual situation is unique enough that an employee may choose multiple entities to pursue for the same employment-law violations—regardless of which entity actually was responsible for the violations. These are fundamentally different questions from both legal and policy perspectives.

As the Second Circuit has held, consideration of independent-contractor factors like economic dependence or a worker's investment in the business "do not bear directly on whether workers who are already employed by a primary employer are also employed by a secondary employer."[12] The Proposed Rule should resist the temptation to over-correct for criticisms of the 2020 Final Rule by allowing consideration of factors that do not bear on whether the putative joint employer exercises control that bears on an employee's rights under the FLSA, FMLA, or MSPA.

The Commenters also disagree with the Proposed Rule's statement that a "repeated relationship" with a potential joint employer may indicate joint employment. § 791.115(e). If businesses enter successful contracting relationships, and then want to repeat those same relationships on different projects in the future, why should that increase their risk of joint-employment liability? If the purpose of this "additional factor" is to make it harder for dishonest employers to use sham arrangements to avoid joint-employment liability, then that problem can be addressed with more specific, narrowly-tailored language. It should not be addressed by disincentivizing repeated, successful, good-faith business-to-business partnerships.

In all, the Commenters understand the Department's acknowledgment that "additional factors" may be relevant to the joint-employment analysis. But the enumeration of unnecessary "additional factors" in the Proposed Rule will lead to less consistent outcomes and more frivolous disputes. That would impose additional costs and burdens that discourage business-to-business cooperation, even if it rarely changes the final outcome under the Proposed Rule. The Department should consider removing from the rule these unnecessary and non-probative examples of "additional factors."

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[11] *New York v. Scalia*, 490 F. Supp. 3d 748, 782 n. 19 (S.D.N.Y. 2020)

[12] *Zheng*, 355 F.3d at 68 (*citing Lopez v. Silverman*, 14 F. Supp. 2d 405, 415 (S.D.N.Y. 1998) (finding application of all the independent-contractor factors in the joint-employment context "skewed" results in favor of joint-employment findings).

6. The Department Should Reincorporate the "Store Within a Store" Example and Expand the List of Business Models or Practices that Are Not Relevant to the Joint-Employment Analysis.

The Proposed Rule lists certain business models that do not make joint employment more likely. §791.125.[13] The Commenters support this portion of the Proposed Rule but suggest re-inserting the "store within a store" exclusion from the 2020 Final Rule. That exclusion provides important clarity to retailers and specialty businesses that partner to provide better service to customers, and its removal is not required by legal or policy considerations. The Commenters also propose expanding the list of examples of the types of contractual obligations that do not impact the joint-employment analysis.

Under the 2020 Final Rule, the Department wrote that "allowing the employer to operate a business on the premises (including a 'store within a store' arrangement)" did not make joint employment more or less likely under the FLSA. "Store within a store" concepts are common in retail workplaces and often involve truly independent businesses that form symbiotic relationships – each can better serve customers efficiently by working together in a shared space. There is no reason that such relationships should make joint employment inherently more likely.

The Proposed Rule already recognizes that the location where work is performed can be a relevant "additional factor."[14] Of course, that factor could apply to "store-within-a-store" relationships. But it does not follow that the Department needed to delete its statement regarding the irrelevance of "store-within-a-store" relationships standing alone. Quite the opposite. By deleting the "store-within-a-store" exclusion, the Proposed Rule invites employees to argue that such relationships—without more—support a finding of joint employment. That argument is not supported by the case law or by the practical realities of such relationships. As such, the Commenters encourage the Department to add the "store-within-a-store" arrangement as another business model under §791.125 that is not relevant to the joint-employment analysis.

The Commenters support the other business model examples in the Proposed Rule. The Proposed Rule correctly recognizes that a franchise relationship does not make joint employment more or less likely – it is the facts of each relationship, not their generic structure or character, that matters

[13] The Rule does not explicitly state that the exceptions in §791.125 apply to both vertical and horizontal joint-employment relationships. The Department should consider adding clarifying language to that effect.

[14] The Commenters recognize that some courts consider the "location of the work" factor as potentially relevant to the joint-employment analysis, but the ownership of real property alone should not influence the joint-employment analysis. Commercial real estate ownership in the franchise context, for example, is nothing more than a landlord-tenant relationship. That should not weigh in favor of joint employment. The location of the work factor should play a role only if the property owner also maintains a management presence on the site or employs its own workers at the same location, such that its ownership of the location might also result in some control over the site on a day-to-day basis. The Department should clarify that ownership of premises that are leased to a separately operating business, where the property owner does not exercise control over the lessee's employees, does not indicate joint employment.

to the joint-employment analysis. It also acknowledges that general "compliance with law" provisions in contracts between business partners do not meaningfully impact the terms and conditions of employment for workers. All businesses must comply with law, regardless of whether that requirement comes from a contract, so the provisions have no practical influence on an employee's work. Moreover, certain OSHA standards and other laws require property owners or business partners to take steps to ensure legal compliance by their counterparts, including mandatory safety training. Using provisions that require compliance with those laws as a sword to impose liability under the FLSA, FMLA, or MSPA discourages cooperative business relationships without providing any material benefit to employees.

It is also well-established under existing FMLA and FLSA case law that quality control standards and time-of-performance clauses in contracts should not create joint-employment liability. As the Second Circuit said in *Zheng*: "supervision with respect to contractual warranties of quality and time of delivery has no bearing on the joint employment inquiry, as such supervision is perfectly consistent with a typical, legitimate subcontracting arrangement.[15]" It follows that if *supervision* related to these contractual requirements does not make joint employment more likely, then the mere existence of such clauses also does not impact the joint-employment analysis. Quality standards, customer experience requirements, and brand guidelines are permissible service specifications that define "what" must be delivered under the contract — such as delivery windows, uniform branding, and customer service protocols — and are characteristic of every principal-contractor relationship. They do not dictate how workers perform their day-to-day tasks.

The Commenters suggest that the Department could provide additional clarity in the Proposed Rule if it included other common examples of business-to-business contract provisions in §791.125(b) and (c). The current draft acknowledges that its examples in §791.125(b) and (c) are not exhaustive, but it does not mention some more common clauses in standard outsourcing relationships. For example, contractual provisions in the logistics and transportation industry that require contract partners take steps to prevent human trafficking; provisions that require partners to implement or administer any social responsibility codes or policies; clauses that allow for third-party audits within supply chain relationships; safety-related provisions that mandate OSHA, FMCSA, DOT or EPA compliance or establish audits, controls or technology to ensure safe working conditions; provisions that encourage or require the use of certain technology platforms or tools; provisions that allow a principal to adjust contractor workloads or volumes; and provisions that govern a principal's right to terminate a contract for cause or good reason. These provisions serve the public interest, do not meaningfully influence employee working conditions and should not increase the likelihood of joint-employer liability under the covered statutes.

Conclusion

The Commenters support the Department's Proposed Rule and encourage the Department to move forward with the rulemaking process as quickly as possible. Even though the Commenters

[15] *Zheng v. Liberty Apparel Co. Inc.*, 355 F.3d 61, 75 (2d Cir. 2003).

supported the 2020 Final Rule, they recognize the importance of enacting a standard that accounts for the varied meaning of "employer" and "joint employer" under FLSA, FMLA, and MSPA case law. The Proposed Rule will benefit businesses with multistate operations and encourage more business-to-business cooperation, which creates job growth and opportunities for employees. And it will not affect the ability of employees to recover damages for legal violations from the parties responsible for those violations. As such, the Department should adopt the Proposed Rule, including the modifications suggested by the Commenters herein.

American Foundry Society
American Hotel and Lodging Association
American Pipeline Contractors Association
American Road & Transportation Builders Association
American Seniors Housing Association
American Supply Association
American Trucking Associations
Argentum
Associated Builders and Contractors
Associated Equipment Distributors
Associated General Contractors of America
Center for Defense of Free Enterprise
CHRO Association
FMI - The Food Industry Association
Foodservice Equipment Distributors Association
Heating, Air-conditioning, & Refrigeration Distributors International
Independent Bakers Association
Independent Electrical Contractors
International Foodservice Distributors Association
International Sign Association
International Warehouse Logistics Association (IWLA)
ISSA, The Association for Cleaning & Facility Solutions
Manufactured Housing Institute
National Apartment Association
National Association of Convenience Stores
National Association of Home Builders
National Association of Wholesaler-Distributors
National Automobile Dealers Association
National Cotton Ginners Association
National Council of Chain Restaurants
National Federation of Independent Business
National Grocers Association
National Multifamily Housing Council
National Restaurant Association

National Retail Federation
National RV Dealers Association
National Tooling and Machining Association
NATSO, Representing America's Travel Centers and Truck Stops
Pennsylvania Utility Contractors Association
Petroleum Equipment Institute (PEI)
Plastics Pipe Institute
Power and Communication Contractors Association
Precision Machined Products Association
Precision Metalforming Association
SIGMA: America's Leading Fuel Marketers
Small Business & Entrepreneurship Council
TRSA - The Linen, Uniform and Facility Services Association
United States Hispanic Business Council
U.S. Chamber of Commerce