

# A NEW NLRB RULE ARE YOU NOW A JOINT EMPLOYER?

In case you missed it, the National Labor Relations Board (NLRB) has recently resurrected an Obama era rule (which had been rescinded by the Trump Administration) that expands the definition of employer. Under the new rule, an employer **will include any entity that has indirect control or the right to exert control over the terms and conditions of an employment relationship**. Previously the definition of employer was limited only to those entities that **actually exerted direct control over the employment relationship**. While the rule is designed to bring larger franchisors and companies that use employment agencies into the definition of employer, the language will likely snare unexpected smaller entities as well.

**Any entities that are linked almost in any way will now have to reexamine how they discuss and contract around employment issues.** For example, any contracts between entities like lessor and lessee, management agreements or employee agency agreements that set terms or conditions of employment or standards for employment (or give the right to do so) **will likely give rise to a joint employer relationship under the NLRB.**

In the senior care environment, documents such as lease agreements, management or agency contracts, or contracted employees between owners and management companies often include language that set both employment standards, as well as the terms and conditions of employment. One of the new challenges is that most of these agreements **often extend budget approval over wages and terms of employment** to these entities. The new NLRB rule defines an employer to extend and include those entities (owners, propcos, lessors or opcos) if they have the right to exert this **indirect control - even if not actually exercised**. Time and court decisions (or even politics) will tell just what this language will mean. This new definition of employer could also be extended beyond the reach of the NLRB. Asked rhetorically, **would an entity that simply has the right to indirectly control the employment relationship also be liable for say, worker's comp claims as a joint employer, potential ERISA claims, OSHA claims or Title VII claims?** In these areas, actual direct control has been the key to establishing a joint employer relationship. However, one must wonder if the new NLRB definition of employer will migrate into other aspects of the employment relationship?

The **operational takeaway** in this developing arena is for all companies **to review their contracts for indirect control language** over an employment relationship which may include budget approvals. In the Senior Care sector, companies/entities are often linked to each other as Owners, Opcos, Propcos, Lessors, and Management Companies. Ownership entities often have overriding concerns that require indirect controls over the operating relationship. The business issue for owners is to consider (and balance) the respective risks of being tagged as an employer by the NLRB with the need for specific language over control and oversight of the employment relationship. As a joint employer under this new NLRB definition, unexpected companies may be on the hook for fines, costs, penalties, or damages, as well as injunctive orders along with the direct day to day controlling entity overseeing the employees.

The **insurance and risk transfer takeaway** is to review all EPLI policies ensuring all appropriate “added” and “named” insured parties are listed. And be advised, even with an insurance policy, you will have exposure to deductibles on the policy. And some of this exposure, like wages or a union campaign, will likely not be covered by an EPLI policy.

The **contractual takeaway** is to review your lease and management agreements and any employee agency agreements for indemnification language that will cover this developing exposure.

In light of this new NLRB position, and given this new area of exposure, our team at CAC is available to answer any questions or to review your program in the context of your various agreements.

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