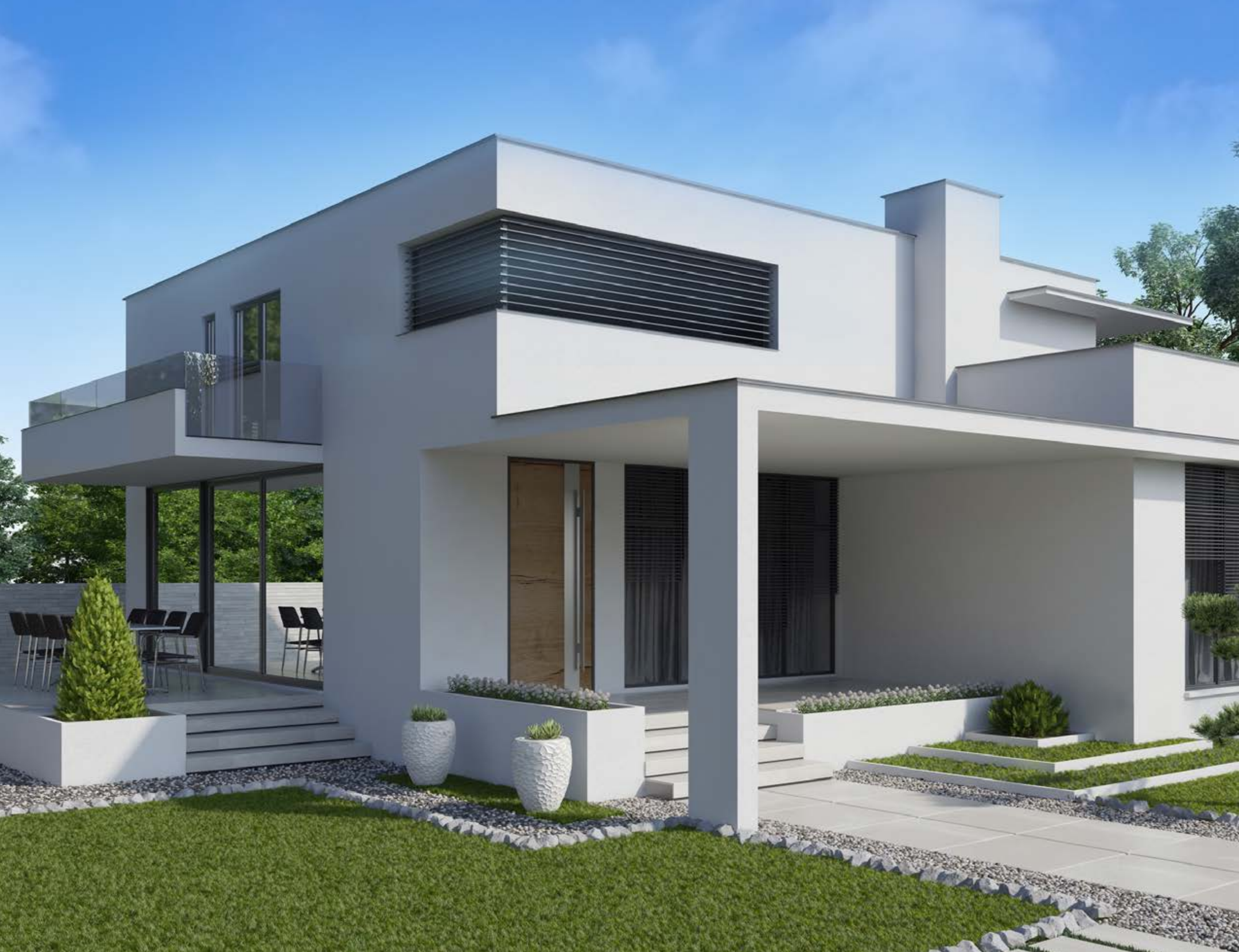
# FACILITIES & RESIDENTIAL SERVICES

## OPPORTUNITIES & CHALLENGES



# LEGAL ISSUES FACING FACILITY AND RESIDENTIAL SERVICES BUSINESSES

Certain legal issues apply to facility and residential services businesses, particularly those that employ a buy-and-build growth strategy. Those businesses that expand through mergers and acquisitions (M&A) must constantly integrate newly acquired businesses into their existing structure, which can present a host of legal issues. The legal issues described below are not unique to facility and residential services businesses and are not the only material legal issues applicable to such businesses.

## 401(K) PLANS/TREATMENT OF LONG-TERM PART-TIME EMPLOYEES

Employers must be mindful of the legal requirements relating to part-time employees and their eligibility to participate in 401(k) and other retirement plans. Until recently, it was permissible for an employer to exclude employees who regularly work fewer than 1,000 hours per year from participating in its 401(k) plans. (Employees who work more than 1,000 hours and who are 21 or older generally must be permitted to participate once they complete a year of service.)

However, in an effort to ensure that more American workers have access to a workplace retirement plan, Congress passed the Setting Every Community Up for Retirement Enhancement Act (SECURE Act) in 2019, which requires employers to allow part-time employees who work at least 500 but fewer than 1,000 hours in three consecutive years (long-term part-time employees or LTPTEs) to make contributions to the employer's 401(k) plan, though they are not required to be provided any employer matching or other contributions. This SECURE Act requirement went into effect on January 1, 2024 for calendar-year plans, based on hours worked during 2021-2023.

In 2022, Congress passed legislation called SECURE 2.0, which shortened the period for treating an employee as an LTPTE to two consecutive years from three, starting in 2025. As a result, employers are now required to allow even more part-time employees to participate in their 401(k) plans.

These new rules will pose particular challenges for employers who employ individuals on a sporadic basis, such as for discrete project-based engagements that are common in the facility and residential services sector. It will require that such employees' hours be carefully tracked and that plan participation be offered to them as soon as they become eligible. Failure to offer them participation on a timely basis may require the employer to make corrective contributions on their behalf of up to 50% of the average level of participation by other employees in the plan (plus lost earnings).

In addition, if sufficient numbers of LTPTEs end up contributing to the plan, it could increase the number of participants to more than 100, which will make the plan costlier to maintain since it will be subject to a required annual independent CPA audit. Failure to include an audit with the plan's annual Form 5500 filing can result in the imposition of significant penalties by the Department of Labor.

### Treatment of SIMPLE IRA Plans in Transactions

Some small employers seeking to avoid the expense and administrative complications of maintaining a 401(k) plan have chosen instead to offer employees a SIMPLE IRA retirement plan. Such a plan can be established at minimal expense, using IRS-provided forms. Under a SIMPLE IRA plan, a traditional IRA account is established for each participating employee with a selected provider. Employees can contribute up to a specified annual limit (for 2024, $16,000, plus a $3,500 "catch-up" for employees over age 50) through payroll deductions, and the employer must either make a dollar-for-dollar matching contribution up to 3% of pay or a flat 2% of pay contribution for all eligible employees. Employee contributions may be made on a pretax or Roth basis. Once established, a SIMPLE IRA plan must generally be maintained for an entire year; it cannot be terminated midyear.

SIMPLE IRA plans may be offered only by employers with fewer than 100 employees. An employer (including all trades or businesses that are treated as part of a "controlled group" as a result of common ownership) may not offer a SIMPLE IRA and any other type of workplace retirement plan, like a 401(k) plan. This rule creates complications where an employer that sponsors a SIMPLE IRA is acquired midyear by another company that sponsors a 401(k) plan.

On the one hand, the transaction would result in the acquired company no longer being eligible to offer a SIMPLE IRA plan, since the combined company also has a 401(k) plan (and in many cases, would have more than 100 employees). On the other hand, as noted above, the SIMPLE IRA rules generally prohibit terminating a SIMPLE IRA plan midyear. Prior to 2024, the solution to this dilemma was a special rule that permitted the SIMPLE IRA plan to continue through the end of the year of the transaction, but this meant that for the remainder of the year following the closing, the combined company had to maintain two separate plans, and it could not offer its 401(k) plan to the employees of the acquired company until the following year.

Employers in this situation are now permitted to terminate the SIMPLE IRA midyear and transition the employees into the acquiror's 401(k) plan if the following requirements are met: (1) the 401(k) plan must be a "safe-harbor" 401(k) plan; (2) the acquired employees must be permitted to begin participating immediately after the termination, and (3) the acquired employees must be given at least 30 days' advance notice of the transition and the opportunity to begin contributing to the 401(k) plan.

Since the SIMPLE IRA and 401(k) annual contribution limits differ, the total annual limit for both plans for the transition year is a weighted average of days participating in both plans times the applicable limits under each plan for the year. Employees can be permitted to roll over their SIMPLE IRA account balances into the 401(k) plan, which is an exception to the general rule that SIMPLE IRA contributions can't be rolled over into another plan for at least two years.

This new rule can smooth the transition for acquired employees participating in a SIMPLE IRA plan, but care must be taken to ensure that the requirements are met. Allowing the transition midyear without satisfying these requirements can result in significant tax penalties imposed on the SIMPLE IRA participants. Considering whether to use this new rule should be part of the pre-closing planning for a transaction involving a target company that sponsors a SIMPLE IRA plan.

## QUICK TIPS

Employers who employ part-time or sporadic workers may be required to permit them to participate in their 401(k) plans, and failure to permit that participation may lead to significant unexpected costs for the employer.

Companies that acquire small employers that maintain a SIMPLE IRA plan may be permitted to immediately transition the acquired employees into their 401(k) plan, provided certain requirements are met, rather than being required to maintain both plans until the end of the year.

# INTELLECTUAL PROPERTY OWNERSHIP, NONDISCLOSURE AGREEMENTS, AND DOMAIN NAME OWNERSHIP

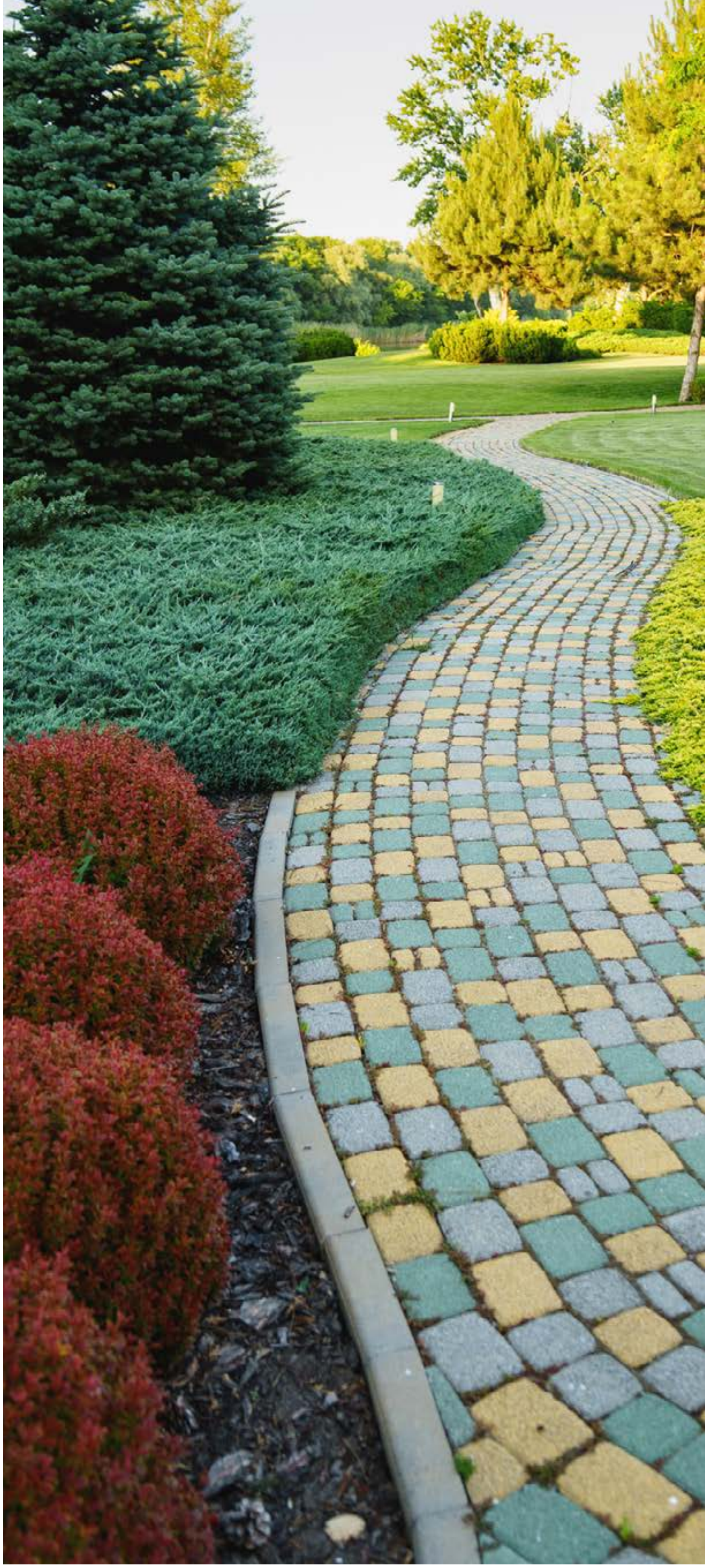
## Trademark Clearance and Registration

It is not uncommon for companies in the facilities and residential services sector to rely on common law (or unregistered trademarks) to conduct business, as opposed to having their trademarks registered federally with the US Patent and Trademark Office (USPTO). Several reasons for this include longstanding use of a trademark without any issues, limited geographic scope of the business, and sensitivity to the costs associated with trademark clearance and registration. Such trademark owners should keep records showing their earliest use of a mark in commerce with details on the geographic areas in which it has used it in case it ever needs to enforce its common law trademark rights against a subsequent user of the same or similar mark.

That being said, relying on common law rights may result in limited coverage and has the potential to create significant risks outside of the United States. Although US federal registration is not required, it does provide certain material benefits, including a legal presumption of the validity of and the registrant's ownership and exclusive right to use the subject mark on or in connection with the goods or services listed in the registration throughout the United States.

If a company is considering adopting a new trademark (a word mark, logo, or slogan, for example) or further investing in an existing trademark, it should perform clearance searches to identify any legal barriers to use, enforcement, or registration of the trademark. Clearance searches evaluate whether a proposed trademark is identical or confusingly similar to, and thereby potentially conflicting with, preexisting registered, pending, or unregistered trademarks.

If a third party is already using an identical or confusingly similar trademark, there is a risk that such third party will assert its preexisting rights against the company by sending a cease-and-desist letter or filing a trademark infringement lawsuit. If the company attempts to register its trademark without first clearing it, it runs the risk of the USPTO citing a prior registration or application for an identical or confusingly similar trademark as grounds to refuse registration by the company. Potential legal risks and associated costs can be avoided by performing clearance searches before adopting a new trademark or further investing in an existing trademark.



## IP Assignments and Nondisclosure Agreements

Companies should consider adopting form intellectual property (IP) assignment and nondisclosure agreements and requiring all employees and contractors to sign their respective form agreement during their onboarding process. This is especially true for companies integrating newly acquired businesses, as such acquired businesses may have differing historical practices related to IP assignment and nondisclosure documentation. High employee turnover and decentralized recordkeeping can make facility and residential services businesses particularly susceptible to IP assignment and nondisclosure documentation gaps.

### IP Assignments

Under US copyright law, copyrightable material (website content, marketing materials, and training materials, for example) created by an employee within the scope of their employment is—even without express language to that effect—likely to be considered "works made for hire" and owned by the employer by operation of law (unless there is an agreement to the contrary). In contrast, ownership or patent rights of any inventions developed by an employee are retained by the employee absent an express assignment transferring such rights to the employer. Further, under US law, ownership or patent rights of copyrightable material or inventions developed by an independent contractor are retained by such contractor absent an express written assignment transferring such rights to the company.

IP ownership is particularly important in the context of M&A transactions because buyer's counsel will review whether employees and contractors have signed agreements that include an express present-tense IP assignment such that the company is the sole and exclusive owner of all rights, title, and interest in and to all IP created by the employee/contractor within the scope of their employment/engagement.

Depending on where the company's business is in its lifecycle and how important IP is to its overall business, due diligence may focus on all former and current employees and contractors or be limited to those who have contributed to material IP. For facility and residential services businesses, the focus will most often be limited to employees or contractors who developed and/or manage the company's website and social media accounts as well as any employees or contractors who design and develop software or other technology, product and service documentation, marketing materials, or training materials for the company. Lack of proper IP assignment documentation from key personnel creates ownership uncertainties and can become particularly difficult if key personnel is no longer employed/engaged or is based outside the United States.

Diligence should also include third-party vendors and licensors who license software or other technology (including artificial intelligence technology) to the company that are material to the company's operations and/or generate revenue (e.g. device and system monitoring tools and applications), and who may develop custom software products and solutions for the company's exclusive use as part of the vendor's services. Under these agreements particular attention should be paid to the scope of the licenses granted, restrictions and limitations on use, and ownership of deliverables, data, materials, and other intellectual property generated by the vendor's provisioning of, and the company's (and its customers') access to, use, and receipt of, the products and services.

### Nondisclosure Agreements

In addition to physical security measures, nondisclosure agreements (sometimes referred to as confidentiality agreements) are an effective means to protect a company's confidential information, including trade secrets. A well-drafted nondisclosure agreement identifies the categories of information and documents to be protected, creates a legal obligation to keep sensitive information confidential, explains how such information and documents should be returned or destroyed upon the end of an employee's or contractor's employment/engagement, identifies remedies in the event of a breach of confidentiality, and complies with the federal Defend Trade Secrets Act (DTSA) and any relevant state trade secrets acts.

To claim protection of a trade secret under the DTSA or state trade secrets acts, the owner of a trade secret must take reasonable measures to keep the information secret, which often includes entering into nondisclosure agreements. A company's failure to maintain employee confidentiality policies as well as its decision to rely solely upon such policies (and not to obtain separate standalone nondisclosure agreements from all employees or other parties who have had access to its confidential information) may make it difficult for a company to successfully assert trade secret rights and/or to recover damages for any related unauthorized disclosures.

Further, pursuant to the DTSA, any agreement with an employee or an individual contractor (as opposed to an entity) entered into or amended on or after May 11, 2016 must provide notice of such individual's whistleblower rights or the company may not recover certain punitive damages and attorney fees in a federal trade secret misappropriation action. To be most effective, a nondisclosure agreement must be specific and detailed.

## Domain Name Ownership

Domain name ownership refers to the legal right and control a person or organization has over a specific internet domain name. It gives the owner the ability to manage, transfer, and make decisions regarding the domain name. A common pitfall with respect to domain name ownership is that the owners of many facility and residential services companies (and other small, independently owned businesses) will enter their own name as the domain name registrant, instead of the name of the company, thereby giving themselves administrative control of the domain name.

This becomes an issue in an M&A transaction because the company does not own the domain name and thus cannot transfer ownership to the buyer. It is also not uncommon for companies to allow their website host or website design firm to put their information as the registrant and administrative contact. In either case, as part of pre-closing diligence or when considering closing deliverables, the buyer should require the company to provide evidence that the domain registrations have been updated to reflect the company as the registrant. Domain names can be valuable, so it is imperative that companies secure administrative control of their domain names.

## QUICK TIPS

Perform clearance searches to determine whether trademarks are available for use and registration.

Ensure employee and contractor agreements include adequate IP assignment and confidentiality provisions.

Register all Company-owned domain names in the name of the Company (as opposed to an employee or third-party vendor).

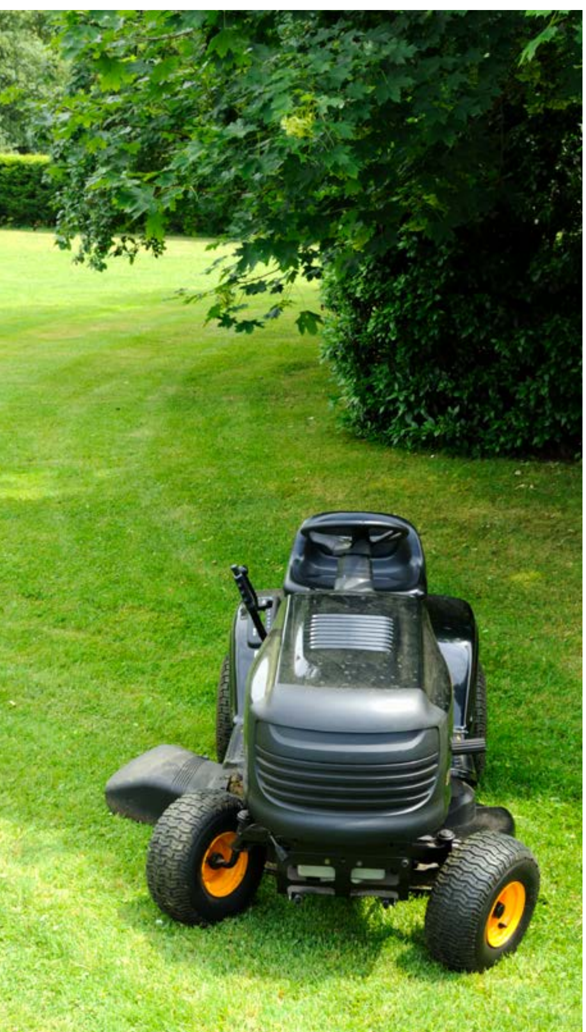
## PAYROLL TAX CONSIDERATIONS FOR COMPANIES WITH MULTIJURISDICTIONAL FOOTPRINTS

Facility and residential services businesses employing a buy-and-build growth strategy often expand their presence into multiple states and, when doing so, send employees into these states to provide services. Such businesses may become accustomed to allowing employees to work in states in which they do not otherwise operate. In these cases, facility and residential services businesses must fully understand the corporate income and franchise tax nexus and state payroll tax implications of remote work.

When employees work in states in which their employers do not otherwise have a physical presence, it can trigger corporate income and franchise tax nexus with that state and expose the employer to the state's tax regime. As such, employers must be cautious and thoughtful about their business decisions to expand to or locate their employees in other states. Additionally, employers should be aware that arrangements where the employee works in a different location or state may inadvertently trigger state payroll tax registration and filing requirements. These requirements can include having to adjust tax payments for an individual employee and potentially subject an employer to another state's payroll tax regime.

Generally, in jurisdictions that have a personal income tax, businesses are required to register and withhold taxes on wages of employees in that location if they meet the applicable threshold to register and if an employee performs services in these states. However, there are exceptions that apply in certain states, including reciprocity agreements and convenience of employer rules.

It is important for facility and residential services businesses to understand and track where employees will be providing services and, if the footprint expands into new states and locations, to fully understand the state and local tax implications of that activity.



## QUICK TIPS

Companies expanding into new states may inadvertently trigger corporate income, franchise tax nexus, and state payroll tax registration requirements, including when employees work remotely in those states.

Employers need to be aware of varying state payroll tax laws, including registration and withholding requirements, with certain exceptions like reciprocity agreements and convenience of employer rules.

Businesses should monitor where employees provide services, especially when expanding into new states, to comply with state and local tax obligations.

## NLRB'S 2020 STANDARD FOR DETERMINING JOINT EMPLOYER STATUS REMAINS IN EFFECT

Facility and residential services businesses should be aware of potential joint employer liability issues, particularly if they acquire new businesses through M&A. If two entities are considered joint employers under the National Labor Relations Act (NLRA), both must bargain collectively with the union representing their employees, and both can potentially be liable for unfair labor practices committed by the other.

On October 27, 2023, the National Labor Relations Board (NLRB) issued a final rule addressing the standard for determining joint employer status under the NLRA. The final rule significantly expands the circumstances under which separate businesses will be considered joint employers. More specifically, under this rule, a company will be deemed a joint employer where it exercises direct and immediate control over a second entity's workforce or possesses "reserved" yet unexercised or "indirect" control over another company's employees. This new standard is critical for determining union recognition and collective bargaining obligations, unfair labor practice liability, and the scope of lawful picketing or boycott activity. The new rule became effective on February 26, 2024.

However, on March 8, 2024, the United States District Court for the Eastern District of Texas vacated the 2023 final rule issued by the NLRB. The effect of the district court's ruling is that it preserves the NLRB's 2020 Rule on the joint employer standard, which the 2023 Rule sought to rescind and replace.

Under the 2020 Rule, actual control must be exercised over narrowly defined essential employment terms, such as determining wages, benefits and work schedules, hiring and firing, and assignment of employees to particular positions or work tasks. Unexercised contractually reserved control alone cannot establish joint employment but is considered probative of joint-employer status to the extent it supplemented or reinforced evidence of actual control.

While the NLRB appealed the Eastern District of Texas' decision, on July 19, 2024, the NLRB voluntarily dismissed its pending appeal before the United States Court of Appeals for the Fifth Circuit.

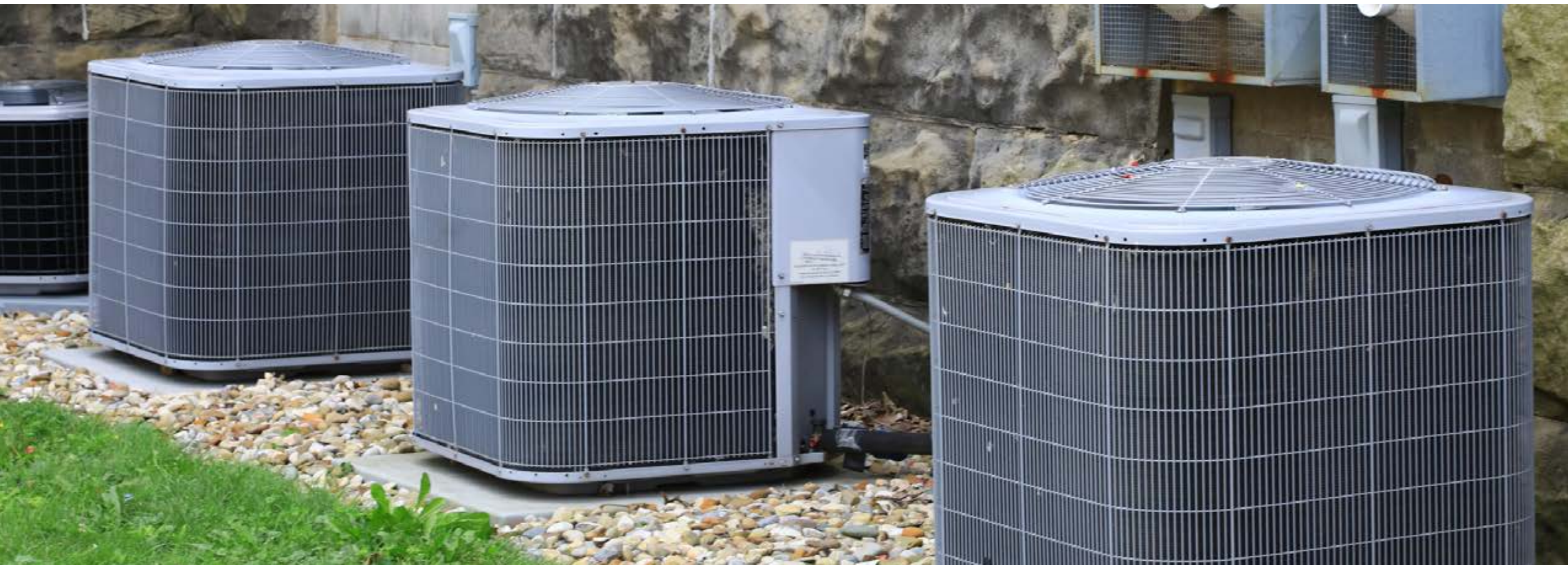
## IMMIGRATION ENFORCEMENT

The landscape of immigration enforcement in the United States has seen a significant shift. President Donald Trump's executive orders have greatly impacted both employers and foreign workers across industries. With a marked increase in activity by US Immigration and Customs Enforcement, businesses are facing heightened scrutiny and more frequent enforcement actions targeting undocumented workers, including workplace inspections, audits, and raids. This shift has raised important questions for employers about what to do if Immigration and Customs Enforcement (ICE) agents appear at their establishment—what information they are required to provide, what they should ask from the agents, and how to ensure compliance with the law while protecting their interests and the privacy of their employees.

If ICE agents arrive at your business, it is important to remain calm and professional and contact experienced white collar legal counsel immediately for assistance in reviewing warrants and any other documentation. ICE agents are required to identify themselves and present valid credentials, including a valid judicial (not an administrative) warrant, to enter nonpublic places for purposes of conducting a search or apprehension. You should: Request Identification, Ask for the Scope of the Visit, Obtain a Copy of the Warrant or Subpoena, and Ask for Details About Employee Rights.

Employers have certain obligations when it comes to complying with ICE requests. However, there are limitations on what ICE agents can demand and how they can gather information. ICE agents may enter public areas of the business without permission. However, workers encountering agents in a public area still have the right to remain silent and to ask for an attorney. Employers may (but are not obligated to) tell employees that they can decide for themselves whether to speak with ICE. However, employers must not direct employees not to cooperate. If ICE agents have a valid judicial warrant, they have the legal right to enter the premises and inspect documents as specified in the warrant. If they do not have a judicial warrant—or have only an administrative warrant—they do not have the legal authority to enter nonpublic areas, nor are employers obligated to allow them entry.

Other than enforcement actions, one of the most common reasons ICE agents visit businesses is to inspect I-9 forms to verify the identity and employment authorization of employees. Under federal law, employers must maintain I-9 forms for all active and some terminated employees and provide them for inspection upon request by authorized government officials, including ICE agents. A Form I-9 investigation is initiated when ICE serves the employer a Notice of Inspection (NOI). Employers have at least three business days to produce the I-9 forms and supporting documents. Employers should not provide ICE agents access to physical spaces, nor should they produce any material immediately upon the NOI being served.



## DOL'S INDEPENDENT CONTRACTOR FINAL RULE

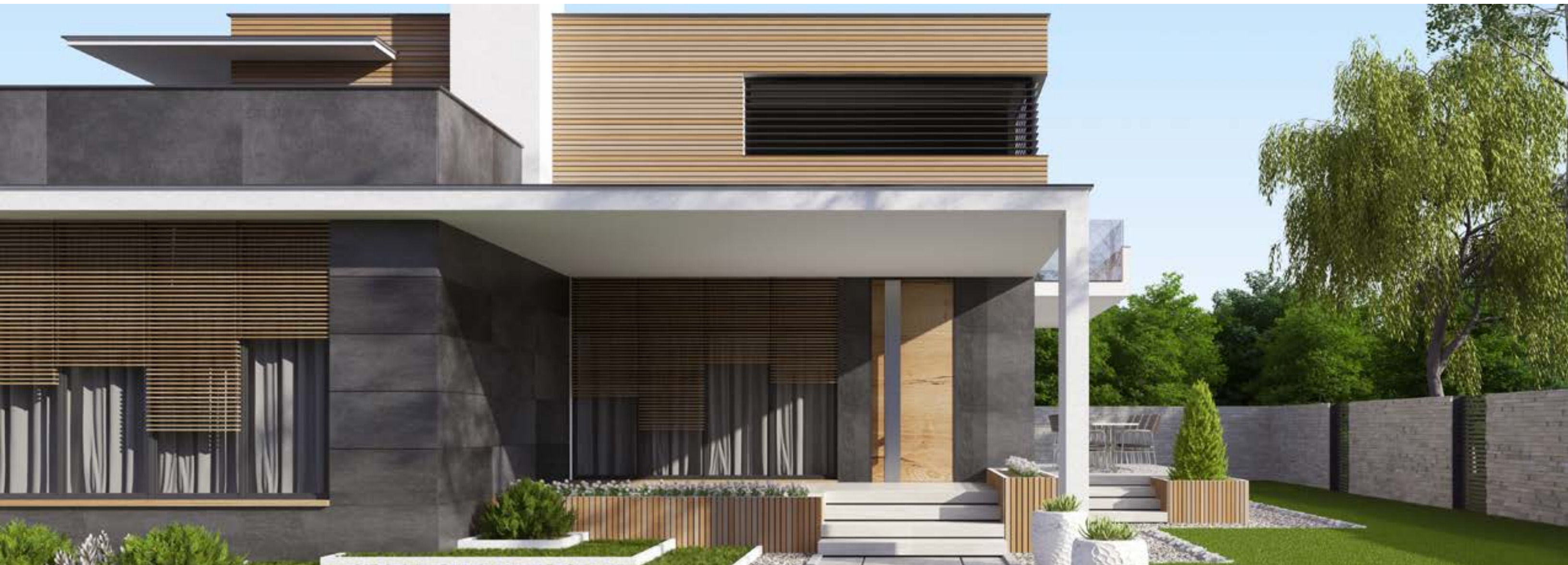
Because of an employer's potential exposure to labor and employment liabilities, appropriate classification of independent contractors under the Fair Labor Standards Act (FLSA) is an issue facing all businesses, including those in the facility and residential services sector. On January 10, 2024, the US Department of Labor (DOL) published its final rule regarding independent contractor classification under the FLSA, replacing its 2021 rule. Under the final rule, which went into effect on March 11, 2024, the DOL's independent contractor test is fact-specific and requires examining multiple factors, including:

1. The worker's opportunity for profit or loss depending on managerial skill
2. Investments by the worker and the potential employer
3. The degree of permanence of the work relationship
4. The nature and degree of control over the worker
5. The extent to which the work is an integral part of the company's business, and
6. The skill and initiative required to perform the services.

Unlike under the 2021 rule, none of the six factors is given any particular weight or greater importance. Each factor is to be individually considered in the context of each situation.

The DOL provides detailed guidance as to how to interpret each factor. Some key takeaways include:

- A worker may be economically dependent on all of the entities with which they have a relationship—theoretically having multiple employers, even if deriving negligible income from one entity.
- Where a worker can accept and decline jobs with varying degrees of potential profit and unilaterally decides which jobs to pursue and how much time to devote to the various jobs, that is the exercise of managerial skill impacting profitability that supports contractor status.
- To suggest independent contractor status, the worker's investment must be capital or entrepreneurial in nature. Investments that serve a business-like function, such as increasing the worker's ability to do different types of or more work, reducing costs, or extending market reach, support contractor status. Costs borne by the worker simply to perform the job (tools and equipment to perform a specific job, use of a personal vehicle already owned, costs unilaterally imposed by the company) are not considered capital or entrepreneurial investments.
- A worker's purported ability to set his or her own schedule provides only "minimal evidence" of contractor status if the worker's ability to pick hours or arrange the sequence or pace of the work is dictated by stringent requirements imposed by the company that negate meaningful flexibility.



Some facility and residential services businesses may have less technical practices for classifying their service providers as employees or independent contractors. As such, M&A buyers should conduct diligence on these issues carefully and consider auditing current independent contractor engagements and agreements post-closing to determine what changes can be made to align existing relationships with the DOL's evolved guidance as to the factors supporting independent contractor status.

The final rule may also prompt inquiries from workers about independent contractor classifications, and employers should be prepared for questions from workers on those issues.

In certain limited cases, the guidance from the DOL's final rule will support making changes to staffing models or reclassifying workers from independent contractors to employees. That will require developing a communication strategy; conducting training; designing timekeeping, scheduling, and compensation policies and practices; and revising benefit plans.

## SOME POINTERS IN NEGOTIATING AI DEALS

While the regulatory landscape around artificial intelligence (AI) continues to evolve, navigating contractual arrangements and apportioning risk for the development and use of AI may seem like stepping into the unknown. In this section, we consider how a few familiar concepts within commercial contracts may be applied to the provision and use of AI tools as part of agreements in the facility and residential services space. This includes the growth of AI tools in smart home devices that may interact with HVAC systems, AI-powered site intelligence and facility management platforms, as well as home security systems and other appliance and equipment monitoring systems.

### Disclosure and Due Diligence of AI Use

A first step to contracting for use of AI is to understand how it may be used as part of services and/or products.

- General disclosure obligation: A service provider may be contractually or legally obligated to keep a customer generally informed of AI usage as part of services and/or products, including without limitation, the use of any open-source licenses or third-party AI components included in, or used to provide, the AI products and services.
- Information requests: A customer may seek a right to receive specific information on the use of AI as part of the services, and on access to and use of customer data in connection with AI usage, on request. A service provider might counterbalance such a right by including language protecting its commercially sensitive business information and the confidential information of other third-parties, including customers, whose datasets are used to train the AI tool or that benefit from the AI tool.
- Issue notification: If a party detects issues with the use or output of AI, then each party will likely seek a mutual obligation to be promptly notified. Key points of negotiation may include
  - the scope of "issues." Aside from data breaches, these could include inaccurate, biased, or unrepresentative outputs, or written complaints, notices, or investigations by a regulatory authority, or pending litigation regarding AI technology.
  - Time period and scope of notification.
  - Consequences of any issues (whether the parties agree to a remediation plan or whether the customer will have a right to terminate, suspend, or opt-out of the use of AI or the services themselves, for example).

### Performance Standard

Where products and services utilize AI, customers may expect service providers to ensure that a provider's use of AI:

- Is subject to and will not degrade the contractual standard for performance of the services;
- Produces accurate and representative outputs and does not take into consideration certain protected characteristics, unless the customer has provided preapproval;
- Requires human verification of results and outputs; and
- Does not develop harmful or inappropriate behaviors or produce harmful or inappropriate content.

The extent to which a service provider can meet these expectations will depend on various factors, including how the applicable AI tool is procured, licensed, and how it is trained on datasets. For example, if such datasets are provided by the customer, then a service provider may seek to carve out errors or inaccuracies in the customer-provided training datasets from its responsibility.

### Compliance with Laws

Given the evolving layers of AI regulation, the contractual allocation of compliance responsibility within the AI ecosystem is becoming increasingly important. Broadly, responsibility for ensuring an AI tool does not violate applicable laws may fall on the party who developed the AI tool and provided the dataset(s) that train the AI tool. A key negotiation point may be whether it is the service provider's responsibility to not cause the customer itself to violate applicable laws through its permitted use of the AI tool, or whether the customer alone is responsible for its own compliance obligations (for example, sector-specific regulations), or whether the parties have a shared responsibility based on their respective rights and obligations with respect to the provisioning, use, and training of AI technology, for example the service provider's responsibility for the development and training of the AI tool and the customer's responsibility for its fine-tuning of the AI tool, inputs, and downstream use of the output.

Further, if an AI tool is used to collect or process any personal information, then it is crucial to ensure that appropriate notices are provided and consents obtained from the individuals, and that personal information is collected, handled, and processed in accordance with relevant privacy laws and regulations.

The obligations and liability of the parties with respect to who is responsible for providing legally required notices and obtaining legally required consents for the collection, use, and ownership of data with an AI tool is often a material point of negotiation.

### Ownership and Licensing of Intellectual Property Rights

The ownership of intellectual property rights (IPR) in the layers of input to the AI tool should be clearly delineated, since each party will expect the other to stand behind the IPR that it contributes, typically through indemnification against third-party claims of IPR infringement.

Contractual allocation of ownership of IPR in the outputs of the AI tool will be another key commercial consideration. Customers may consider that they should exclusively own IPR in the output; however, if the underlying concern is the ability to use such outputs without any restriction, then this may be achievable through licensing terms. However, due to the nature of AI technologies generally, most service providers will not guarantee that output is unique to a specific customer since an AI tool may generate the same or similar results across customers.

It is also important from both a legal and regulatory perspective to consider licensing arrangements in the event of a termination of use of the AI tool, whether planned or sudden, in order to minimize service disruption. The retention and portability of data analytics from a service utilizing an AI tool are another key commercial consideration.

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