

News You Can Use



Because You're Different

Independent Contractors

New State Law Alters Employment Landscape



GOVERNOR GAVIN Newsom has signed a bill into law that will codify a court ruling from last year that set new ground rules for what constitutes an independent contractor, and which expands on that ruling.

There's been a lot written in the media about the law, AB 5, and much of it misses the point.

Some news reports have said it will spell the end of independent contractors in the state and that anyone a company hires to do a temporary job on contract must be treated as an employee.

Now that AB 5 is the law, state and federal labor laws will apply to independent contractors who have to be reclassified as employees.

That means they would be afforded all of the associated worker protections, from overtime pay and minimum wages to the right to unionize. Employers would have to cover them under their workers' comp policies, and extend benefits to them as they do to other employees.

The law also gives the state and cities the right to sue employers over misclassification.

AB 5 codifies and expands on a 2018 California Supreme Court decision that adopted a strict, three-part standard for determining whether workers should be treated as employees.

Known as the "ABC test," the standard requires firms to prove that people working for them as independent contractors meet certain standards:

THE ABC TEST

- A)** Must be free from the company's control when they're on the job;
- B)** Must be doing work that falls outside the company's normal business; and
- C)** Must be operating an independent business or trade beyond the job for which they were hired.

The first prong aligns with the common-law test for employment, and evaluates the degree of control exercised by the company over the worker.

The second prong examines whether the worker can reasonably be viewed as working in the hiring company's business.

The third prong inquires whether the worker independently made the decision to go into business. The fact that the hiring company does not prohibit the worker's engagement in such an independent business is not sufficient.

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OCCUPATIONS THE LAW TARGETS AND TYPES OF COMPANIES AFFECTED

- **Rideshare & delivery services** - Like Uber, Lyft, DoorDash and Postmates
- **Truck drivers** - Heavy duty trucks, Amazon delivery trucks, some tow truck companies
- **Janitors and housekeepers** - Commercial cleaning services
- **Health aides** - Nursing homes, assisted living facilities
- **Newspaper carriers** - The bill's author agreed to delay implementation by one year in a concession to newspaper publishers.
- **Unlicensed manicurists** - Licensed manicurists will get a two-year exemption.
- **Land surveyors, landscape architects, geologists**
- **Campaign workers**
- **Language interpreters**
- **Strippers**
- **Rabbis**

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Workers' Comp

New Experience Rating, Physical Audit Levels Set

STARTING IN 2020, the threshold for California employers to be eligible for experience rating (X-Mod) has been reduced by order of the state insurance commissioner.

Commissioner Ricardo Lara in September approved the recommendations by the Workers' Compensation Insurance Rating Bureau to lower thresholds for determining eligibility for experience rating and when a carrier needs to perform a physical audit of an employer's payroll records.

NEW THRESHOLDS

Annual physical audit

As of Jan. 1, 2020: Any employer with \$10,500 or more in annual premium.

Current threshold: \$13,000 or more in annual premium.

Threshold for experience rating (to have an X-Mod)

As of Jan. 1, 2020: \$9,700 in annual premium.

Current threshold: \$10,000 or more in annual premium.

"Physical audit" is defined as an "audit of payroll, whether conducted at the policyholder's location or at a remote site, that is based upon an auditor's examination of the policyholder's books of accounts and original payroll records (in either electronic or hard copy



form), as necessary to determine and verify the exposure amounts by classification."

The eligibility rating threshold is the amount of payroll developed during the experience period in each classification, multiplied by the expected loss rates for each class. If the total for all assigned classes is at or above the threshold, then the employer is eligible for an X-Mod.

Changes to dual-wage class codes

Lara also approved the Rating Bureau's recommendations for changes to a number of construction dual-wage class codes.

While most workers' comp classes have one rate, in some classes the difference in claims costs between high- and lower-wage workers is so great that a dual-wage classification is needed. In those cases, the workers above the threshold rate are assigned one rate, while those below that threshold are assigned a higher rate.

The new thresholds are for 14 construction classifications, and any workers above the threshold will have a lower rate applied. ❖

DUAL-WAGE CLASSES AFFECTED

Masonry – 2020 threshold: \$28 per hour (+\$1 from 2019)

Heating/Plumbing/Refrigeration – 2020 threshold: \$28 (+\$2)

Automatic sprinkler installation – 2020 threshold: \$29 (+\$2)

Concrete/Cement work – 2020 threshold: \$28 (+\$3)

Carpentry – 2020 threshold: \$35 (+\$3)

Wallboard application – 2020 threshold: \$36 (+\$2)

Glaziers – 2020 threshold: \$33 (+\$1)

Painting/Waterproofing – 2020 threshold: \$28 (+\$2)

Plastering/Stucco work – 2020 threshold: \$32 (+\$3)

Roofing – 2020 threshold: \$27 (+\$2)

Steel framing – 2020 threshold: \$35 (+\$3)

Excavation/Grading/Land leveling – 2020 threshold: \$34 (+\$3)

Sewer construction – 2020 threshold: \$34 (+\$3)

Water/Gas main construction – 2020 threshold: \$34 (+\$3)

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Many Contractors Exempted from New Law

Some occupations exempted by the law include:

- Doctors
- Some licensed professionals (lawyers, architects, engineers)
- Accountants, securities broker-dealers, investment advisors
- Real estate agents
- Direct sales (compensation must be based on actual sales)
- Builders and contractors (who work for construction firms that build major infrastructure projects and large buildings)
- Freelance writers, photographers (provided the worker contributes no more than 35 submissions to an outlet in a year)
- Hair stylists, barbers (must set their own rates and schedule)
- Estheticians, electrologists, manicurists (must be licensed)
- Tutors (must teach their own curriculum)
- AAA-affiliated tow truck drivers.

What employers should do

Legal experts recommend that employers:

- Perform a worker classification audit, and especially review all contracts with personnel.
- Determine which benefits and protections should be provided to any workers who are reclassified from independent contractor to employee (think health insurance and other benefits).
- Notify any state agencies about changes to a worker's status.
- Discuss with legal counsel whether you should also include a worker as an employee for the purposes of payroll taxes, workers' comp insurance, federal income tax withholding, FICA payment and withholding.

Note: Federal law remains unchanged. The IRS and National Labor Relations Board have their own independent contractor tests. ❖



Dealing with Workers with Substance Abuse Issues

WITH THE opioid epidemic continuing to sweep the nation, more and more workers are battling addiction than ever before.

But if you as an employer suspect or know one of your staff has a substance abuse problem, you need to be careful about how you approach them and try to deal with the issue.

Even if many employees can keep their addictions under wraps in the workplace, not all of them can. According to a survey conducted by the website *drugabuse.com*, which offers educational content and recovery resources to people dealing with addiction:

- 23% of workers surveyed said they had used drugs or alcohol on the job.
- 60% said they had used alcohol on the job work (not including office parties or functions).
- 23% said they'd smoked marijuana on the job.

On top of that, 75% of U.S. employers say they've been affected in some way by an employee's substance abuse. That can include:

- Employee theft to support the habit.
- Mistakes that cost the company money and lost business.
- Workplace accidents.
- Accidents that injure third parties.
- Reduced productivity because of presenteeism.

While you can have policies in place that bar employees from working under the influence – under threat of firing – it's a trickier matter if one of them comes to you to tell you they have a problem.

The Americans with Disabilities Act protects workers who:

- Have successfully completed a rehab program and have stopped taking the drug that caused them to enter the substance abuse program,
- Who are currently in a rehab program, or
- Who have been wrongly accused of having a substance abuse problem.

It's also a challenge for employers to know the difference between an employee who may have been taking one Vicodin every day for years for pain but continues to do a great job, or someone who needs treatment. Taking the wrong action can set you up for being sued, and it's hard to win a case if the employee is taking medication as prescribed by a physician.

What you can do

There are ways that employers can legally find out if employees are taking opioids.

You can set a policy that requires employees to disclose if they are taking prescription medications that may cause impairment or come with warnings about drowsiness.

This is legal under Equal Employment Opportunity Commission regulations as long as the policy is companywide.

But if you think you have a worker on staff who has a substance abuse problem, you need to go through an interactive process as prescribed by the ADA.

Steps under the interactive process start with talking to a worker you think has a substance abuse problem or is taking medication that could create a safety risk, to see if there is some way you can accommodate them. That could include:

- Restructuring their job.
- Offering a leave of absence to let them get treatment.
- Modifying their schedule so they don't have to work after they have taken their medication.
- Reassigning them to a vacant position that will not put them or others at risk.

If you have an employee who has been on leave to get treatment for their substance abuse, you can ask them to take a fitness-for-duty exam to make sure they are up for resuming their old job. ❖

Basics of a Strong Lockout/Tagout Program

A LOCKOUT/tagout program will not be effective if your employees are not properly trained in how it works, and if you don't have consequences for them if they fail to follow the program.

Every year, hundreds of workers in the United States die because they don't follow lockout/tagout procedures or their employers did not have them in place – or, if they did, failed to enforce their rules.

Failure to train or inadequate training is one of the top-cited lockout/tagout violations by Cal/OSHA.

Improper training or failing to train all of your workers can have dire consequences, even for staff that are trained in procedures.

In this past year in California, two workers died because of inadequate training. One died on the job at a nut cannery because he had missed lockout/tagout training when he was on layoff.

In the other case, an employee at a clothing manufacturer was killed after a maintenance mechanic who had not been trained in lockout/tagout walked away when his co-worker entered part of the machine to remove finished product. The machine was de-energized but not locked out, and it started up when the worker entered it.

Under Cal/OSHA's lockout/tagout standard, all authorized and affected employees, plus those who work in areas where energy-control procedures are used, must be trained on lockout/tagout procedures.

Training must include hazards related to:

- Cleaning,
- Repairing,
- Servicing,
- Setting up and adjusting prime movers, and
- Machinery and equipment.

"Affected" employees include:

- Qualified persons who lock out or tag out specific machines for such operations.
- Those whose jobs require them to operate a machine. They must be instructed on the purpose and use of energy-control procedures.
- Other employees include those whose work might be in an area where the procedures might be used. They must be instructed about the prohibitions on restarting or energizing machines that have been locked or tagged out.

HECP training requirements

The training provisions of the Cal/OSHA standard require that authorized employees be trained on hazardous energy control procedures (HECPs) and associated hazards.

Affected employees must be trained on the purpose and use of HECPs, and all other workers in the area must be instructed on the prohibition on attempting to restart machines which are locked or tagged out.

CAL/OSHA REQUIREMENTS

Cal/OSHA requires that employers must develop and utilize an HECP for cleaning, repairing, etc., and shall clearly and specifically outline the scope, purpose, authorization, rules and techniques to be utilized for the control of hazardous energy, and the means to enforce compliance, including:

- Shutting down, isolating, blocking and securing machines or equipment;
- Placement, removal and transfer of lockout/tagout devices;
- Testing machines to determine the effectiveness of lockout/tagout devices; and
- Separate procedural steps for safe lockout/tagout of each machine.

Pay especially close attention to training on controlling all sources of hazardous energy. That can sometimes require developing equipment-specific lockout procedures.

Turning off a machine is often not enough. It needs to be disengaged or de-energized. That's because the control switch can still contain electrical energy. A release of stored energy can start the machine again briefly, but enough to cause serious injury.

If possible, you should also block out moveable parts during lockout/tagout procedures.

You also need to develop, implement and enforce a lockout program.

All workers involved in lockout/tagout should get their own locks. They should not use someone else's lock, and they should not install or remove another employee's lock.

Final bit of advice: Once a machine is locked out, the operator should try to turn it on again to see if it has been effectively disengaged.

