News You Can Use

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HEFFERNAN INSURANCE BROKERS
Because You're Different

Independent Contractors

AB 5 Suffers Early Legal Setbacks

CALIFORNIA'S INDEPENDENT contractor law suffered its first two legal setbacks in January after trucking firms and independent truckers scored wins in court.

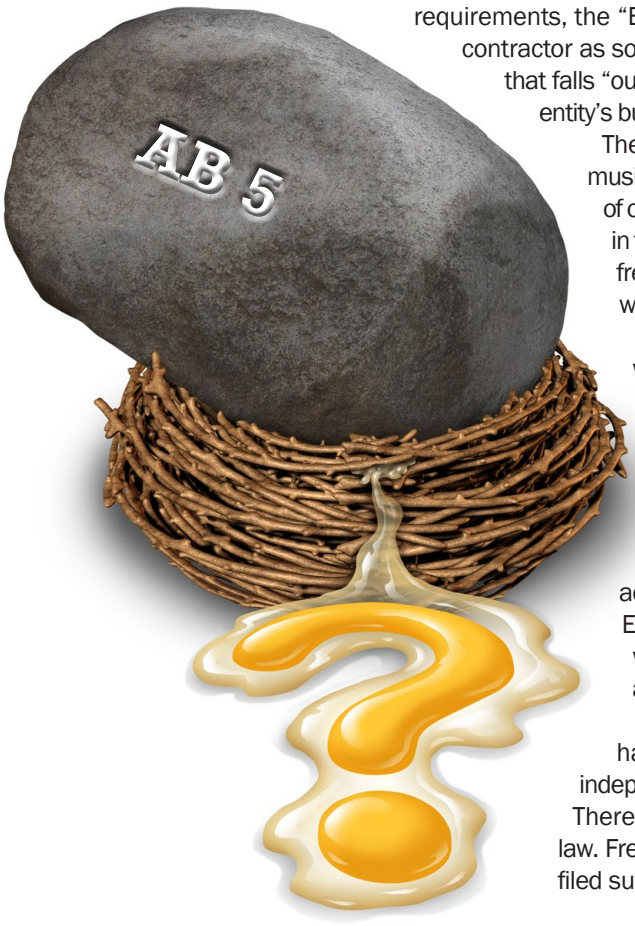
On Jan. 8, a Los Angeles County Superior Court judge ruled that AB 5 does not apply to independent truckers because they are covered by federal law.

And on Jan. 13, a federal judge extended a restraining order for the law to cover truckers as of Jan. 1 this year in a case brought by the California Trucking Association, seeking a preliminary or permanent injunction on the new law.

AB 5, which took effect Jan. 1, has been highly controversial. It was mainly written in response to the gig-worker economy and targets companies like Uber and Lyft, whose drivers are classified as independent contractors.

The law codified a 2018 California Supreme Court decision, in the *Dynamex Operations West, Inc. vs. Superior Court of Los Angeles* case, that set new independent contractor rules

The new law has put into place a stringent "ABC test" for determining the validity of independent contractor relationships. This is because one of the requirements, the "B prong," defines an independent contractor as someone who is providing a service that falls "outside the usual course of the hiring entity's business."



The law has had a spillover effect on musicians, freelance writers and a host of other professions. Many of the people in these professions want to keep their freelance status for fear of losing their work, which has happened.

AB 5 essentially states that workers who perform the work the company is in business to do are in fact employees and cannot be treated as independent contractors.

The distinction is important because employees are eligible for additional benefits and protections. Employees have rights to minimum wage, overtime and sick leave, among other benefits.

The law has not only raised the hackles of businesses, but also of independent contractors.

There are more legal challenges to the law. Freelance writers and photographers filed suit in December 2019, alleging that AB 5 unconstitutionally restricts free speech and the media. Uber and Postmates filed suit alleging that the law's targeting of app-based workers and platforms violates the equal protection clauses of the United States and California Constitutions.

On top of that, Uber and Lyft are backing a ballot initiative to overturn the law.

The state of play

By now, if you use outside contractors you should have reviewed their statuses and that in order not to be considered employees, they:

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.

In late January, two Republican assembly members introduced AB 1928, which would put a freeze on enforcement of AB 5 while replacement legislation can be written. But, the chances of the bill passing in the Democrat-controlled legislature are slim. ❖

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Injured Worker Study

Physical Therapy, Chiropractics Cut Opioid Use

PHYSICAL THERAPY, acupuncture and chiropractic care correspond with reduced opioid prescription use among injured workers, a new study has found.

Workers who were treated using physical medicine while also being prescribed an opioid all received lower doses of prescribed opioids compared with workers with similar injuries who did not receive physical treatment, according to the study by the Workers' Compensation Insurance Rating Bureau of California.

The study shows great promise for reducing opioid use among injured workers, many of who have become dependent on opioids during their recovery, further hampering their return to work.

Physical therapy worth the cost

When an injured worker who has been prescribed opioids becomes addicted to them, the insurer will have to pay for addiction treatment, which in turn increases the cost of the claim.

The use of physical medicine has increased in California since 2014, when the state workers' compensation fee schedule increased reimbursements for these treatments.

The study found that since then, physical medicine has accounted for a larger proportion of total medical costs per claim.

But the higher expenditures may be worth it if opioids are also prescribed to injured workers.

SIGNFICANT DROP IN OPIOID PRESCRIPTIONS

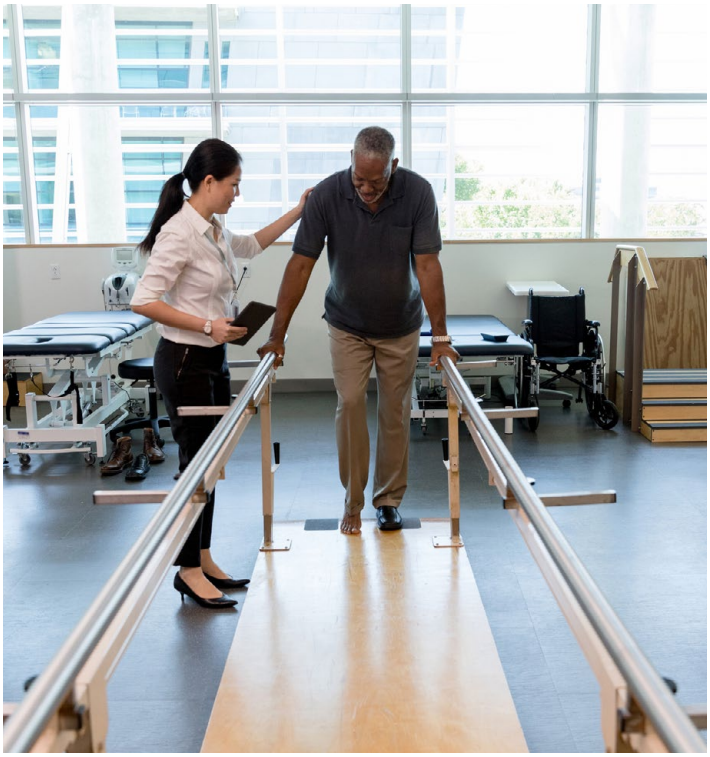
- **86% decline in opioid use** – For claims involving physical medicines.
- **23% lower doses** – Among soft-tissue injury claims that had at least one opioid prescription within one year of the injury with early physical therapy.
- **Less opioid usage** – For soft-tissue injury claims involving physical therapy during the first 30 days of the initial medical visit.
- **Lower probabily of opioid use** – For claims involving early chiropractic care for soft-tissue injuries.

Increased contact beneficial

Some experts also say that increased contact with an injured worker can reduce the chances of them abusing these high-powered painkillers.

Physicians who treat injured workers tend to spend significantly less time with them compared to doctors treating group health plan patients, according to a report in the trade publication *Carrier Management*.

Having more one-on-one time with their treating physician, group health patients are often better educated about the types of treatment available to them, including opioid alternatives. As a result, these individuals are less likely to get a prescription that may not be the best treatment option for them.



Opioids can delay an injured worker's return to work. Sadly, workers who take opioids for more than three months often don't return at all, due to dependence or other side effects, according to a study by the American Psychiatric Association Foundation.

Not only that, but a person using opioids can pose a danger to themselves and others while on the job. And workers with a pain-medication use disorder miss an average of 29 days a year of work, according to the Centers for Disease Control.

The takeaway

If you have an injured worker, you can talk to your workers' comp carrier's claims adjuster about possible physical medicine approaches:

- If there are opioids prescribed, talk to the insurer about how you can play a supporting role in trying to prevent the worker from spiraling into addiction.
- To best reduce the chances of opioid abuse, there should be collaboration between the claims adjuster, nurse case manager, treating physician and the employee.
- The treating physician should monitor the injured worker throughout the life of the claim, and the should be in regular communication with the claims adjuster.

There are many alternatives to opioid treatment, including acupuncture, cognitive behavioral therapy, physical therapy, chiropractic treatment and yoga. ❖

Price Hardening

Most Commercial Insurance Lines Seeing Increases

A NEW REPORT by Willis Towers Watson predicts that most commercial insurance lines will see increases in 2020 as the market continues to harden almost across the board.

Overall, 19 commercial lines are expected to see price increases, according to the report.

MOST AFFECTED LINES

- Property
- Commercial auto
- Umbrella
- Directors and officers

LINES WITH LOWER HIKES

- Fiduciary
- Environmental
- Marine
- Kidnap & ransom
- Terrorism insurance

"We're seeing the biggest upward price shift in years. We expect rate hikes and capacity constrictions will continue throughout 2020 and likely into 2021," Joe Peiser, global head of broking at Willis Towers Watson, said in a prepared statement.

Here's what's happening with the two lines that are seeing the highest rises:

Property

Insurers are tightening underwriting in any parts of the country that have been experiencing increased levels of natural disasters. Additionally, some insurers have decided to curtail the amount of policies they are willing to write, while others have pulled out of the market altogether.

Hurricanes are increasing in both number and intensity and the destruction is severe as real estate developments have continued in high-risk areas and coastlines.

In addition, rising tides are contributing to increasing floods during storms and hurricanes.

Meanwhile, the West has had its worst fire seasons ever in the last five years.

Many insurers are raising rates on properties in high-risk areas and are requiring property owners to reduce the chances of their properties catching fire by building buffer zones around their structures. Those that don't may not have their policies renewed.

While overall rate increases vary from region to region, properties with greater exposure to catastrophes and claims histories have been seeing the largest increases.

Liability and umbrella

This includes the liability portion of auto policies, which has been the driving force in increasing auto insurance rates.

Commercial auto has been pressured for many years as distracted driving (attributed to smartphone use while driving) has driven up accidents that result in injuries, as well as increasing repair costs for modern vehicles and rapidly increasing medical costs for injured parties.

These costs can often trigger a company's umbrella liability policy as well.

As a result, "loss severity in auto and general liability, and therefore umbrella, is spiking, " the report states.

On top of that, jury awards keep growing. Businesses are easy targets for litigation, and juries consider that they have deep pockets and can afford to pay out substantial awards. ❖

CLOUDY FUTURE – *As natural disasters grow in intensity and how much damage they inflict, property insurance costs are rising in some areas.*

Simplified Regulations

DOL Issues New Rules for Joint Employer Status

THE U.S. Department of Labor has issued new and more simplified rules for determining joint employer status, which can often be found in work involving temporary workers, subcontractors or workers in franchises.

The new rule reverses Obama-era regulations that employers say opened a floodgate of litigation, making it easier for workers to sue more than one entity for labor violations, as for example in these instances:

- Both the Subway Group as well as individual franchisees.
- A business and the subcontractor that it hires to do specific work.
- A delivery company and the temp agency it contracts with for drivers.

The joint employer rules apply mainly to violations under the Fair Labor Standards Act, when an employee may have, in addition to their employer, one or more entities that are jointly and severally liable with the employer for the worker's wages.

The new non-binding rule, which takes effect March 15, spells out when an entity can be considered a joint employer for FLSA purposes.

Balancing test

The final rule provides a four-factor balancing test when an employee performs work that also benefits another person or entity. It defines a potential joint employer as an entity that:

- Hires or fires the employee;
- Supervises and controls the employee's work schedule or conditions of employment to a significant degree;
- Determines the employee's rate and method of payment; and
- Maintains the employment records.

An employer does not have to meet all four factors to be a joint employer.

The ruling seems to fall in line with recent court decisions regarding McDonald's Corp., which franchisee employees had sued along with the franchisee itself in seeking back wages and overtime.

The National Labor Relations Board in late 2018 approved a settlement between workers and their employer, a McDonald's franchisee, which absolved franchisor McDonald's Corp. from any direct joint employer responsibility.

Additionally, the U.S. Ninth Circuit Court of Appeals in California decided in October 2018 that McDonald's was not a joint employer with its franchisee for violations of California wage and hour laws, because the company did not exercise the "requisite level of control" over the workers' employment.

The takeaway

When the rule becomes effective, it should provide clarity for all parties in a multi-employer or multi-company arrangement.

That said, you should not interpret the new rule as a reason to approach joint employer responsibility recklessly.

If you use temp workers and/or subcontractors and you provide your employee handbooks and policies to any other entities' employees, you should include disclaimers that make it clear that the provision of those materials does not create an employment relationship.

You can take this opportunity to examine your relationships with the workers from whom you receive beneficial services, but whom you do not employ directly. ❖