MINDFUL
INSURANCE SOLUTIONS INC.

# RISK REPORT

October 2019 | VOLUME 2 | ISSUE 4

## 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.

Occupations exempted 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)

*See 'Contractors' on page 2*

### 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

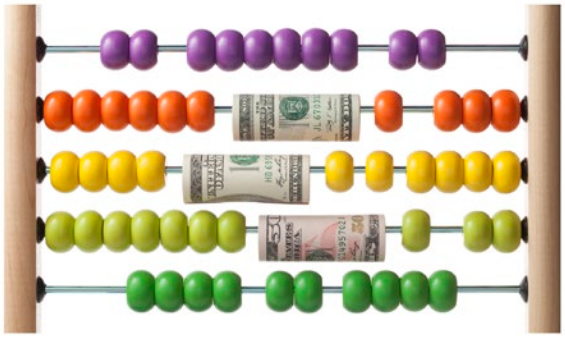
**Annual physical audit**

**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)

*Continued from page 1*

# *Many Contractors Exempted from New Law*

- 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.*

## Workers' Compensation

# Bureau Recommends Further Rate Cut

WORKERS' COMP insurance rates will likely continue sliding in 2020 after California's rating agency submitted its recommendation that the state insurance commissioner reduce the average benchmark rates by 5.4%.

If the recommendation is approved, it will be the ninth consecutive rate decrease since 2015 (some years had two decreases), which has resulted in the average benchmark rate for all class codes falling a combined 45% since then.

The Workers' Compensation Insurance Rating Bureau, which makes the filing at least once a year, said average claims costs continue falling due to the effects of reforms that took effect in 2014.

The Rating Bureau tracks workers' comp costs in the state and makes the recommendations for changing the benchmark rates, which insurers use to price their policies.

Every class code gets its own rate, which will change depending on the trends in claims costs and numbers for that class code.

### WHY RATES ARE FALLING

Rates are still declining because:

- Old claims costs are less than expected.
- Claims are being settled more quickly.
- Drug costs continue falling sharply.
- Fewer liens on claims are being filed.

Insurers use the benchmark rates as guideposts for pricing their own policies, but in the end, they can price the policies as they wish.

On top of the benchmark rate, insurers will add surcharges for various classes or regions, and add on administrative costs to arrive at their own rates.

Also, rates will not fall for all employers.

Rates depend on a number of factors, including an employer's claims history and region.

Policies in Southern California, for instance, are often surcharged because of the amount of cumulative trauma claims filed in the region.

The state insurance commissioner will hold a hearing on the rate filing on October 14, and then make a final decision on the rate change.

## What to do

Just because rates have been falling, do not waver in your focus on safety.

Here are some mistakes to avoid:

**Complacency** – When your premium falls, it's easy to shift focus away from workplace safety, injury management and cost containment to other business matters.

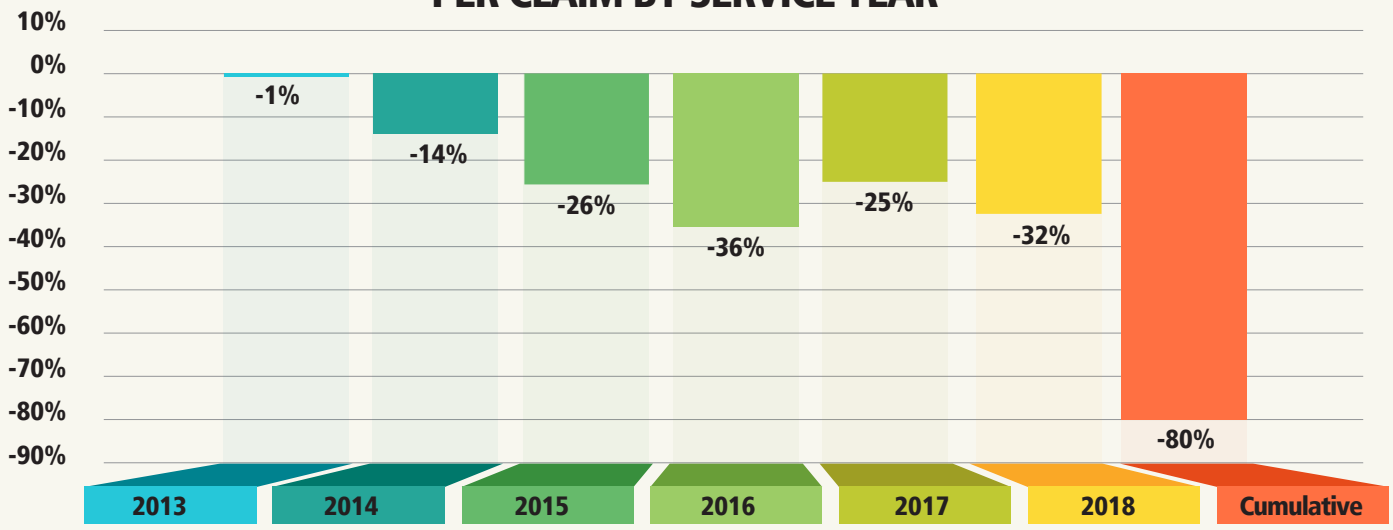
This is a mistake and can cost you in additional workplace injuries.

**Focusing on just premiums** – Indirect costs – including overtime, temporary labor, increased training, supervisor time, production delays, unhappy customers, increased stress, and property or equipment damage – represent several times the direct cost of an injury.

**Expecting rates to stay low forever** – Rates are cyclical. The key is to ride the low rates for as long as you can through unwavering attention to workplace safety and claims management.

**Chasing low rates** – One benefit you have from working with us is continuity, and jumping ship to another broker just to save a few thousand dollars on your premium is not always a smart choice, particularly if the new brokerage is not involved in helping you keep claims costs low.

### CHANGE IN PHARMACEUTICAL COSTS PER CLAIM BY SERVICE YEAR




*Source: Workers' Compensation Insurance Rating Bureau*

CAL/OSHA REPORTING

# New Law Changes When Injuries Must Be Reported

GOV. GAVIN Newsom has signed a measure into law that will greatly expand when employers are required to report workplace injuries to Cal/OSHA.

The new law, AB 1805, broadens the scope of what will be classified as a serious illness or injury which regulations require employers to report to Cal/OSHA "immediately." As of yet there is no effective date for this new law, but observers say regulations will first have to be written, a process that would start next year.

The definition of "serious injury or illness" has for decades been an injury or illness that requires inpatient hospitalization for more than 24 hours for treatment, or if an employee suffers a "loss of member" or serious disfigurement.

The definition has excluded hospitalizations for medical observation. Serious injuries caused by a commission of a penal code violation (a criminal assault and battery), or a vehicle accident on a public road or highway have also been excluded.

## THE NEW RULES

- Any inpatient hospitalization for treatment of a workplace injury or illness will need to be reported to Cal/OSHA.
- For reporting purposes, an inpatient hospitalization must be required for something "other than medical observation or diagnostic testing."
- Employers will need to report any "amputation" to Cal/OSHA. This replaces the terminology "loss of member." Even if the tip of a finger is cut off, it's considered an amputation.
- Employers must still report any serious disfiguration to Cal/OSHA.
- Loss of an eye will have to be reported.
- Serious injuries or deaths caused by a commission of a penal code violation will have to be reported.
- While the exclusion for injuries resulting from auto accidents on a public street or highway remain in effect, accidents that occur in a construction zone will have to be reported.

## Compliance

Rules for reporting serious injuries and illness or fatalities are as follows:

- The report must be made within eight hours of the employer knowing, or with "diligent inquiry" should have known, about the serious injury or illness (or fatality).
- The report must be made by phone to the nearest Cal/OSHA district office (note that a companion bill, AB 1804, eliminated e-mail as a means of reporting because e-mail can allow for incomplete incident reporting).

Because of the "diligent inquiry" component, employers should monitor any injured worker's condition once they learn of an injury, particularly if they need to seek out medical treatment.

A member of the staff should be on hand to monitor the employee and report to supervisors immediately if that person will need to be hospitalized.

Employers should make sure that supervisors are made aware of the new rules so that any time a worker is injured to the point that they need to be hospitalized, they know to notify Cal/OSHA within eight hours.

Also, if you have an employee that suffers a medical episode at work – such as a seizure, heart attack or stroke – you are required to report the hospitalization to Cal/OSHA.

It's better to err on the side of caution if an employee is hospitalized for any reason. Not doing so can result in penalties for failure to report or failing to report in a timely manner.

Accordingly, it is important to educate management representatives, particularly those charged with the responsibility to make reports to Cal/OSHA, about the nuances of Cal/OSHA's reporting rules.

**One final note:** The results of a serious injury or illness or workplace fatality will usually trigger a site inspection by Cal/OSHA, so be prepared if one should occur.