



AB 5 AND LEGISLATIVE ROUNDUP

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Today's Speaker

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WHAT WE'LL COVER

- Assembly Bill 5: Independent contractors or employees?
- Other bills approved by the governor.
- Topics that will most likely come up in future legislative sessions.
- Brief case law update, 4 things to know.



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ASSEMBLY BILL 5

- Governor: Gavin Newsom in, Jerry Brown is out.



- First big piece of legislation: Goes after Uber, Lyft, Postmates, Grubhub, and other gig economy companies.



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WHAT DOES AB 5 SAY?

- It codified the “ABC Test” from the CA Supreme Ct decision in Dynamex v. Superior Court. The new bill means that the ABC Test primarily replaces the Borello factors.
- Takes effect 1/1/2020. Doesn’t mandate that everyone be reclassified overnight, but violators may wish they had as could face wage and hour, workers’ comp coverage situations.



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THE ABC TEST SAYS:

if a worker does not meet all of the following three conditions, then they are an employee for purposes of workers’ compensation law:

- A: The worker is free from the control and direction of the hiring entity in connection with the performance of the work;
- B: The worker performs work that is outside the usual course of the hiring entity’s business;
- C: The worker is customarily engaged in an independently established trade, occupation, or business.



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IT'S THE "B"



Insurance analysts believe the factor that will transform the most workers into employees is the "B", which says that a worker is an IC if they perform work that is outside the usual course of the hiring entity's business.

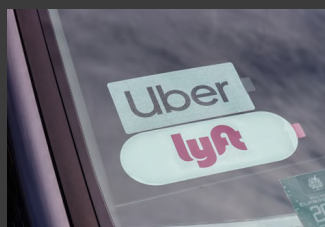


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HOW TO COUNTER THE "B"

Uber reportedly plans to counter that by arguing that Uber is an app/technology company, and not a driver/transportation company. The drivers are merely independent contractors who drive.



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WHAT ABOUT THE OTHER FACTORS?



Gig economy companies can:

- ⦿ Dispute “A” by arguing that they don’t control their workers’ schedules, or tell them where to go or how to do it.
- ⦿ Dispute “C” by arguing that their workers are independent and doing their own business as a driver. For instance, Uber doesn’t bar them from working for Lyft, and vice versa. (Many do both.)



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IT AIN’T OVER TILL IT’S OVER ...

- ⦿ Uber, Lyft, and DoorDash have also vowed to put a total of \$90 million into a California ballot initiative that would thwart Assembly Bill 5.
- ⦿ Vox reported that: the proposed ballot measure would give some concessions, such as putting in a guaranteed wage floor for workers in exchange for not classifying drivers as employees.
- ⦿ Class-action filed asking for declaratory judgment that Uber has misclassified its workers.



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BALLOT INITIATIVES AREN'T EASY



- Ballot initiatives are only as strong as the people that organize them. If it's run by error-prone people, it can be very difficult to get the necessary amount of signatures, which ranges from 365,880 to 585,407. Getting that many signed typically costs at least \$2 million to \$4 million according to Ballotpedia.org.
- That means they'll have \$86 million remaining to bombard us with ads this election season.



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WHILE THEY DUKE IT OUT, EVERYONE ELSE WILL ...

- Most likely litigate the ABC Test when independent contractor v. employee disputes arise.
- There is no requirement to totally reclassify by 1/1/2020.



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THIS AFFECTS MORE THAN YOUR UBER DRIVER

Other independent contractors include:

- Truck drivers
- Nail salon workers
- Hairdressers/stylists/barbers
- Construction workers
- Limo drivers
- Couriers



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EXEMPTIONS TO AB 5

These people are independent contractors, and any disputes will be subject to the Borello test (aka the right-of-control test), which is the test we've used in comp for years:

- Doctors, dentists, lawyers, engineers, accountants, architects, realtors, travel agents, graphic designers, HR administrators, grant writers, marketers, fine artists, investment advisors, brokers/dealers, payment processors, photographers, photojournalists, freelancers, repo men and more.

professionals



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BORELLO FACTORS

Borello determines who had right to control the worker, and considers:

- a) whether one performing services is engaged in a distinct occupation or business
- b) kind of occupation, whether the work is done with/without supervision
- c) skill required by occupation
- d) supplying of the tools
- e) length of time services provided
- f) method of payment - by time, or by job
- g) is the work part of the reg business of the principal
- h) parties' belief as to employer/employee



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WHAT ABOUT MY BARBER?



- ⦿ Not that you want my barber, but... barbers, manicurists, and cosmetologists are only exempt if they:
 - Set their own rates
 - Paid directly by clients
 - Do their own scheduling of appointments
 - (Many of the good ones already schedule by text message, and set their own rates.)



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OK, BUT WHAT ABOUT

- Salespeople: exempt if their salary is based upon actual sales.
- Commercial fishermen: exempt from everything except the Unemployment Insurance Code. (ie they'll most likely qualify for unemployment benefits, but not work comp)



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CONSTRUCTION SUBCONTRACTORS

Exempt, if they have a:

- Written subcontract
- Are licensed by the state
- If the local jurisdiction requires a license, then a license or business tax registration
- Has a business location separate from the general contractors' location
- Has authority to hire/fire its own people
- Assumes liability for litigation pertaining to the labor or services provided (E&O, gen liability coverage)
- Has their own independent business



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KEEP ON TRUCKING

- Construction industry truck drivers enjoy a two-year grace period to act as independent contractors.
- Most truckers are subject to the bill. The California Trucking Association opposed the bill, noting that it would hurt the 70,000 truckers who are independent contractors in California.



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OTHER IMPACTS OF AB 5

- Anticipate price hikes with your favorite services: Uber, Lyft, Postmates, Grubhub, etc. if the law stands.
- Could see mass reclassifications of ICs to employees, which means more premiums for insurers. Most of the aforementioned professions are Occ Codes of 290-500.
- More litigation.



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OTHER APPROVED BILLS

- AB 749: Voluntary resignations can't use "no rehire"
- SB 537: MPNs must post physician rosters online, AD can place MPNs under close scrutiny
- SB 542: PTSD and psyche are compensable for first responders
- AB 668: Protection from civil arrests
- SB 78: State hospital patients covered by comp while doing voc rehab



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APPROVED: AB 749



- Takes effect 1/1/2020.
- Bars "no rehire" or "agrees not to reapply to employer" provisions in voluntary resignations that are part of settlement documents.
- Exception: You can use them if the employer has good reason to believe that the resigning person committed sexual harassment or sexual assault.
- A product of the "Me too" movement.



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APPROVED: AB 749

- So what about your voluntary resignations?
- Still okay to use, just do not include “no rehire” or “will not apply for reemployment” language.
- Regarding that exception, be careful about labeling someone a sexual harasser or saying that they are guilty of sexual assault. Don’t want to wind up with a libel or slander suit.



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APPROVED: AB 749



- AB 749 also clarifies that employers are not required to continue to employ or rehire a person if there is a legitimate nondiscriminatory or nonretaliatory reason for terminating or refusing to rehire a person.
- Ex: If they messed up a costly order, you do not have to rehire them.
- Tip for employers: Document terminations well.



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APPROVED: SB 537



MPNs, MPNs, MPNs! Requires

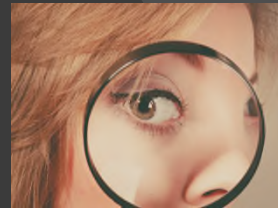
- MPNs to post a roster of physicians online.
- Providers to use national provider identifier number on itemized billing.
- Providers who are contracted at more than 20% less than OMFS must provide payors with rate sheets. These providers may require payors to sign an NDA in exchange for this information.



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APPROVED: SB 537



- Gives the A.D. authority to investigate complaints, conduct random reviews.
- Prohibits anyone other than the requesting physician/provider from changing the RFA documents.
- Clarifies that a “normal business day” does not include Saturday, Sunday, or holidays. (Helpful for UR timeliness disputes.)



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APPROVED: SB 537

Requires the A.D. to create:

- A legislative report by 1/1/2023 that would compare potential alternatives to the OMFS.
- Publish information related to UR/IMR determinations that resulted in a modification or denial. This must begin 1/1/2024 and will continue yearly.



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APPROVED: SB 542



- Adds PTSD and psyche to first responders' (police & fire) rebuttable presumption of compensability.
- Only affects DOIs on/after 1/1/2020.
- Has a six-month rule, ie no psyche/PTSD unless they worked there for at least six months, unless it was caused by a "sudden and extraordinary" employment condition.



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APPROVED: SB 542



- Sudden and extraordinary?
- An earlier version of the bill mentioned “fires, stabbings, gun battles and shootings, including active shooter incidents, domestic violence, terrorist acts, riots, automobile accidents, airplane crashes, earthquakes, and other gruesome scenes.”
- Bottom line: Sudden and extraordinary are not your “run of the mill” events.



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APPROVED: AB 668

- SB 668 bars civil arrest while at the courthouse. In other words, no citizen's arrests while a person is at the WCAB for a hearing or “legal business” at the courthouse.



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APPROVED: SB 78

- State hospital patients who are participating in vocational rehabilitation programs are employees while they do that.
- If they get injured during voc rehab, they are the state's employee.



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SMALLER APPROVED BILLS: AB 35

- AB 35: If the State Department of Public Health receives a lab report showing 20 micrograms of lead per deciliter of blood ($\mu\text{g}/\text{dL}$), then they have to report it to the Division of Occupational Safety and Health. 20 $\mu\text{g}/\text{dL}$ is relatively high.
- That report would constitute a serious violation and subject the employer to an investigation.
- The bill forces the division to make any citations or fines imposed as a result of the investigation publicly available on an annual basis.



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SMALLER APPROVED BILLS: AB 203



- Requires Central Valley construction companies to provide training on Valley Fever to all employees before they begin dusty work.
- Filed under Cal-OSHA, which would make a violation of this statute a crime.
- Enacted this to prevent Valley Fever, which had a historic jump in rates in the late 2000s. It can cause irreversible lung damage and meningitis in extreme cases.



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SMALLER APPROVED BILLS: AB 1400

- Requires the Commission on Health and Safety and Workers' Compensation (CHSWC) to work with LA County and the unions to produce a study about the risk of exposure to carcinogenic materials and incidence of occupational cancer in mechanics who repair and clean firefighting vehicles.



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SMALLER APPROVED BILLS: AB 1804 AND AB 1805



- AB 1804 would allow employers to report a serious occupational injury, illness, or death to the state via a website. Current provisions allow them to do it via telephone or email.
- AB 1805 changes some of the language as what qualifies as a “serious injury.” Clarifies that amputations are included, so is long-term exposure to hazardous substances.



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SMALLER APPROVED BILLS: AB 528



- Requires pharmacies to start reporting Schedule V prescriptions to the CURES database.
- Before this bill, CURES only tracked Schedule II through IV drugs. Schedule V includes drugs with limited quantities of narcotics.
- Useful when you’ve got drug-seeking applicants who are doctor-shopping. The smart PTPs check this database, it’s not worth getting in trouble over.



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TOPICS TO COME UP IN FUTURE SESSIONS



Labor will continue to:

- Attack apportionment to nonindustrial factors.
- Try to limit UR/IMR in new and creative ways.
- Obtain increased LC 4850 salary continuation benefits for state employees.



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CASE LAW NEWS AND NOTES



Point #1:

- AAs are trying to use the Kite decision to increase PD by encouraging QMEs to add PD ratings together, instead of using the QME chart.
- *Kite v. Athens Administrators* (2013) 78 CCC 213 (writ denied)



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CASE LAW NEWS AND NOTES

What does Kite and subsequent case law say?

- If there is a synergistic effect between two injuries, then use the addition method.
- Example of synergistic effect: left hip and right hip were industrially injured.



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CASE LAW NEWS AND NOTES

- Why now? CAAA encouraged this last January. Now every AA wants to add PD.
- Smart med-legal experts know that the 2005 PDRS is presumed to be correct. The latest case law only supports the addition method if there is not overlap between the PD for the injured body parts, but when put together they still create significant limitations.
- Ex of synergy: bilateral shoulders both industrially injured



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CASE LAW NEWS AND NOTES

Point #2:

- A policy exclusion of general employer's employees doesn't have to be signed.
- 2nd DCA published this decision in *Travelers Property Casualty Co. of America v. WCAB* (B292915).



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CASE LAW NEWS AND NOTES

- When does this come into play?
- When you:
 - Insure a special employer;
 - The special employer uses temporary workers from a staffing agency, and one of the temps gets injured;
 - The staffing agency's carrier goes insolvent;
 - CIGA argues your policy is "other insurance;"
 - Your policy for the special employer policy contains an exclusion of the staffing agency employees.

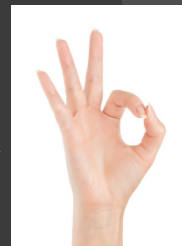


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CASE LAW NEWS AND NOTES

- How to take advantage of that?
- Show that:
 - The insurance commissioner approved your exclusion.
 - The agreement where the staffing agency agreed to provide coverage for all their employees.
 - A little witness testimony or signed declaration wouldn't hurt.



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CASE LAW NEWS AND NOTES

Point #3:

- Saturday is not a “working day” for UR purposes.
- WCAB clarified this in a significant panel decision called Puni Pa’u v. Department of Forestry/Cal Fire, legally uninsured and adjusted by SCIF, 84 Cal. Comp. Cases, 9/11/19.



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CASE LAW NEWS AND NOTES

- What is a significant panel decision?
It's one where the WCAB said, "Hey look at this. This is an important issue that arises a lot, but for unimportant procedural reasons it'll never rise to the level of a en banc or appellate decision.



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CASE LAW NEWS AND NOTES

Bottom line from Pa'u:

- Saturdays are not "business days" or "working days" for purposes of determining whether a UR is timely.
- Can infer from this that Sundays and holidays are also not working days.
- Who wrote this? Chairwoman Zalewski, who is the Chair of the WCAB.



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CASE LAW NEWS AND NOTES

Point #4:

- The WCAB explained how psyche PD secondary to orthopedic trauma can be compensable due to an injury being “catastrophic” in *Wilson v. State Cal Fire*, 84 Cal. Comp. Cases 393, 2019 Cal. Wrk. Comp. LEXIS 29 (W.C.A.B. May 10, 2019).
- SB 863 normally bars psyche PD secondary to orthopedic trauma.
- Exception: If it’s catastrophic!



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CASE LAW NEWS AND NOTES

- The WCAB felt this was a good example of a catastrophic injury. No set definition of one, but here the applicant had numerous secondary factors that made his original smoke inhalation injury “catastrophic.”



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CASE LAW NEWS AND NOTES

Catastrophic factors in Wilson included a 28-year-old firefighter who had a:

- Month long hospital stay, involuntary coma, near death experience.
- Waking up while intubated, causing panic attacks/nightmares later.
- Renal failure and liver problems.
- Can't return to work as a firefighter, too strenuous, too many restrictions on ADLs.
- AMEs/QMEs in 4+ specialties.



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CASE LAW NEWS AND NOTES

Takeaway: Catastrophic injuries are not your standard, run-of-the-mill case, and that the applicant:

- was unconscious for a few weeks in the Intensive Care Unit and almost died from his injuries;
- has numerous restrictions on his activities daily living, ranging from vision, memory, sleep, orthopedic limitations, and breathing issues;
- cannot return to his work as a firefighter.



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CASE LAW NEWS AND NOTES

Things the WCAB doesn't take into consideration when evaluating "catastrophic":

- The WCAB determined that a psychological injury is not catastrophic if it has a big impact on the applicant's earning capacity.
- The board also concluded that there is not a PD threshold that would automatically render an injury "catastrophic." In other words, there's no "magic number" or percentage of PD that would automatically render a psychological claim catastrophic.



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CASE LAW NEWS AND NOTES



The good news about the Wilson decision:

- "Catastrophic" psychological injuries will only be found in extreme cases, which are currently a tiny percentage of all claims.

The bad news:

- It will make that small subsection of bad cases even worse for defendants.



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Thank you for your time!

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