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## MEMORANDUM

ATTORNEY-CLIENT PRIVILEGED

**TO:** Stacy DeFoe, Executive Director  
Tameka Island, Executive Associate, Professional Affairs  
California Physical Therapy Association

**FROM:** Sasha G. Aguilar

**RE:** *Frequently Asked Questions*  
Assembly Bill 5

**DATE:** November 21, 2019

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▪ *What is AB 5?*

AB 5 is an assembly bill that was signed by Governor Gavin Newsom on September 18, 2019. It becomes effective as law on January 1, 2020.

▪ *What does AB5 do?*

AB 5 enacted Labor Code Section 2750.3 which provides that:

For purposes of the provisions of this code and the Unemployment Insurance Code, and for the wage orders of the Industrial Welfare Commission, a person providing labor or services for remuneration shall be considered an employee rather than an independent contractor unless the hiring entity demonstrates that all of the following conditions are satisfied...

It codified (puts into statute) the court findings in *Dynamex* case using an ABC test to distinguish between employees and

independent contractors. Now everyone will use the ABC test and not just the courts.

▪ ***Does AB 5 apply to physical therapists?***

Yes. A number of professions are exempt such as doctors, psychologist, dentists, podiatrists, insurance agents, stockbrokers, lawyers, accountants, engineers, veterinarians, direct sellers, real estate agents, hairstylists, barbers, and travel agents. Physical therapists are not listed as exempt, so the bill applies.

▪ ***Does that mean a physical therapist cannot be an independent contractor?***

Not necessarily, but AB5 states a worker, including a physical therapist, will be considered an employee *unless...*

1. The worker is are free from control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.
2. The worker performs work that is outside the usual course of the hiring entity's business.
3. The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

This test is very difficult for physical therapists to meet in an environment where they provide patient care.

▪ ***So, I am considered an employee, unless I meet all three requirements?***

Correct.

▪ ***How do I figure out if I can be an independent contractor?***

Attached is a flow chart to guide you through the ABC test.

▪ ***When does AB 5 take effect?***

January 1, 2020.

- ***What is the difference between an employee and an independent contractor?***

Employees are entitled to benefits such as minimum wage, worker's compensation, unemployment insurance, expense reimbursement, paid sick leave and paid family leave. Employers pay half of the employees' social security tax.

Employees are also governed by California wage and hour laws involving overtime, meal and rest periods, payroll rules, and leave rules.

Many companies use independent contractors to save the costs otherwise associated with employment.

- ***What if I own/manage a physical therapy practice –can I use independent contractors to treat patients?***

Under AB 5 and the ABC test above, most physical therapists who provide treatment to patients as an independent contractor will need to be reclassified as employees to avoid the serious penalties and liabilities discussed below. Consult legal counsel regarding this important issue.

- ***Are my business costs higher?***

Employees are required to have certain types of leaves, overtime and meal periods, and payroll taxes deducted. Thus, reclassifying your independent contractors to employees adds to labor costs but avoids possible penalties.

- ***What if I use an independent contractor and he/she should be an employee?***

Misclassification is very serious and there are many monetary fines associated with it. See attached penalty chart.

- ***Why are physical therapists not exempt from AB5 like physicians are?***

AB5 sets forth a number of professions that are exempt, but does not include physical therapists. Some include doctors, psychologist, dentists, podiatrists, insurance agents, stockbrokers, lawyers, accountants, engineers, veterinarians, direct sellers, real estate agents, hairstylists, barbers, and travel agents are specified as exempt. When a profession is not specified, the law provides that the Legislature meant to exclude it.

- ***How will AB 5 be enforced?***

Various California agencies, including the Labor Commissioner's Office, the Employment Development Department and the Franchise Tax Board have authority over worker misclassification. They may investigate, assess fines and penalties, and of course collect payroll taxes.

- ***Will AB 5 change?***

There could be changes when the Legislature reconvenes in 2020. Physical therapists are not the only industry that feels that it should be exempt. For example, industries such as truck owner-operators continue to lobby for exemptions. On November 12, 2019 the California Trucking Association filed suit in the Southern District of California challenging AB 5. So, there may be changes coming.