

ALERT

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 **CalChamber**
CALIFORNIA CHAMBER OF COMMERCE

Employer Liability an Issue with State-Run Pension Plan

Proposed Budget Trailer Language Removes Safeguards



The California Chamber of Commerce is fighting to protect employers from liability for a state-run retirement savings plan for private employees.

As originally established, the

California Secure Choice Retirement Savings Investment Program calls for automatic enrollment of private sector employees with an opt-out provision. Historically, automatic enrollment programs are subject to the requirements and protections of the federal Employee Retirement Income Security Act (ERISA).

The goal of Secure Choice supporters was to provide a retirement plan for an estimated 6.3 million California workers whose employers do not currently offer an eligible retirement savings program.

Private employers with five or more employees will be required to automati-

cally enroll their employees into and make deductions for those employees' Secure Choice retirement savings accounts, unless the employee opts out of the program.

Secure Choice originally anticipated enrollment to begin no sooner than 2019; however, it now is anticipating beginning enrollment in 2018.

Safe Harbor Nixed

Regulations adopted by the U.S. Department of Labor (DOL) last year offered California employers a safe harbor, exempting the Secure Choice program and others like it from the complex requirements of ERISA, the 1974 law that set standards to protect individuals in private pension plans.

The CalChamber and other business organizations insisted that the Secure Choice program not be subject to ERISA and, as such, that the program comply with the 2016 safe harbor and its criteria, along with other provisions to protect employers from liability, minimize

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Seeking Salary History May Be Banned



OPPOSE

inquiring into an applicant's prior salary even when there is no harm.

Sent to the Senate on a vote of 60-9 was **AB 168 (Eggman; D-Stockton)**, which also penalizes employers for failing to provide a pay scale upon demand, even though the employee has not suffered any harm or wage loss as a result of the violation.

In opposing AB 168, the CalChamber and a coalition of employers pointed out that the bill creates hurdles in the hiring process and already is addressed by existing law.

Current Law

Last year, the business community negotiated language on a similar proposal to ensure that an employer could not base an applicant's or employee's compensation solely on prior salary (**AB 1676; Campos; D-San Jose**; Chapter 856). AB 1676 was signed and went into effect on January 1, 2017.

The Legislature should allow this new law to have an impact before banning any inquiry into an applicant's salary history.

Salary Data: Legitimate Uses

The CalChamber letter noted that there are several legitimate, nondiscriminatory reasons employers seek information about

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Legislative Flurry as Deadlines Near

As *Alert* went to print, fiscal committees in both houses of the Legislature were scheduled to review numerous bills placed on the suspense files pending analysis of the proposals' financial impacts on the state.

Friday, May 26 is the deadline for fiscal committees to hear and send bills

to the Senate or Assembly floors for action.

The following Friday, June 2, is the deadline for bills to pass the house in which they were introduced.

Watch CalChamber online communications, including **Facebook** and **Twitter**, for updates on legislative

Labor Law Corner

Steps to Consider When Employee Leaves Behind Personal Belongings



Ellen S. Savage
HR Adviser

My employee quit without notice and left behind in her office some framed family photos and a few large pieces of artwork. What should I do with these personal items?

There is no specific labor law addressing an employer's obligation to retain or deliver personal property left behind by a former employee.

You may choose to contact the employee to arrange for her to pick it up, or you could return the property by mail or other delivery service if you know her current physical address.

When a former employee cannot be located, the employer must determine how long to keep the property that was left behind.

What 'Abandonment' Means

California's labor laws do not specify how long an employer must hold on to personal property abandoned by an employee.

In deciding how long to keep the former employee's things, an employer should keep in mind that in California, "abandonment requires non-use accompanied by unequivocal and decisive acts showing an intent to abandon." (*U.S. v. Crawford* 239 F.3d 1086 (2001))

Document Reasonable Efforts

An employer therefore should make every reasonable effort to contact the former employee to arrange for return of

the property, and document those efforts. Some suggestions include:

- Attempting to reach the former employee by mail, phone, email and/or text;
- Calling anyone the former employee may have listed as an emergency contact, and asking them if they know how to reach the employee or are willing to ask the former employee to contact you about the personal property;
- Asking current employees who may have become friendly with the individual if they know how to contact him/her.

If these efforts fail, after a reasonable period, the employer may determine that the property has been abandoned and dispose of or donate it.

Note: Unlike personal property, unclaimed wages must be turned over to the local office of the California Labor Commissioner after reasonable attempts have been made to contact the employee.

The Labor Law Helpline is a service to California Chamber of Commerce preferred and executive members. For expert explanations of labor laws and Cal/OSHA regulations, not legal counsel for specific situations, call (800) 348-2262 or submit your question at www.hrcalifornia.com.

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CalChamber-Sponsored Seminars/Trade Shows

More at www.calchamber.com/events.

Labor Law

HR Boot Camp. CalChamber. June 6, Santa Clara; August 24, Thousand Oaks; September 6, Beverly Hills. (800) 331-8877.

Nothing Ordinary About Local Ordinances in California. CalChamber. June 15, Live Webinar. (800) 331-8877.

Leaves of Absence: Making Sense of It All. CalChamber. August 18, Sacramento; June 22, Huntington Beach. (800) 331-8877.

Meal and Rest Break Rules. CalChamber. September 21, Webinar. (800) 331-8877.

International Trade

20th Annual International Business Luncheon. Northern California World

Trade Center. June 1, Sacramento. (510) 367-7389.

SelectUSA Investment Summit 2017. SelectUSA. June 18–20, Washington, D.C. (202) 482-6800.

5th Annual Pacific Cities Sustainability Initiative. Asia Society. June 29–30, Los Angeles. (213) 788-4700.

10th World Chambers Congress. Sydney Business Chamber, The International Chamber of Commerce, and The International Chamber of Commerce World Chambers Federation. September 19–21, Sydney, Australia.

Next Alert: June 9



Californians Rely on Judicial Branch to Ensure, Protect, Access to Justice

“Separation of powers,” “judicial independence” and “rule of law” are abstract concepts with important implications.

At an abstract level, most Americans cannot identify with these concepts. Nearly two-thirds cannot name the three branches of government; a third cannot name a single First Amendment right; three out of four don’t know the role of the judicial branch.

More Than Abstractions

But these concepts do not just live in abstractions. As California Chief Justice Tani Cantil-Sakauye has said:

“People have to know that government belongs to them, it runs on their participation and their leadership. But if they don’t ever get an understanding that government exists for them—three branches are there for them—then they’ll never feel they’re a part of it. And decisions will be made without them, and they’ll feel helpless—or they will mistrust the system.”

Perceptions

Despite the lack of civic literacy of these abstract concepts, Californians seem to recognize the need for a robust judiciary. A recent study of California voters conducted by the Great West Policy Research Center highlights findings on how Californians perceive the role of the third branch.

More than 7 in 10 of those polled believe that among the most important functions of California’s court system is to “hold the executive and legislative branches accountable to our State Constitution,” while more than two-thirds of voters agreed that hearing criminal and public safety cases also was a high priority.

At the same time, a plurality of voters responded that public safety

was the most important issue facing their community today. So, even while public safety tops the list of most important

issues, more voters believe that the judiciary’s primary function is to balance political power and act as the third leg of the democratic stool.

FOUNDATION FOR DEMOCRACY & JUSTICE

Adequate Funding

In support of the belief in a critical governance role for the judiciary, nearly 9 in 10 voters agreed that “adequate funding is necessary to ensure that the courts can carry out its role of holding the state Legislature and Governor accountable to state Constitutional requirements.”

It’s clear that Californians rely on the judiciary to ensure and protect access to justice, yet courthouses across California face constant pressure to adjudicate more and more cases each year and struggle to find the resources to carry out that role.

As a third co-equal branch of state government, and one that Californians encounter most in their daily lives, the courts are an invaluable institution of our democracy and one we should encourage our leaders to support.

Award-Winning Video

For more on the stake that Californians have in a strong, independent judiciary, see the brief, award-winning video produced by the Foundation for Democracy and Justice at <https://fdjca.org/videos/>.

The Foundation is a partnership of state leaders and committed professionals working to strengthen Californians’ understanding of the roles, functions and interrelationships between the three branches of state government with a particular emphasis on the importance of a strong and independent judiciary.

Contact: Sosan Madanat, Executive Director, Foundation for Democracy and Justice



TANI CANTIL-SAKAUYE
Chief Justice of California



WILLIE BROWN
Former Mayor of San Francisco
Former Speaker of the Assembly



ALLAN ZAREMBERG
President and CEO
California Chamber of Commerce

California Chief Justice Tani Cantil-Sakauye, former San Francisco Mayor/former Assembly Speaker Willie Brown and CalChamber President and CEO Allan Zaremberg highlight the importance of an independent judiciary, civic involvement and understanding the role the three branches of government play in a strong democracy in an award-winning video produced by the Foundation for Democracy and Justice, <https://fdjca.org/videos/>.

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administrative burdens and reduce the risk of employer liability if the program were to be preempted by ERISA if challenged.

Earlier this month, however, Congress passed and the President signed legislation to roll back the DOL rule, leaving employers extremely concerned about the applicability of ERISA to the Secure Choice program.

Budget Trailer Language

In response to the federal actions, Secure Choice supporters have proposed adding language to a budget trailer bill that allows the Secure Choice Investment Board to self-certify that the program is not subject to ERISA. As *Alert* went to print, that bill language was not yet in print.

The proposal relies on legal advice paid for by the board so that the board self-certifies that the program is exempt from ERISA and structures the program so it is not subject to ERISA. The legal opinion cited by Secure Choice supporters maintains that meeting the safe harbor requirements in a 1975 law established for individual retirement accounts (IRAs) will suffice.

Moving forward with the mandatory Secure Choice program without the federal ERISA exemptions could expose

businesses to ERISA requirements and litigation in federal courts, no matter what the state legislation provides.

U.S. Department of Labor

In the background to the now-repealed rule, DOL agreed that current law (the 1975 safe harbor) does not allow automatic enrollment into a retirement plan without being subject to ERISA.

Even while issuing its 2016 safe harbor regulation, however, DOL said only the courts would have the final say and even the new regulation would not guarantee that the state-run programs would be outside of current ERISA laws governing employee benefits.

Clarifying Language

In opposing the proposed budget trailer language, the CalChamber called for state lawmakers to consider carefully language from the repealed DOL rule that underscores employer concerns:

“Due to the broad scope of ERISA coverage, some stakeholders have expressed concern that state payroll deduction savings programs, such as those enacted in California, Connecticut, Illinois, Maryland, and Oregon may cause covered employers to inadvertently establish ERISA-covered plans, despite the express intent of the states to avoid such a result.”

“With regard to the 1975 IRA Payroll Deduction Safe Harbor’s condition requiring that an employee’s participation be ‘completely voluntary,’ the Department intended this term to mean that the employee’s enrollment in the program must be self-initiated. In other words, under the safe harbor, the decision to enroll in the program must be made by the employee, not the employer. If the employer automatically enrolls employees in a benefit program, the employees’ participation would not be ‘completely voluntary’ and the employer’s actions would constitute the ‘establishment’ of a pension plan, within the meaning of ERISA section 3(2). This is true even if the employee can affirmatively opt out of the program. Thus, arrangements that allow employers to automatically enroll employees—as do all existing state payroll deduction savings programs—do not satisfy the condition in the safe harbor that the employees’ participation be ‘completely voluntary,’ even if the employees are permitted to ‘opt out’ of the program. Consequently, such programs would fall outside the 1975 safe harbor and could be subject to ERISA.”

High Stakes

The CalChamber notes that the stakes are high for employers if the state gets it wrong. The state of California cannot dictate the enforcement priorities or interpretations of the federal Department of Labor. Therefore, the state alone cannot protect California employers from federal pre-emption.

“Moving the program forward under the very real threat of ERISA pre-emption clearly places employers at risk,” the CalChamber wrote in its letter opposing the Secure Choice bill language in the budget trailer bill. “We urge the legislature to consider the consequences and the legal issues surrounding the program design under the new federal circumstances and vote no on the trailer bill language.”

More Information

More background information on the Secure Choice program is available in the *Business Issues Guide* article at www.calchamber.com/businessissues.
Staff Contact: Marti Fisher

Get Easy Access to *Alert* Updates with Mobile App

Readers looking for an easy way to stay up-to-date on proposed state and federal laws or regulations of interest to employers can download the *CalChamber Alert* app at www.calchamberalert.com/app.

In addition to coverage of the CalChamber’s pro-jobs advocacy, the *CalChamber Alert* offers explanations of major court decisions affecting employers and the economy; special reports on job killer bills, the economy, ballot measures and legislative vote records; plus information on CalChamber compliance products and services.

A regular feature is a popular column answering common California employment law questions.

The latest version has been optimized for greater speed on iOS or Android platforms.



Positive Drug Test Results Hit 12-Year High

American workers tested positive for illicit drugs at the highest rate in 12 years, according to an analysis of more than 10 million workforce drug test results released by **Quest Diagnostics**, a large nationwide drug testing lab.

More than 1 in 25 workers fail their drug test: 4.2% of employee drug tests that Quest conducted were positive. This is a 5% relative increase over last year's rate of 4% and the highest annual positive drug test rate since 2004 (4.5%).

"This year's findings are remarkable because they show increased rates of drug positivity for the most common illicit drugs across virtually all drug test specimen types and in all testing populations," said Barry Sample, Ph.D., senior director, science and technology, Quest Diagnostics Employer Solutions, in a statement.

"Our analysis suggests that employers committed to creating a safe, drug-free work environment should be alert to the potential for drug use among their workforce," he said.

Positive Tests for Marijuana

Positive tests for marijuana were very common among U.S. workers, especially in states that have allowed recreational marijuana. Positive marijuana results from oral fluid tests increased nearly 75%, from 5.1% in 2013 to 8.9% in 2016. Marijuana positivity also increased in both urine testing and hair testing.

Employees in states that allow recreational marijuana use show positive drug tests at a rate more than double the national average. The number of employees testing positive in Colorado increased by 11% from 2015 to 2016. In Washington, the number increased 9%.

Recreational use of marijuana didn't

become legal in California until late 2016, but there's no reason not to expect similar results in this state.

More Use of Other Drugs

Marijuana and opiate use have received a lot of national attention, but



the Quest Diagnostics analysis points out that cocaine use continues "its troubling upswing not just in the general workforce, but in safety-sensitive jobs with federally mandated testing."

Positive drug test results for cocaine increased 12% in 2016, reaching a seven-year high of 0.28%.

Alarming, the rate of cocaine positives in post-accident testing was more than twice that of pre-employment drug tests and was also higher than the rate in random drug tests.

"While a positive test doesn't prove drug use caused the accident, it raises the question as to whether it played a role," said Dr. Sample.

Positive test results for amphetamines—which includes methamphetamines and Adderall, a prescription drug used for attention deficit disorder—also continued its year-over-year upward trend.

Positive tests for heroin remained about the same in the general U.S. workforce.

In Quest Diagnostics' analysis, the only decline was in prescription opiates. For example, positive test results for oxycodone have declined for four consecutive years, dropping 28% from 0.96% in 2012 to 0.69% in 2016.

Ability to Test

Beginning November 9, 2016, California joined several other states in legalizing recreational use of marijuana by adults. Proposition 64, also known as the Adult Use of Marijuana Act, legalized the recreational use of marijuana for adults 21 years old and over.

California employers, however, can take a deep breath of fresh air because Proposition 64 maintains the status quo for employers

seeking to maintain a drug- and alcohol-free workplace.

Even with the passage of Proposition 64, employers may continue to prohibit use, possession and impairment at work and may continue to test for use when appropriate. Proposition 64 is not intended to interfere with these employment policies or practices.

Other Resources

California Chamber of Commerce members can read the *Marijuana and Workplace Policies* white paper on HRCalifornia. Nonmembers also can sign up to read the white paper there.

A recorded CalChamber webinar, *Are Drug-Free Workplaces in California Up in Smoke?*, is available for purchase in the CalChamber Store, www.calchamberstore.com.

Staff Contact: Gail Cecchetti Whaley

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an applicant's prior compensation.

For example, employers do not necessarily have accurate wage information on what the current market is for all potential job positions. In fact, employers in competitive industries do not advertise salaries in order to utilize their pay structure as a way in which to lure talented employees from their competition.

By requesting salary information, employers can adjust any unrealistic expectations or salary ranges to match the current market rate for the advertised job position. This has worked to the benefit of the applicant/employee.

In addition, salary data can be used as a reference regarding whether the employee's expectations of compensation far exceed what the employer can realistically offer. Requiring both the applicant and employer to waste time on the interview process which, for highly compensated employees, could be lengthy, to ultimately learn at the end of the process that the employee would never consider taking the compensation offered is unnecessary.

Although AB 168 allows an employee to request a pay scale for the specific position, that mandate raises concerns as well.

As set forth above, an employer may assume a pay scale accurately captures the current market for a specific position, yet could be wrong. Disclosing a pay scale could artificially limit an applicant's interest in a position.

Employers determine the appropriate wage and salary to pay an applicant based

upon various factors, including skill, education and prior experience, as well as the funding available for the job. Employers may feel compelled to enlarge the pay scale in order to create sufficient room to adjust that rate depending on the various factors and varied candidates for the job. Such a broad pay scale will not assist an applicant in negotiations.

Disclosure of wage rates or pay scales has not been proven to address gender equity pay. A **March 28, 2015 Sacramento Bee article** detailed findings that, despite disclosing actual compensation of all employees, women staffers in the California Legislature make less than male staffers.

Current Protections

In addition to **AB 1676** enacted just last year to preclude an employer from basing an applicant's or employee's compensation solely on prior salary, Labor Code Section 1197.5 was just amended by **SB 358 (Jackson; D-Santa Barbara; Chapter 546)** in 2015 to mandate an employer provide equal wages for substantially similar work.

The CalChamber supported SB 358 after it was amended to clarify ambiguous standards, balancing the payment of equal wages for substantially similar work with maintaining an employer's ability to control the workforce and pay higher wages for legitimate reasons other than gender.

Moreover, Labor Code Section 232 precludes an employer from preventing an employee from disclosing his or her wages.

The Fair Employment and Housing Act (FEHA) precludes any discrimination in the workplace based upon various protected classifications, including gender.

Added Litigation Avenue

As a part of the Labor Code, AB 168 exposes employers to costly litigation under the Labor Code Private Attorneys General Act (PAGA). Exposing employers to additional threats of litigation, even when the employer pays an applicant equal wages as other employees, is simply unfair.

For example, under AB 168, if an employer asks an employee about his or her prior salary, yet ultimately pays the applicant a higher salary than any of the applicant's male colleagues, that employer still could be sued under PAGA for penalties and attorney's fees. It is unfair to expose employers to this costly litigation, especially when no harm has occurred to the individual applicant or employee.

Key Vote

The Assembly voted 60-9 on May 22 to send AB 168 to the Senate:

Ayes: Acosta (R-Santa Clarita), Aguiar-Curry (D-Winters), Arambula (D-Kingsburg), Baker (R-San Ramon), Berman (D-Palo Alto), Bloom (D-Santa Monica), Bocanegra (D-Pacoima), Bonta (D-Oakland), Burke (D-Inglewood), Caballero (D-Salinas), Calderon (D-Whittier), Cervantes (D-Riverside), Chau (D-Monterey Park), Chávez (R-Oceanside), Chiu (D-San Francisco), Chu (D-San Jose), Cooley (D-Rancho Cordova), Cooper (D-Elk Grove), Cunningham (R-Templeton), Dababneh (D-Encino), Dahle (R-Bieber), Eggman (D-Stockton), Flora (R-Ripon), Frazier (D-Discovery Bay), Friedman (D-Glendale), C. Garcia (D-Bell Gardens), E. Garcia (D-Coachella), Gipson (D-Carson), Gloria (D-San Diego), Gomez (D-Los Angeles), Gonzalez Fletcher (D-San Diego), Grayson (D-Concord), Holden (D-Pasadena), Jones-Sawyer (D-South Los Angeles), Kalra (D-San Jose), Lackey (R-Palmdale), Levine (D-San Rafael), Limón (D-Goleta), Low (D-Campbell), Maienschein (R-San Diego), Mathis (R-Visalia), McCarty (D-Sacramento), Mullin (D-South San Francisco), Quirk (D-Hayward), Quirk-Silva ((D-Fullerton), Rendon (D-Paramount), Reyes (D-Grand Terrace), Ridley-Thomas (D-Los Angeles), Rodriguez (D-Pomona), Rubio (D-Baldwin Park), Salas (D-Bakersfield), Santiago (D-Los Angeles), Steinorth (R-Rancho Cucamonga), M. Stone (D-Scotts Valley), Thurmond (D-Richmond), Ting (D-San Francisco), Voepel (R-Santee), Waldron (R-Escondido), Weber (D-San Diego), Wood (D-Healdsburg).

Noes: T. Allen (R-Huntington Beach), Brough (R-Dana Point), Choi (R-Irvine), Gallagher (R-Yuba City), Gray (D-Merced), Harper (R-Huntington Beach), Melendez (R-Lake Elsinore), Obernolte (R-Big Bear Lake), Patterson (R-Fresno).

No vote recorded: Bigelow (R-O'Neals), Chen (R-Walnut), Daly (D-Anaheim), Fong (R-Bakersfield), Irwin (D-Thousand Oaks), Kiley (R-Granite Bay), Mayes (R-Yucca Valley), Medina (D-Riverside), Muratsu-chi (D-Torrance), Nazarian (D-Sherman Oaks), O'Donnell (D-Long Beach).

Staff Contact: Jennifer Barrera

CalChamber Calendar

Capitol Summit:

May 31, Sacramento

International Forum:

May 31, Sacramento

Education Committee:

May 31, Sacramento

Water Committee:

May 31, Sacramento

Environmental Policy Committee:

May 31, Sacramento

Fundraising Committee:

May 31, Sacramento

Host Breakfast:

June 1, Sacramento

Board of Directors:

June 1, Sacramento

Job Creator Workforce Development Bill Moves to Senate



A California Chamber of Commerce-supported education bill aiming to

increase the pool of skilled workers has passed the Assembly with unanimous support.

AB 669 (Berman; D-Palo Alto) extends the Economic and Workforce Development (EWD) program within the California Community College system through July 1, 2023.

The bill will ensure that the program continues to provide grants to help develop industry-aligned curriculum, provide training and work-based learning opportunities and connect colleges with

businesses, thereby creating a skilled workforce aligned with the needs of industry in California, especially in subjects in highest demand. Without legislation, the program is set to expire in 2018.

The EWD program was created to advance California's economic growth and global competitiveness by developing high-quality education and services focusing on continuous workforce improvement, technology deployment, and business development, consistent with the current needs of the state's regional economies.

A 2016 report by the Chancellor's Office highlighted the program's achievements thus far, including training of almost 60,000 individuals and service to

more than 11,000 businesses. Extending the program will assist in furthering such success.

The EWD program funds both long-term and short-term activities in strategic priority areas, including advanced transportation, biotechnology, environmental technologies, health care delivery, and international trade.

Extending the program will help ensure that students continue to have access to programs targeted toward employable career paths and that employers have access to a growing pool of qualified workers trained in subject areas in highest demand.

AB 669 is set for a June 14 hearing in the Senate Education Committee.

Staff Contact: Karen Sarkissian

Senate Sends Tax Penalty Relief Bill to Assembly



A California Chamber of Commerce-supported bill providing relief from penalties when a late tax payment is due to the Board of Equalization

SUPPORT

(BOE) website passed the Senate this week.

SB 11 (Gaines; R-El Dorado Hills) prohibits the assessment of penalties for a late tax payment for sales-and-use tax to the BOE if the failure to make a payment was due to the BOE website and not attributable to the taxpayer.

Although electronic filing and payment generally is more efficient, it also can cause delay and interruption when technological problems arise. The BOE website recently encountered such technological difficulties on a quarterly deadline for

taxpayers to pay sales-and-use tax.

SB 11 ensures that taxpayers will not be assessed any penalties or interest if such website interruptions occur that are outside the control of the taxpayer, similar to other laws that allow the BOE to waive penalties assessed.

The Senate unanimously approved SB 11 on May 22. The bill has been held at the Assembly desk.

Staff Contact: Jennifer Barrera

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Partner discounts available to CalChamber Online, Preferred and Executive members.



Save 20% or More on Required Poster Updates for July 1



On July 1, 2017, minimum wage increases take effect in many California cities, as well as in nearby states. These locations require updated postings on that date. (What's more, Arizona is adding an earned paid sick time notice.)

Where your employees work affects which updated posters apply to you. (Review covered employers and employees at calchamber.com/july1.)

Now through June 16, 2017, save 20% on local ordinance and out-of-state posters with required updates for July 1. Preferred/Executive members receive their 20% member discount in addition to this offer.

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