

ALERT

Is Worker an Employee or Independent Contractor?

Two Court Cases Review Complex Issue



Properly classifying an individual as an employee versus an independent contractor has always been a

daunting task for any business/employer, especially in California. A recent U.S. district court ruling brings some clarity to the issue and a still-unresolved court case before the California Supreme Court may provide more guidance soon.

The difficulty for businesses and employers in California has been the subjective and inconsistent analysis used to determine whether an individual qualifies as an employee versus an independent contractor.

Grubhub

One of the most recent and closely watched cases is a lawsuit filed in California against Grubhub. Instead of settling, the parties went to a bench trial starting in September 2017 and finished closing arguments at the end of October 2017. On February 8, 2018 in the case of *Raef Lawson v. Grubhub, Inc.*, the U.S. court for the Northern District of California held that the former Grubhub delivery driver was properly classified as an independent contractor.

Lawson worked as a restaurant delivery driver for Grubhub in Southern California for four months in late 2015 and

See Is Worker an Employee: Page 4

Special Elections Set in Three Los Angeles County Assembly Districts



Election Day will come early for voters in three Los Angeles County-based Assembly

districts due to year-end resignations.

- Assembly District (AD) 39, formerly represented by Assemblymember Raul Bocanegra (D-Pacoima);

- AD 45, formerly represented by Assemblymember Matt Dababneh (D-Encino); and

- AD 54, formerly represented by Assemblymember Sebastian Ridley-Thomas (D-Los Angeles).

The Special Primary Election is scheduled for Tuesday, April 3 with the runoff coinciding with the regularly scheduled June 5 Primary Election. The runoff election will determine who fills the vacant seat through December.

The winning candidate in the November General Election will then serve a full two-year term. Voters will be asked four times in 2018 who they want to represent them in the lower house of the Legislature. (The regular Primary Election to choose the top two candidates for the November General Election is separate from the special election runoff.)

Multiple Candidates

All three districts—considered “safe”
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2018 **Expanding Opportunity:**
An Agenda for All Californians

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Labor Law Corner

New Parent Leave Act Applies to Employees Not Subject to FMLA/CFRA



Erika Pickles
HR Adviser

How does the New Parent Leave Act interact with the federal Family Medical Leave Act/California Family Rights Act?

Beginning January 1, 2018, California's New Parent Leave Act (Parental Leave) requires employers with 20 or more employees to allow eligible

employees to take up to 12 weeks of unpaid, job-protected leave to bond with a newborn, or a child placed with the employee for adoption or foster care.

Previously, only employers with 50 or more employees had to provide eligible employees with baby-bonding leave. That's because those employers were covered by the federal Family Medical Leave Act (FMLA) and the California Family Rights Act (CFRA)—laws that give employees the right to take protected time off for certain qualifying reasons, one of which is bonding with a new child.

Interactions with FMLA, CFRA

A common question about Parental Leave is how it interacts with FMLA and CFRA leave. To be eligible for Parental Leave, an employee must have worked for you for at least 12 months, worked at least 1,250 hours in the last 12 months, and work at a worksite with at least 20 employees within a 75-mile radius.

The New Parent Leave Act says that Parental Leave is available only to employees who are not subject to both FMLA and CFRA. That means if an employee is eligible for baby-bonding leave under FMLA/CFRA, that employee is not eligible for leave under the New Parent Leave Act. Employees can be

eligible for either Parental Leave or FMLA/CFRA leave—not both.

Overlap May Occur

That does not mean, however, that employers covered by FMLA/CFRA shouldn't be concerned with the New Parent Leave Act. Even if you are a covered employer under FMLA/CFRA, there may be times when you have an employee who is not eligible for FMLA/CFRA, but is eligible for Parental Leave.

For instance, an employee may meet the first two eligibility requirements under FMLA/CFRA (worked for you for at least 12 months and 1,250 hours), but not be eligible for FMLA/CFRA because the employee works at a worksite where you have fewer than 50 employees within a 75-mile radius. The employee, however, will be eligible for Parental Leave if the employee works at a worksite with at least 20 employees within a 75-mile radius.

Column based on questions asked by callers on the Labor Law Helpline, 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. February 28, San Diego; April 11, Oakland; April 26, Costa Mesa; June 5, Santa Clara; August 21, Sacramento; September 5, Long Beach. (800) 331-8877.

Leaves of Absence: Making Sense of It All. CalChamber. March 15, Sacramento; March 22, Pasadena; June 21, San Diego; August 10, Oakland. (800) 331-8877.

Business Resources

Higher Taxes or Real Reform Tax Seminar. Indo-American Chamber. February 28, Milpitas. (650) 450-0388.

Capitol Summit and Sacramento Host Breakfast. CalChamber. May 23–24, Sacramento. (916) 444-6670.

TECHSPO LA 2018. TECHSPO. June

13–14, Santa Monica. (800) 805-5385.

International Trade

Canada Day Ag Forum. The Consulate General of Canada, California Farm Bureau Federation and CalChamber. February 22, Sacramento. (916) 930-1233.

Import Compliance Training Program. Orange County Center for International Trade Development. February 23, Santa Ana. (714) 564-5415.

Asia Pacific Business Outlook Conference. University of Southern California
See CalChamber-Sponsored: Page 6

Next Alert: March 2



Immigration Enforcement: State Officials Issue Guidance for Employers



California Attorney General Xavier Becerra and Labor Commissioner Julie Su this week issued two documents for California employers dealing with California's Immigrant Worker Protec-



tion Act (AB 450).

- Attorney General Becerra **issued an advisory** providing an overview of and guidance on the privacy prescriptions under AB 450.

- Commissioner Su also issued **joint guidance on frequently asked questions** to help employers and workers understand and comply with the new state law.

Links to both documents are available in the media section on the Attorney General's website at www.oag.ca.gov.

Under AB 450, all employers, regardless of size, must limit U.S. Immigration and Customs Enforcement (ICE) agents' access to both the worksite and employee records, and must follow new notice obligations. This law applies to all California employers and went into effect on January 1, 2018.

Warrants/Subpoenas Required

California employers can no longer consent voluntarily to allow ICE to enter nonpublic work areas or to access com-

pany records. Instead, ICE must present legal documentation before employers can allow access.

Employers cannot voluntarily allow an ICE agent to enter any nonpublic areas of a business without a judicial warrant. The employer can take the agent to a nonpublic area to verify the warrant, as long as no employees are present and the employer doesn't provide consent to search nonpublic areas in the process.

Employers cannot voluntarily allow agents to access, review or obtain employee records without a subpoena or judicial warrant.

The prohibition does not apply to *Form I-9* or other documents for which a Notice of Inspection (NOI) was provided to the employer.

Notify Employees

Employers must follow specific requirements related to *Form I-9* inspections. For example, within 72 hours of receiving a Notice of Inspection, California employers must post a notice to all current employees informing them of any federal immigration agency's inspections of *Forms I-9* or other employment records.

CalChamber added the new **Notice to Employee English** and **Spanish** versions to the *HRCalifornia* website. These forms are available for free.

Employers also have obligations once the inspection is over. Within 72 hours of receiving the inspection results, employers must provide each "affected employee" a copy of the results and a

written notice of the employer's and employee's obligations arising from the inspection. The written notice must contain specific information and must be hand-delivered in the workplace, if possible. An "affected employee" is one identified by the inspection results as potentially lacking work authorization or having document deficiencies.

Unions also have the right to receive notices.

An employer that fails to follow any of these notice requirements can be fined between \$2,000 to \$5,000 for a first violation and \$5,000 to \$10,000 for each subsequent violation.

At the same time, federal penalties for *Form I-9* violations can range from a couple hundred dollars to more than \$20,000.

Preparation Is Essential

Because the timeframes are so short, preparation is key to meeting the notice requirements. Employers should have a process in place to respond to Notices of Inspection. Employers should identify who in their organization would likely receive a Notice of Inspection and confirm that person knows how to respond.

CalChamber members can learn more about **Worksite Immigration Enforcement and Protections** in the HR Library.

The white paper, *Worksite Immigration Enforcement: What You Need to Know* is available for **nonmembers to download**. CalChamber **members can also access this white paper** on *HRCalifornia*.

CalChamber Calendar

Water Committee:

March 1, Coronado

Board of Directors:

March 1-2, Coronado

International Trade Breakfast:

March 2, Coronado

Capitol Summit:

May 23, Sacramento

Is Worker an Employee or Independent Contractor?

From Page 1

early 2016. He complained that Grubhub improperly classified him as an independent contractor rather than an employee under California law and in doing so violated California's minimum wage, overtime and employee expense reimbursement laws.

For years, determining whether a worker is an independent contractor or an employee has been governed by the multi-factor test found in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341. This test focused on whether the person to whom service has been rendered has the right to control the manner and means of accomplishing the desired result. Businesses and individuals have relied on this test as they agreed to their business relationships.

According to the *Borello* precedent, "the principal test of any employment relationship was whether the person to whom the service is rendered has the right to control the manner and means of accomplishing the result desired."

The district court in the *Grubhub* case found that:

- Grubhub exercised little control over the details of Lawson's work during the four months he performed deliveries for Grubhub.

- Grubhub also did not control Lawson's appearance while he was making Grubhub deliveries.

- Grubhub did not require Lawson to undergo any particular training or orientation.

- Lawson, rather than Grubhub, controlled whether and when Lawson worked and for how long.

- Lawson could decide not to work a block he signed up for right up to the time the block started. In other words, he had no obligation to perform any delivery offered to him by Grubhub even though he had signed up to work a particular block.

- Lawson had complete control of his work schedule.

- Grubhub also did not control how and when Lawson delivered the restaurant orders he chose to accept.

- Grubhub also did not prepare performance evaluations of Lawson.

In the opinion, U.S. Magistrate Judge Jacqueline Scott Corley wrote:

"After considering all of the Borello factors as a whole in light of the trial record, the Court finds that Grubhub has satisfied its burden of showing that Mr. Lawson was properly classified as an independent contractor. While some factors weigh in favor of an employment relationship, Grubhub's lack of all necessary control over Mr. Lawson's work, including how he performed deliveries and even whether or for how long, along with other factors persuade the Court that the contractor classification was appropriate for Mr. Lawson during his brief tenure with Grubhub."

California Supreme Court Case

Two days before the federal court ruling in the *Grubhub* case, the California Supreme Court heard oral arguments in a case that will decide what definition of employee should be applied in class action lawsuits alleging that wage-and-hour violations occurred because workers were improperly classified as independent contractors.

The California Chamber of Commerce filed a friend-of-the-court brief in the case of *Dynamex Operations West, Inc. v. Superior Court*. The case involved a class action lawsuit brought by delivery drivers who alleged they were misclassified as independent contractors and that the misclassification resulted in unlawful denial of overtime and other wage-and-hour violations.

Despite the *Borello* precedent, in 2014, a California appellate court issued an opinion allowing workers in a class action lawsuit to rely on a Wage Order's expansive definitions of "employer" and "employee" to bolster their claim that they were misclassified as independent contractors. The Wage Order test is much easier for a worker to meet than the right to control test.

CalChamber is concerned that the appellate court's opinion creates uncertainty as to whether any independent contracting arrangement could be created.

In a letter brief, CalChamber noted that California is one of the most challenging places in which to run a business.

California businesses face innumerable compliance requirements set forth in, at times, confusing and ambiguous regulations and statutes. CalChamber urged the Supreme Court to review the *Dynamex* case because allowing the Court of Appeal opinion to stand will inject one more layer of uncertainty into the task of classifying workers as employees versus independent contractors, which could result in more litigation.

The California Supreme Court agreed to review the lower court decision in *Dynamex* and to specifically decide the following issue:

- In a wage-and-hour class action involving claims that the plaintiffs were misclassified as independent contractors, may a class be certified based on the Industrial Welfare Commission definition of employee? Or should the common law right to control test for distinguishing between employees and independent contractors apply?

Arguments were heard on February 6. The court has 90 days to rule.

CalChamber Position

The challenge employers face with regard to properly classifying individuals as employees versus independent contractors has been an issue in California for years. The growth of the gig economy has simply mainstreamed the challenge.

Many employers do not intentionally misclassify their employees as independent contractors. Rather, most employers conduct an analysis of the *Borello* factors referenced above to determine the appropriate classification. The significant financial consequences employers face as a result of misclassification fail to take into consideration their good faith efforts to navigate through subjective, differing and sometimes inconsistent standards.

All employers in California, including those in the gig economy, would benefit from objective standards that provide better guidance of who qualifies as an employee versus an independent contractor, but do not eliminate the option for independent contractor status altogether.

Staff Contacts: Erika Frank, Laura E. Curtis

Proposition 68

CalChamber Supports Clean Water Bond; Urges Members to Join Endorsement



The California Chamber of Commerce Board of Directors

voted to support Proposition 68 (The California Clean Water & Safe Parks Act), a bond measure that will appear on the June 2018 ballot. The measure funds vital investments in the state's natural resources, with a crucial emphasis on water quality and reliability.

CalChamber is proud to be a part of the broad coalition supporting Prop. 68 and urges members to join in issuing support for the bond today by clicking the link at the campaign website: <https://yes68ca.com>.

CalChamber's endorsement has been echoed by organizations throughout the state, including the League of California Cities, Association of California Water Agencies, the American Heart Association, California State Parks Foundation, The Nature Conservancy and League of Women Voters.

Why CalChamber Supports

The state Legislature passed SB 5 (de León; D-Los Angeles) to put the bond measure on the ballot. If approved by voters, the measure would authorize the issuance of \$4 billion in general obligation bonds.

The funds for water quality and supply total \$1.27 billion of the \$4 billion (30%). The funds for environmental protection and restoration total \$2.83 billion of the \$4 billion (70%).

The CalChamber Board voted to support Prop. 68 because the measure:

- Provides funds for groundwater cleanups that improve water quality.
- Provides funds for flood protection and repair.
- Provides \$250 million for clean drinking water and drought programs with \$30 million available for grants in the San Joaquin River basin, where many communities lack access to clean, safe drinking water.
- Provides funds for parks in urban and disadvantaged communities.
- Improves state park tourism.

- Helps address the backlog of deferred maintenance at state parks.
- Invests in rural communities.

Why Join Endorsers

Prop. 68 will help tackle some of the most critical issues facing the state, helping to make California's water supplies more secure, making needed investments in drought preparedness and ensuring every California community has access to safe, quality parks.

The measure will fund projects to ensure clean drinking water throughout California, protect communities from floods, safeguard the state's oceans, rivers, lakes and streams, and build new outdoor spaces in neighborhoods with the greatest need.

The CalChamber invites members to join us in pushing for Prop. 68's passage by lending their names to the broad coalition of organizations already supporting the measure.

For further information on Prop. 68, please contact Sarah Melbostad at smelbostad@fionahuttonassoc.com or (818) 760-2121.

Special Elections Set in Three Los Angeles County Assembly Districts

From Page 1

Democratic seats—have drawn multiple candidate fields and only one of the office seekers currently holds an elective office.

However, in North San Fernando Valley-based AD 39, former Assembly-member Patty Lopez is running in an attempt to regain the seat she lost to Bocanegra in 2016.

What the candidates lack in electoral experience they more than make up for in their past academic achievements. In the case of AD 39, three leading candidates have advanced degrees, with one, Luz Rivas, holding an undergraduate electrical engineering degree from Massachusetts Institute of Technology (MIT) and a master's in technology education from Harvard University.

The two leading candidates in the West San Fernando Valley-based AD 45 also have impressive academic credentials, with Tricia Robbins Kasson holding a master's in urban planning from the University of Southern California (USC) and Jesse Gabriel, who earned his J.D. from Harvard Law School.

Finally, in the West Los Angeles-based AD 54, there are two leading candidates, both of whom holding post-graduate degrees. Los Angeles Community College District Board Member Sydney Kamlager, the lone elected running in these districts, earned her master's in public policy from USC. Her principal challenger, Tepring Piquado, is a Ph.D. neuroscientist working at the RAND Corporation as a research and policy scientist. Piquado

received both her master's and Ph.D. from Brandeis University.

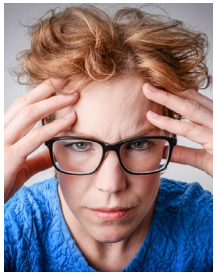
CalChamber Activity

The California Chamber of Commerce Public Affairs Department is closely monitoring the activity in all three Assembly districts, having interviewed all leading candidates. In addition, the department is working for other business community groups in an assessment of candidate viability, as well as their stances on issues important to the employer community.

For more information on these races or others races in the regularly scheduled elections, please contact the Public Affairs Department.

Staff Contact: Martin R. Wilson

CalChamber Seminar Explains How to Manage Leaves of Absence



The challenges of managing leaves of absence and resolving related human resources issues are the focus of the popular California Chamber of Commerce seminar “Leaves of Absence: Making Sense of It All.”

Plenty of documentation and tracking are involved, which aren’t so simple when leaves are intermittent or when California and federal rules overlap.

At the seminar, CalChamber employment law experts walk attendees through paid sick leave, family, medical and parental leave, pregnancy disability leave and more.

“Navigating the different leaves available to California employees is always a hot topic for California employers, particularly so this year with the addition of the New Parent Leave Act,” says Erika Pickles, seminar co-presenter and CalChamber employment law counsel. “Understanding the numerous laws and requirements that apply to employee leaves is crucial for employers to stay in compliance.”

Topics

The seminar will cover common and more difficult-to-resolve issues related to leaves of absence, such as:

- What benefits apply whether the leave is paid or unpaid;
- Eligibility requirements for various leaves;
- Required notices from the employee and the employer;
- What leaves require employers to continue benefits such as health care;
- When employers must pay an employee on a leave of absence;
- How different leaves interact with each other.

Locations/Dates

- Sacramento: Thursday, March 15;
 - Pasadena: Thursday, March 22;
 - San Diego: Thursday, June 21;
 - Oakland: Friday, August 10.
- Time: 8:30 a.m. to 3:30 p.m.
 Cost: \$399 (\$319.20 for CalChamber Preferred and Executive members).

Presenters

• **Erika Frank**, executive vice president, legal affairs, and general counsel, joined CalChamber in April 2004 as a policy advocate and general counsel, leveraging her 10 years of legal, governmental and legisla-

tive experience. Named vice president of legal affairs in 2009, she is CalChamber’s subject matter expert on California and federal employment law. Frank oversees and contributes to CalChamber’s labor law and human resources compliance publications; co-produces and presents webinars and seminars; and heads the Labor Law Helpline. J.D., McGeorge School of Law.

• **Erika Pickles** joined CalChamber in 2015 as employment law counsel and a Helpline HR adviser. She previously represented employers in California and federal employment law litigation, class actions, and private arbitration involving a range of workplace-related issues, including wage and hour, discrimination, harassment, retaliation and wrongful termination claims. She also investigated and responded to administrative claims before state and federal agencies, and conducted employment law training seminars. J.D., University of San Francisco School of Law.

Registration

Register online at www.calchamberstore.com or call (800) 331-8877 for more information.

This seminar is approved for 6.0 HRCI recertification, SHRM professional development and MCLE credit hours.

CalChamber-Sponsored Seminars/Trade Shows

From Page 2

Marshall School of Business. April 16–17, Los Angeles. (213) 740-7130.
 Business Forum: Innovations in Safety and Security. U.S. Consulate in Hong Kong and the U.S. Commercial Service. April 18–20, Hong Kong. (703) 235-0103.
 Expo Seguridad Mexico Trade Show. Governor’s Office of Business and Economic Development. April 26–28,

Mexico City. (916) 322-0694.
 World Trade Week Kickoff Breakfast. Los Angeles Area Chamber. May 4, Los Angeles. (213) 580-7569.
 Water and Agriculture Technology Business Mission to Israel. U.S. Chamber. May 8–10, Israel. (202) 463-3584.
 21st Annual International Business Luncheon. World Trade Center Northern California. May 24, Sacramento. (916)

319-4272.
 SelectUSA Investment Summit. U.S. Department of Commerce. June 20–22, Oxon Hill, MD. (800) 424-5249.
 83rd Thessaloniki International Fair. HELEXPO. September 8–16, Thessaloniki, Greece.
 China International Import Expo. China International Import Export Bureau. November 5–10, Shanghai, China.

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U.S. House OKs Retroactive Renewal of Cost-Saving Trade Preference Program



This week, the U.S. House of Representatives approved bipartisan legislation providing a

three-year retroactive renewal of the Generalized System of Preferences (GSP) program.

The 400-2 vote the evening of February 13 renews a longstanding U.S. trade preference program that delivers tariff relief and cost savings to U.S. businesses, workers, and consumers across the country. The issue now is expected to be addressed in the U.S. Senate in March.

“GSP expiration has already cost American companies approximately \$100 million, a figure that grows by several million dollars every day,” Dan Anthony, executive director of the Coalition for GSP, said in statement. “A three-year extension will provide American businesses with the certainty needed to continue growing and investing in their workers and communities.”

Business Letter

On January 4, nearly 400 U.S. companies and associations (including the California Chamber of Commerce) sent a letter to House Speaker Paul Ryan, Senate Majority Leader Mitch McConnell, House Minority Leader Nancy Pelosi, and Senate Minority Leader Chuck Schumer urging swift, retroactive renewal of the GSP program.

GSP had expired on December 31, 2017, and companies now must pay \$2 million–\$3 million per day in extra taxes while awaiting a potential congressional reauthorization. The last time GSP expired, Congress did not renew it for nearly 2 years and companies paid about \$1.3 billion in tariffs.

Despite broad, bipartisan support in

both the House and Senate, GSP renewal did not get a vote in 2017. In January 2018, a White House official reported the Trump administration supports a three-year GSP extension and would like to see Congress act “this year.”

Boosting Growth

GSP is an important tool for boosting economic growth and job creation. Many U.S. companies source raw materials and other inputs from GSP countries, and the duty-free treatment of these imports reduces the production costs of these U.S. manufacturers, making them more competitive.

According to analysis by the Coalition for GSP, approximately 82,000 jobs are either directly or indirectly associated with the importation and use of GSP-eligible imports.

GSP saved U.S. companies \$619 million in the first eight months of 2017, about \$83 million more than in 2016. California has received the most savings—more than any other state. In 2016, GSP waived tariffs in California on \$3.2 billion worth of imports and saved California companies \$119 million. Of the \$729 million saved by U.S. companies in 2016, more than 16.3% went to California.

Products eligible for duty-free treatment under GSP, according to the Office of the U.S. Trade Representative, include most manufactured items; many types of chemicals, minerals and building stone; jewelry; many types of carpets; and certain agricultural and fishery products.

Background

The GSP program eliminates import taxes on designated products from 120 developing countries around the world. It was instituted on January 1, 1976 by the Trade Act of 1974.

The U.S. program is one of 14 GSPs around the world.

The U.S. GSP was most recently reauthorized on June 29, 2015 (effective July 29, 2015) for a period of two and a half years. According to the Coalition for GSP, the renewal alone led to about \$1.3 billion in refunds.

Coalition members represent businesses ranging in size from single-person sole proprietorships to some of the largest corporations in the world. Industries represented include apparel, footwear, food, consumer electronics, fashion jewelry and accessories, wood products, fisheries, retail, recreational vehicles, rug importers, sports and fitness, and travel goods. The businesses are headquartered in 46 states and 290 congressional districts, and the District of Columbia.

CalChamber Position

The California Chamber of Commerce, recognizing that the GSP has stimulated two-way trade with the United States and has contributed to the long-term economic development of some developing countries, supports annual extensions of the GSP.

In keeping with long-standing policy, the CalChamber enthusiastically supports free trade worldwide, expansion of international trade and investment, fair and equitable market access for California products abroad and elimination of disincentives that impede the international competitiveness of California business. New multilateral, sectoral and regional trade agreements ensure that the United States may continue to gain access to world markets, resulting in an improved economy and additional employment of Americans.

For further information, see www.calchamber.com/GSP and <http://renewsgptoday.com>.

Staff Contact: **Susanne T. Stirling**



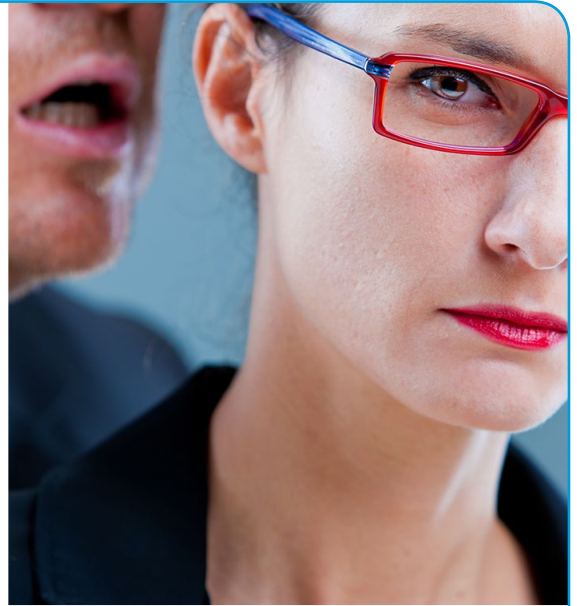
LIVE WEBINAR | FRIDAY, FEBRUARY 23, 2018 | 10:00 - 11:30 AM PT
Sexual Harassment Investigations From A to Z

She said. He said. Do you know exactly what to do—the moment an employee informs you of sexual harassment?

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Join CalChamber and special guest presenter Lisa Buehler for a start-to-finish overview of properly investigating sexual harassment in your workplace.

Cost: \$199.00 | Preferred/Executive Members: \$159.20



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