

ALERT

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 **CalChamber**[™]
CALIFORNIA CHAMBER OF COMMERCE

Committee OKs Government Agency to Raise Payroll Taxes



On a party-line vote, the Senate Health Committee gave unfettered discretion to an unelected government bureaucracy to raise taxes — anytime it deems

appropriate — to fund a comprehensive health benefit package for the uninsured.

AB 8 (Núñez; D-Los Angeles) imposes a tax on employers who can't afford to provide health care coverage to fund health care coverage for those who don't currently purchase it. The Cali-

fornia Chamber of Commerce-**opposed** "job killer" bill sets up a government-run health care system for employees who don't receive health care from their employers financed almost exclusively by a payroll tax on all employers who don't spend a certain level of funding on employee health care.

In addition, the bill grants to an unelected government bureaucracy — the Managed Risk Medical Insurance Board (MRMIB), unpaid appointees of the Governor and Legislature — the authority to increase the employer tax to whatever

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'Job Killers' Threaten Rollback of Workers' Compensation Reforms

A handful of California Chamber of Commerce-**opposed** bills that roll back cost-saving workers' compensation reforms, including three "job killer" bills, are moving through the Legislature.

SB 942 (Migden; D-San Francisco), SB 936 (Perata; D-Oakland) and AB 338 (Coto; D-San Jose) increase workers' compensation costs and jeopardize the 2004 reforms.

'Job Killers' Still Moving

Following are three "job killer" bills to increase workers' compensation costs still moving through the Legislature:

- **SB 942** increases workers' compensation costs by creating new requirements for employers when bringing injured employees back to work.

The bill expands labor code section 132(a), which protects employees from discrimination based on their workers' compensation claims. Specifically, the bill creates new penalties for employers who do not return injured workers to their pre-injury occupation within five days of receiving notice that the employee can return to work, making the employer liable for a penalty of \$100 per day, plus payment of full wages while not in compliance.

This unnecessary expansion is not in keeping with the traditional purpose of

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CalChamber policy advocate Marti Fisher reviews testimony at the State Capitol for the July 11 hearing for AB 8 (Núñez; D-Los Angeles), a bill that imposes a tax on employers to fund a government-run health care system. AB 8 was approved on a party line vote in the Senate Health Committee.

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Labor Law Corner

Customer Preference Not an Excuse for Discrimination



Ellen Savage
Employment Law
Counsel

I'm hiring for customer service positions, and our customers really prefer people they can identify with. Can I refuse to hire applicants who have heavy foreign accents or who are not highly fluent in English? What about applicants who wear turbans, veils or other ethnic clothing?

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*E-mail: alert@calchamber.com.
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Both state and federal law protect against national origin discrimination, including discrimination based on foreign accent, fluency and cultural traits including clothing. While there are limited circumstances where an employer may take these factors into account in making employment decisions, customer preference is never a defense to a claim of national origin discrimination.

Accent

Generally, employment decisions may be based on a person's accent only when:

- effective oral communication in English is required to perform job duties; and
- the individual's foreign accent materially interferes with his or her ability to communicate orally in English.

It is important to distinguish between a merely noticeable foreign accent and one that interferes with communication skills necessary to perform job duties.

While the federal Equal Employment Opportunity Commission specifically recognizes that effective oral communication is required for positions such as customer service, teaching and telemarketing, an employer still must determine whether the particular individual's accent interferes with the ability to perform the job duties involved.

For example, a hotel hiring a concierge may take an applicant's heavy accent into account since effective communication with hotel guests, both in person and over the telephone, is essential to the position. The same applicant may be able to work in the data entry department, since his heavy accent should not affect his ability to perform those duties.

Fluency

An employer may wish to establish minimum English fluency requirements for all employees. However, a fluency re-

quirement is permissible only if required for the effective performance of a particular position.

The employer must be prepared to show that a certain level of fluency is necessary to do the job. For example, an applicant may be turned down for a sales position in a primarily English-speaking community due to his limited ability to speak English, if the employer can show he would not be able to effectively assist customers.

However, the same applicant might be qualified for a job in the stock room where there is limited contact with customers.

Cultural Traits

It is illegal to discriminate against a person because of his or her cultural traits, including wearing items of clothing such as turbans and veils. While this style of dress may be different from what a customer is wearing, again, customer preference is not a defense.

However, an employer could impose the same dress code on all workers in similar jobs, regardless of their national origin, as long as the policy was not adopted for discriminatory reasons and is enforced evenhandedly.

Reasonable accommodation must be made if an employee wears a particular garment for religious reasons, unless the employer can show a valid safety-related reason for refusing to allow the religious garment. For example, employees who must wear hard-hats can be required to remove turbans or other head-coverings that would interfere with the safety gear.

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.

Seminars/Trade Shows

Business Resources

California Coalition on Workers' Compensation (CCWC). Anaheim, July 31-August 1. (916) 441-4111.

Next Alert: July 27



'Job Killer' Fuel Mandates Move in Senate

Two "job killer" bills that are likely to result in higher fuel and energy costs in California passed the Assembly Transportation Committee this week. Both bills failed passage last week in the same committee but were granted reconsideration and heard again July 9.

SB 140 (Kehoe; D-San Diego) disadvantages California businesses and increases fuel prices by creating a fuel mandate that picks a winner in the alternative fuels market, preventing the research and development of additional viable options that may be cheaper and more efficient.

SB 210 (Kehoe; D-San Diego) interferes with the development of a competitive alternative fuels market and threatens job creation in California by creating a costly low carbon fuel standard that conflicts with the existing standard created by Governor's Executive Order S-7-04.

SB 140 Prejudges Options

SB 140 would require at least 2 percent of all diesel fuel sold in the state to contain renewable diesel fuel by a date specified by the Air Resources Board (ARB) and 5 percent two years after the implementation of the 2 percent standard.

AB 1007 (Pavley; D-Agoura Hills), signed in 2005, required the California Energy Commission and the ARB to evaluate and recommend options for diversifying the state's energy portfolio to increase consumer access to and use of alternative, non-petroleum fuels. This process is underway.

Unfortunately, SB 140 prejudices this analysis by choosing a winner in the fuels market when all options have not been thoroughly researched and examined.

Although renewable diesel fuel likely will play an important role in California's energy future, it is important to allow the market to pursue as many options as possible instead of prematurely picking winners. Only then can the best fuel options for emission reductions be determined.

Furthermore, SB 140 would make demands on the state's fuel transportation infrastructure that it is not equipped to meet, potentially resulting in increased



transportation costs, decreased supply reliability and even damage to existing infrastructure.

SB 210 Reduces Flexibility

SB 210 limits the fuel technology that providers may use to meet the requirement for a 10 percent reduction in greenhouse gas emissions from fuels.

In order to meet increasing consumer demand, it is necessary that the fuels market be full of options and represent a mix of alternatives. Unlike the Governor's Executive Order, SB 210 does not allow the market to determine the best emission-reduction technologies and limits the flexibility of fuel providers to meet the 10 percent reduction standard.

In addition, SB 210 prejudices the regulatory development process for AB 32 and the Governor's Executive Order already underway at the ARB.

Market Mechanisms in Place

The low carbon fuel standard enacted by Governor Arnold Schwarzenegger in January 2007 is the world's first such standard for transportation fuels.

It is a market-based approach that allows providers to choose how they reduce emissions while responding to consumer demand. For example, providers may purchase and blend more low-carbon ethanol into gasoline products, purchase credits from electric utilities supplying low carbon electrons to electric passenger vehicles or diversify into low carbon hydrogen as a product,

among many options.

This approach refrains from picking winners and losers, responds to supply-and-demand market forces and concentrates on reducing emissions at the lowest cost to consumers and businesses throughout California.

Unforeseen Consequences

It is important to keep in mind the effects these mandates could have on the price of fuel in California. Mandates historically have led to higher, not lower, prices. They force the market to supply — and consumers to buy — products regardless of price.

The California Chamber of Commerce supports fuel efficiency and the use of renewables, but it is vital for California to continue to work on promoting policy goals that are both economical and environmentally sustainable. Although renewable diesel fuels will play a role in meeting California's future energy demand, the state should focus on promoting all alternatives and should work with existing initiatives to ensure its energy supply for the future.

Key Vote

Both SB 140 and SB 210 passed Assembly Transportation on a vote of 8-6.

Ayes: Carter (D-Rialto); DeSaulnier (D-Concord); Karnette (D-Long Beach); Nava (D-Santa Barbara); Portantino (D-La Cañada Flintridge); Ruskin (D-Redwood City); Solorio (D-Santa Ana); Soto (D-Pomona).

Noes: Duvall (R-Yorba Linda); Galgiani (D-Stockton); Garrick (R-Solana Beach); Horton (R-Chula Vista); Houston (R-San Ramon); Huff (R-Diamond Bar).

Action Needed

Both SB 140 and SB 210 will be heard next in the Assembly Natural Resources Committee. The CalChamber urges members to contact their committee members to **oppose** these "job killers."

Staff Contact: Amisha Patel

Committee OKs Government Agency to Raise Payroll Taxes

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level it deems appropriate to pay for the comprehensive benefit package in the proposal. It seems virtually certain the payroll tax will have to be increased substantially, well beyond what most employers pay in health care costs today.

Senate President Pro Tem Don Perata (D-Oakland) and Assembly Speaker Fabian Núñez announced last month that they have merged their proposals into the Speaker's bill, AB 8, compromising on provisions where their legislation would have previously differed. SB 48, which formerly carried Perata's proposal, has since been amended by another author to deal with a different health subject.

"CalChamber members provide healthcare coverage to millions of working Californians and their dependents. We support the goal of increasing health care coverage to more Californians by increasing insurance affordability — without undermining California's economy," said CalChamber President Allan Zaremborg. "Unfortunately, the plan proposed by the Democratic leaders does not meet this goal. AB 8 is not healthcare reform, it is a prescription for continued budget deficits, increased taxes, higher health insurance premiums and fewer jobs."

Underfunded Mandate

A look at the makeup of the uninsured in California quickly demonstrates why it is likely that the benefit package in the new government health care program would require revenues from a much higher tax rate than the 7.5 percent of Social Security wages contained in AB 8.

Other than people with a pre-existing condition, the vast majority of Californians without health insurance are individuals employed in lower-wage jobs. Neither they nor their employers can afford to buy health care coverage.

"A 7.5 percent tax on the payrolls of low-wage employers will not provide enough revenue to purchase the average HMO plans envisioned in the legislation; much more revenue will be needed," Zaremborg said. "And since health care cost inflation grows more rapidly than payroll, even more taxes will be needed in the future as the gap between the costs of the new program and collected revenues only widens.

"Where will the extra needed rev-

enue come from? As envisioned in the legislation: by ever-increasing the health care payroll tax. This means employers who provide health insurance today and believe the bill won't impact them should think again: the payroll tax almost certainly will have to be raised above the payroll percentage level most employers spend on health care today — triggering a requirement for them to pay the difference to the state."

Illegal Tax

"Rather than seek to contain costs and address access through increased affordability, AB 8 simply imposes an illegal tax on employers who can't afford to purchase health insurance," Zaremborg said. "Labeling this new health care tax a 'fee' that can be approved by a simple legislative majority violates the will of the people, who amended our state constitution to require a two-thirds vote for tax increases when they passed Proposition 13. What is even more frightening about the Democrats' bill is that it gives the power to raise this new tax, 'as necessary,' to an unelected board of political appointees. Since the government-run health care program created by the bill is financially unsustainable, it certainly will be 'necessary' to raise the tax."

AB 8 also appears to violate federal law. The federal appellate court recently has ruled that a "pay or play" scheme in Maryland violates the federal Employee Retirement Income Security Act (ERISA), which prohibits states from adopting legislation that requires multistate employers to have different obligations from state to state in how they deliver health care to their employees.

"AB 8 does not increase affordability, does not share responsibility, and is neither sustainable nor legal. It is a bad bill that should be rejected so elected

leaders can focus on real solutions that are financially sustainable and keep faith with the state constitution and federal law," Zaremborg said.

Provisions

AB 8 was officially amended July 3 and includes the following provisions:

- In a major split from the Governor's approach, individuals will not be required to purchase health care coverage.

- Insurers, however, will be required to issue coverage for anyone in the individual market without serious medical conditions.

- A high-risk pool for individuals with serious medical conditions is to be "funded by a broad assessment on health plans."

- The employer mandate and purchasing pool would go into effect in 2010.

- Existing insurance rules for small employers are extended to mid-sized employers with 51-250 employees, while rate bands in the mid-size group market are phased out. There are no exemptions for small businesses.

Key Vote

AB 8 passed the Senate Health Committee July 11 on a party line vote of 7-4.

Ayes: Alquist (D-Santa Clara); Cedillo (D-Los Angeles); Kuehl (D-Santa Monica); Negrete McLeod (D-Chino); Ridley-Thomas (D-Los Angeles); Steinberg (D-Sacramento); Yee (D-San Francisco).

Noes: Aanestad (R-Grass Valley); Cox (R-Fair Oaks); Maldonado (R-Santa Maria); Wyland (R-Del Mar).

The bill will be heard next by the Senate Appropriations Committee.

Contact your Senate representatives and urge their "no" vote on AB 8.

Staff Contact: Marti Fisher

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CalChamber Member Profile

'Company They Keep' Keeps Montague Cooking for 150 Years

Wilfred Weed Montague, purveyor of pots, pans and assorted hardware items, founded Locke and Montague in Gold Rush-era San Francisco in 1857.

Now, 150 years later, through a number of incarnations and a transfer of ownership to the Whalen family in 1932, The Montague Company — a member of the California Chamber of Commerce since 1971 — is a leading producer of high quality, heavy-duty cooking equipment in the food service industry.

"I never really thought much about the total number of years the company has been in existence," said Tom Whalen, the company's president and the third generation Whalen to lead The Montague Company. "It kind of crept up on me. In this industry, there are few companies that have been around for 150 years, let alone family-owned. It bears recognition."

'Good to Be the Boss'

Along with the satisfaction of a sesquicentennial celebration, Whalen is proud of the quality equipment Montague produces and of the company's successes in the 75 years his family has owned it.

Whalen's grandfather, Joseph, started working with Montague in the 1920s, first as a journeyman, then as a foreman. When the Great Depression hit, an opportunity opened for Joseph to purchase the business. The value of keeping the business in the family has been passed down through the generations.

"Hearing about it at the dinner table, sitting around on the weekends and listening to my grandfather and father talk about the company, I felt a closeness to it and a sense of wanting to continue the business," Whalen said.

Whalen said the most rewarding part of growing up in the business has been hearing the good things customers have had to say about Montague equipment.

"It's good to be the boss when you are surrounded by people who are willing to do whatever it takes to meet or exceed the expectations of our customers," he said. "It is the dedication and commitment of our employees that has helped grow the company and reach the level of success we have today."

Customizing Success

How does a company stay in business



Production staff create quality cooking equipment at The Montague Company in Hayward.

for 150 years? Both Whalen and Daniel Garvin, director of sales and marketing, credit Montague's focus on quality, customization and responsiveness to customer needs for its staying power.

In an increasingly consolidated and value-engineered market in which many competitors have been sold to conglomerates, "Montague has maintained a focus on having the best quality we possibly can build; we do more custom work, rather than less," Garvin said.

"We are resolved to be independent in an era of consolidation," Whalen said. "In the primary cooking equipment industry, we are one of the few companies that is independent, and we are successfully competing against companies 10 to 20 times the size."

Montague prides itself on responding to customer requests and suggestions, a prime reason celebrity and gourmet chefs around the world seek out the company. This responsive philosophy assures Montague's motto — "Known By the Company We Keep..." — rings true.

"The key ingredient of our success is listening to the customer first," Whalen said.

The Montague Company has grown steadily over time, maintaining more than 125 production and customer service staff and nearly doubling the square footage of its manufacturing facility a few years ago.

Still, the road ahead is not without its challenges. "Although the quality of life in

California is excellent, maintaining a business here comes at a cost," Whalen said. "Sometimes it's difficult. Traffic, fuel and energy costs and the cost of housing for employees all take their toll."

Whalen considers these as just a few factors contributing to the biggest challenge facing The Montague Company: finding and retaining quality employees.

Belonging to the CalChamber is one avenue through which Montague supports pro-business policy-making efforts.

"It's important from a business lobby sense, from a political standpoint, to have a body to fight for the rights of businesses," Whalen said. "With legislation in California, there's not a real understanding all the time of what it takes to run a business, what it takes to recruit good people and keep them."

Despite the challenges, Whalen sees The Montague Company staying where it is for now. Someday, he would like to pass the company to another generation of family, along with the legacy of quality and custom craftsmanship.

The prospects look bright for a company with many industry accolades and a clientele as diverse and far-reaching as Le Cirque in New York City, the Chinese Embassy in Singapore, the Peruvian Navy and Ruth Chris' Steakhouses worldwide.

"Chefs move around a lot," says Garvin. "When they go somewhere else and they don't like what they're using, they request Montague. That's a nice position to be in."

Legislative Outlook

An update on the status of key legislation affecting businesses. Visit www.calchambervotes.com for more information, sample letters and updates on other legislation. Staff contacts listed below can be reached at (916) 444-6670. Address correspondence to legislators at the State Capitol, Sacramento, CA 95814. Be sure to include your company name and location on all correspondence.

Container Tax Disguised as Fee Passes Assembly Committee



OPPOSE

A California Chamber of Commerce-**opposed** “job killer” bill that assesses an illegal tax on containerized cargo coming through the state’s three largest ports passed the Assembly Transportation Committee this week.

SB 974 (Lowenthal; D-Long Beach) increases the cost of shipping goods and makes California less competitive by imposing an illegal per-container tax in the ports of Long Beach, Los Angeles and Oakland.

The CalChamber believes SB 974 is imposing an illegal tax because it would pay for infrastructure that also is used by citizens in the course of their normal lives, as well as other trucks and trains in the course of intrastate commerce. A fee is defined as benefiting those who pay the fee, which is not the case in SB 974.

The CalChamber is leading a coalition of more than 200 members, including companies and associations in the retail, high technology, shipping, food and agriculture industries, local chambers of commerce, manufacturers and business and industry organizations, in the drive against this bill.

Problems with SB 974

Among its many problems, SB 974 threatens to:

- Put port economic benefits at risk;
- Divert cargo;
- Hurt the state’s agricultural industry;
- Make California’s manufacturing industry less competitive;
- Compromise recycling;
- Enact an illegal tax;
- Violate the commerce clause;
- Violate numerous trade agreements;
- Prompt litigation; and
- Freeze private investment in port infrastructure.

Other Solutions Exist

The claimed purpose of this bill is to finance infrastructure improvements and environmental mitigation projects. Despite suggestions to the contrary, acceptable alternatives to this illegal solution do exist:

- Ports are financed with billions of dollars in private sector investments, paid for mostly through revenue bonds financed by port terminal operators and others through true user fees. California ports are carrying close to \$3.5 billion in revenue bonds for maritime infrastructure improvements, and these funds continue to be spent on updating and building new roads, rail capacity and a variety of other projects.

- In addition, public-private partnerships offer a viable way to fund goods movement-related projects outside of the ports. In principle, a public-private partnership must provide real and tangible benefits to all who contribute funds. This concept is most applicable to individual projects because funding sources may derive varying levels of benefit from each specific project and, therefore should have varying levels of financial involvement in those projects. The one-size-fits-all approach offered by SB 974 does not constitute a true public-private partnership.

Key Vote

SB 974 passed Assembly Transportation on July 9 on a vote of 8-6.

Ayes: Nava (D-Santa Barbara); Carter (D-Rialto); DeSaulnier (D-Concord); Karnette (D-Long Beach); Portantino (D-La Cañada Flintridge); Ruskin (D-Redwood City); Solorio (D-Santa Ana); Soto (D-Pomona).

Noes: **Duvall (R-Yorba Linda); Gagliani (D-Stockton); Garrick (R-Solana Beach); Horton (R-Chula Vista); Houston (R-San Ramon); Huff (R-Diamond Bar).**

Action Needed

SB 974 will be considered next by the Assembly Appropriations Committee.

Ask your Assemblymember to **oppose SB 974.**

For an easy-to-use sample letter, visit www.calchambervotes.com.

Staff Contact: Jason Schmelzer

CalChamber Blocks New Liability Trigger for Shareholders, Board Members



OPPOSE

California Chamber of Commerce-**opposed** legislation to add a vague new prohibition on the ability of corporations to make distributions to its shareholders was rejected by the Senate Banking, Finance and Insurance committee last month.

AB 251 (DeSaulnier; D-Concord) aimed to prohibit these distributions and make board members personally and strictly liable for any distributions that violate the vague new prohibition.

Vague Strict Liability Trigger

Federal and California law already prohibit corporations from making distributions if they have not met pension funding obligations required by law. AB 251 also would have barred distributions if a corporation “failed to make a payment” to a defined benefit plan. This undefined new prohibition would have confused existing law, potentially resulting in litigation and unintended consequences that could have harmed retirees and shareholders.

For example, a corporation may have fully met its pension funding obligation, but be disputing a small payment amount. Under current law, the corporation could lawfully proceed with a distribution, but

under AB 251, a corporation, its shareholders, and board members could be subject to liability.

The confusing new basis for liability created by AB 251 could have discouraged corporations from offering defined benefit plans and dissuaded shareholders from investing in corporations that have them.

AB 251 also created strict liability for board members for distributions violating the vague new standard, even if they acted in good faith and had no knowledge that a distribution was improper. This would have discouraged individuals from serving on boards, already a serious challenge faced by corporations.

Key Vote

AB 251 was rejected June 20 by a vote of 3-6.

Ayes: Lowenthal (D-Long Beach); Romero (D-Los Angeles); Wiggins (D-Santa Rosa).

Noes: **Machado (D-Linden); Runner (R-Lancaster); Correa (D-Santa Ana); Cox (R-Fair Oaks); Hollingsworth (R-Murrieta); Margett (R-Arcadia).**

Absent, abstaining or not voting: Florez (D-Shafter); Scott (D-Pasadena).
Staff Contact: **Kyla Christoffersen**

‘Job Killers’ Threaten Rollback of Workers’ Compensation Reforms

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labor code section 132(a), and would create a situation in which litigation over violations would be commonplace. If the goal of SB 942 is to facilitate increased return-to-work, there should be a collaborative approach that is not punitive for employers who are seeking to comply with the law.

At press time, SB 942 awaited a third reading in the Assembly.

● **SB 936** increases the cost of hiring and keeping employees by rolling back historic reforms and doubling permanent disability costs in California’s workers’ compensation system. The CalChamber is leading a coalition of more than 100 associations and businesses opposing SB 936.

The CalChamber believes there is no statistically valid and objective evidence that warrants an increase in benefits. The drop in overall amounts spent on permanent disability benefits is due to the application of objective medical evaluations using American Medical Association

guidelines, the appropriate use of apportionment, the reduction of benefit weeks for low ratings and return-to-work adjustments.

Although there has been evidence of a drop in benefits, the CalChamber believes California should take a data-driven approach to reviewing the available information before considering a permanent disability benefit increase, let alone doubling benefits. Measuring the adequacy of permanent disability ratings under the current system by comparing them against the old system is unproductive.

At press time, SB 936 awaited a third reading in the Assembly.

● **AB 338** increases temporary disability costs in workers’ compensation claims by increasing the number of weeks benefits can be paid and creating a disincentive to use utilization review to enforce medical treatment guidelines.

AB 338 increases the cap on temporary disability benefits from 104 weeks to 156 weeks, even though evidence suggests that

a prompt return to employment after an injury reduces the injured worker’s long-term wage loss. Moreover, the bill creates a number of situations in which the cap on temporary disability benefits would not apply, thereby increasing the duration of benefits even past 156 weeks.

Provisions in AB 338 also punish an employer for the legal application of utilization review, the only way an employer can force medical providers to adhere to evidence-based medical treatment guidelines (one of the reforms) when requesting treatment.

AB 338 passed the Senate Labor and Industrial Relations Committee July 11 by a vote of 3-2. The bill awaits its next hearing on the Senate floor.

Action Needed

Contact your representatives in the Senate and Assembly and encourage them to oppose these bills. For sample letters, visit www.calchamber.com/positionletters.
Staff Contact: **Jason Schmelzer**

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