

# ALERT

VOLUME 34, NUMBER 26 • AUGUST 22, 2008

 **CalChamber**<sup>™</sup>  
CALIFORNIA CHAMBER OF COMMERCE

## Competitiveness Threats Still Alive in Legislature



With a little more than a week remaining before the scheduled end of the legislative session, 17 of 39 “job killer” bills remain alive, with

two having passed the Legislature.

Strong **opposition** from the California Chamber of Commerce and other business groups has stopped 22 bills that would have hurt California’s competitiveness and stifled job creation.

Following is a recap of the proposals that remained alive as *Alert* went to press.

### In Senate

The following “job killers” await action by the full Senate:

● **AB 437 (Jones; D-Sacramento)**  
**Increased Employer Liability Exposure.**

Could result in significant new liability exposure for employers by stating that it is the intent of the Legislature to reject, for purposes of any California statutes of limitation, a recent U.S. Supreme Court decision that

*See Competitiveness: Page 4*

## Workers’ Comp Reform Roll Back Passes Assembly



Legislation that increases workers’ compensation costs and rolls back the workers’ compensation reforms from 2004 by making apportionment

very difficult to prove passed the Assembly on August 19.

California Chamber of Commerce-opposed **SB 1115 (Migden; D-San Francisco)** weakens the apportionment statute and allows judges to overrule apportionment even when based on findings of actual previous disability.

SB 1115 would lead to increased litigation and indemnity costs for employers, as well as open the apportionment statute to attack by attorneys seeking to increase the disability award of their clients.

### Apportionment

Apportionment is a long-held concept encompassing the principle that an injured worker deserves to be compensated for disability arising from an industrial injury and that the employer deserves to be protected from paying increased compensation for disability that does not arise from an industrial injury.

In opposing SB 1115, the CalChamber and a coalition of employer groups have noted that the issue of apportionment to risk factors has been most appropriately evaluated and addressed by the 3rd

*See Workers’ Comp: Page 6*

## Governor’s Budget Pushes Economic Stimulus *New Proposal Includes 10-Hour Workday*

In an effort to move discussions forward, Governor Arnold Schwarzenegger called a press conference on August 20 to outline a new budget proposal with an economic stimulus package that gives employers and employees flexibility in dealing with overtime.

The Governor’s proposal allows California employers to conform to other states by permitting employees to voluntarily work 10-hour days without overtime. In addition to saving employer costs, the flexibility allows employees to reduce work-related expenses++, such as gas and other transportation costs and child care. For example, if a family with two wage earners could commute one less day a week and save a \$4 gallon of gas, the annual savings would add up to approximately \$400.

Union and government employees

would be exempted from this voluntary flexible work schedule.

The economic stimulus package expedites spending of bond funds and provides targeted tax credits to help retain runaway Hollywood film jobs in the state.

The Governor’s budget proposal also includes: a temporary 1-cent increase in the sales tax for three years, followed by a permanent reduction to a quarter-cent below the current level; a two-year suspension of the ability of corporations to take the net operating loss (NOL) tax deduction to be followed by conformity to federal law when NOL is reinstated; tax amnesty; \$2 billion in cuts beyond what was adopted by the legislative conference committee; an increase in the rainy day fund; and authority for the state Finance Director to make mid-year budget cuts if revenues decline.

### Inside

- CalChamber, Coalition Back Proposition 11: Page 5

## Labor Law Corner

# Employer Must Keep Tabs on I-9 Forms; Could Face Penalties



**Dana Leisinger**  
Senior Helpline  
Consultant

*I'm a little confused regarding I-9s. Am I required to keep them for three years, or one year? Also, can I copy the documents that a new employee presents as proof of their right to work in the United States? Lastly, how do I keep the I-9s — in the employee's personnel file?*

### California Chamber Officers

**Edwin A. Guiles**  
Chair

**Frederick R. Ruiz**  
First Vice Chair

**Larree M. Renda**  
Second Vice Chair

**S. Shariq Yosufzai**  
Third Vice Chair

**Russell Gould**  
Immediate Past Chair

**Allan Zaremberg**  
President and Chief Executive Officer

*Alert (ISSN 0882-0929) is published weekly during legislative session with exceptions by California Chamber of Commerce, 1215 K Street, Suite 1400, Sacramento, CA 95814-3918. Subscription price is \$50 paid through membership dues. Periodicals Postage Paid at Sacramento, CA.*

*POSTMASTER: Send address changes to Alert, 1215 K Street, Suite 1400, Sacramento, CA 95814-3918. Publisher: Allan Zaremberg. Executive Editor: Ann Amioka. Associate Editor: Blake Ellington. Art Director: Marcy Wacker. Capitol Correspondent: Christine Haddon. Photographer: Aaron Lambert.*

*Permission granted to reprint articles if credit is given to the California Chamber of Commerce Alert, and reprint is mailed to Alert at address above.*

*E-mail: [alert@calchamber.com](mailto:alert@calchamber.com).  
Home page: [www.calchamber.com](http://www.calchamber.com).*

There is a lot of confusion surrounding the requirements of I-9s. An employer is required to keep I-9s for the latter of three years from the hire date or one year after termination.

For example, if an employee works for one year and quits/is terminated, the employer will be required to keep his/her I-9 for another two years — three years from the hire date. If the employee has worked for several (for example, 10) years and quits/is terminated, the employer must keep his/her I-9 for one more year.

### Make Copies

Many employers choose to make copies of the documents that employees present as proof of their identity and work eligibility and attach them to the I-9.

Many calls come to the Helpline asking if this is illegal — it is not. However, you must review the original, actual documents when completing the I-9. Attaching copies is proof that you reviewed the documents and that they appeared to be genuine.

### Storage

I-9s should not be kept in the employee's personnel file, for they can contain private information and information regarding race and national

origin, which are protected categories.

It is permissible, however, to keep all I-9s together in a separate cabinet or file drawer. It is not necessary to have a separate file for each employee, and one recommendation is to have a binder for current employees, and a separate binder for ex-employees.

It is wise to review your I-9s periodically and make a practice of re-verifying any documents that expire (there is a section at the bottom of the form for updating and re-verification) if they must be re-verified.

It also is advisable to set up a system that will remind you when the documents expire; however, not all documents must be current. When this occurs, the employee can provide other documents.

Employers sustain penalties for knowingly hiring or retaining an unauthorized alien or failing to even complete the I-9. A consistent practice utilizing the guidelines noted above can help avoid any claim for penalties.

---

*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](http://www.hrcalifornia.com).*

## CalChamber-Sponsored Seminars/Trade Shows

For more information, visit  
[www.calchamber.com/events](http://www.calchamber.com/events).

### Business Resources

E-Waste Recycling. Rosemead Chamber of Commerce. September 20-21, Rosemead. (626) 288-0811.

Free E-Recycling Drive. Volt Services Group. September 26, Sacramento. (916) 564-1144.

### International Trade

COPENMIND Exhibition 2008.

Copenmind. September 1-3, Copenhagen, Denmark.  
[Info@copenmind.com](mailto:Info@copenmind.com).

Celebration — International Trade Community in L.A. U.S.-Mexico Chamber, California Chapter. September 4, Los Angeles.

Fourth International Exhibition/Conference. Elcina Electronic Industries Association of India. September 10-12, New Delhi. (650) 740-6064.

Doing Business with Armenia. Armenian American Chamber of Commerce, Greater Los Angeles Chapter. September 16, Long Beach. (818) 247-0196.

Green Trade Network Summit. Monterey Bay International Trade Association. September 19, Coconut Grove. (831) 335-4780.

### Labor Law

HR 201: Labor Law Update On-Demand Web Seminar. CalChamber. 90 minutes. (800) 331-8877.



## *Small Business Advocate of Year Award*

# Fresno Leader Brings Local, State Relevancy Back to Chamber

Ruth Evans believes that part of the responsibility of a chamber of commerce is to educate local and state legislators with regard to how their decisions have an impact on business.

Evans, a recipient of the California Chamber of Commerce 2008 Small Business Advocate of the Year Award, practices what she preaches as she helped lead the Greater Fresno Area Chamber in recent years back to relevancy in the community where she has spent much of her life.

Large corporations have governmental affairs people, who are able to spend time getting their message out, but small businesses don't really have the time or resources to do the same, Evans said. So in 2005, with the help of some prominent chamber of commerce officials and local leaders, she took a little time after her day job — she has owned her own full-service human resources company, The Evans HR Group, for more than 12 years — to help revamp the Fresno Chamber.

### Revamp

Following a 2004 planning retreat for 2005, Evans, who has been with the chamber for more than 16 years and was serving as the chairman-elect of the board at the time, decided the chamber needed to refocus its goals.

"Quite honestly I was hearing comments from the mayor of the city of Fresno and other people that the chamber wasn't on the map and had other people in the community asking me what the chamber did," she said. "That's never a good question to be asked."

So when getting ready for the new year at the annual planning retreat, the board laid the foundation for an effort to make sure the chamber was indeed relevant to what local business and the community were looking for at the time.

The brainstorming resulted in a clear consensus on the Fresno Chamber Board: focus on a specific plan and get your message out.

### Advocacy

At the time, the chamber had a governmental affairs program focused mainly on the local level. Evans said the chamber decided to "take our program to the next level" when it came to advocacy.



Ruth Evans

"More than ever before, the chamber is representing business before government, and getting involved in issues that impact business locally and at the state level," she said.

In 2005, the chamber significantly increased its governmental affairs efforts, developed a new Governmental Affairs Council of voting members who research, discuss and take positions on issues, hired a new chief executive officer, Al Smith, began a public safety integration process

---

*More than ever before, the chamber is representing business before government, and getting involved in issues that impact business locally and at the state level*

---

by bringing in a consultant to evaluate integration opportunities and named a committee led by former Secretary of State Bill Jones and Smith to get a local transportation measure passed in 2006.

The board of directors also agreed upon the idea of developing a new grass-roots website, solely focused on advocacy efforts, [www.fresnochamberadvocacy.com](http://www.fresnochamberadvocacy.com).

Evans said the new website has been a "big success." The website lists the chamber's positions on legislation and local issues, provides report cards (vote records) for city council members and state legislators, and displays upcoming events.

### Higher Profile

Since the new focus was adopted, the chamber has been very involved in everything from the public safety integration effort to a homeless task force, downtown revitalization, the four-day workweek and efforts to support above-ground water storage.

As chair of the Governmental Affairs Council, Evans led the charge in creating a task force to review the county budget. The task force met with department heads, labor negotiators and top county administration to analyze how local tax dollars were being spent.

In addition, Evans named a task force to review the city budget, a process that had been done several times in preceding years.

"With regard to the county in particular, we had some serious issues with the way things were done and we gave them our feedback on that," Evans said. "I think there is more demand for the authority of the chamber of commerce to facilitate efforts."

On the state level, Evans spearheaded the Fresno Chamber's first legislative testimony in Sacramento when she spoke in front of the Assembly Labor and Employment Committee in 2007 in support of the four-day workweek bill, AB 510 (Benoit; R-Bermuda Dunes).

### Award

For her efforts as a key player in revitalizing the Fresno Chamber, Smith and Governmental Affairs Manager Amy Huerta nominated Evans for the CalChamber Small Business Advocate of the Year Award.

The two credit Evans for laying the foundation for the chamber to take the lead in such efforts.

"Through Evans' leadership in 2005 and 2006, the chamber was able to build a solid reputation for being a force in our local community," the nomination stated. "However, it was in 2007, when her efforts were rewarded on both the local and state levels."

Evans credits Dave Kilby, CalChamber executive vice president, corporate affairs, for facilitating the retreat which brought home the point that "this is not

*See Fresno: Page 6*



## Competitiveness Threats Still Alive in Legislature



*From Page 1*  
provided reasonable and clear limits on statutes of limitation for lawsuits relating to employer decisions.

● **AB 1456 (Laird; D-Santa Cruz) Increased Insurance Costs.** Greatly increases liability exposure for companies and may lead to higher insurance rates for consumers by preventing Medi-Cal amounts paid on behalf of a plaintiff from being considered in determining an insurance company's liability for medical damages.

● **AB 2386 (Núñez; D-Los Angeles) Increased Agricultural Costs.** Hurts the competitiveness of California agricultural producers by artificially increasing labor costs for California producers who must compete in a global market with lower-than-average operating costs. Eliminates the requirement for secret ballot elections for union representation among farm employees, stripping them of their right to decide free of intimidation on that crucial subject by creating a new, completely unsupervised process called a mediated election.

● **AB 2447 (Jones; D-Sacramento) Construction Job Loss.** Severely limits residential and commercial development to a degree that it could virtually shut down any suburban development in certain areas of California by prohibiting the approval of development in fire-risk areas without a mitigating finding by the city or county.

● **AB 2558 (Feuer; D-Los Angeles) Climate Change Tax.** Assesses an unconstitutional tax on businesses and consumers by authorizing the Los Angeles County Metropolitan Transportation Authority to impose a tax by a majority vote on either motor vehicles or vehicle fuel.

### In Assembly

Awaiting action by the full Assembly are the following "job killers":

● **AB 1840 (C. Calderon; D-Montebello) Internet Tax.** Encourages companies that provide services via the Internet and which operate and provide jobs in California to move their operations out of California

by creating uncertainty in the nexus standard for purposes of sales and use tax collection. Failed passage in Assembly; on reconsideration file.

● **AB 2279 (Leno; D-San Francisco) Employee Safety Risk.** Hurts employee safety and employers' right to maintain drug-free workplace policies and exposes employers to potential litigation by prohibiting employers from refusing to hire applicants or fire current workers who use medical marijuana.

● **ABX3 9 (Núñez; D-Los Angeles) Gas Price Increase.** Imposes a billion-plus-dollar tax increase on California oil companies which would result in higher gas prices for consumers, increased dependence on foreign oil, and further damage to our already-suffering economy. Urgency clause refused adoption in Assembly; on Assembly unfinished business file.

● **SB 375 (Steinberg; D-Sacramento) Limits Transportation Capacity.** Thwarts the intent of voters who approved broad-based transportation bonds and limits increased transportation capacity in certain areas of the state by prioritizing transportation projects in areas identified as a preferred area for growth.

● **SB 840 (Kuehl; D-Santa Monica) Government-Run Health Care.** Creates a new government-run, multibillion-dollar socialized health care system financed from a yet-to-be-specified tax increase.

● **SB 1113 (Migden; D-San Francisco) Incentive to Sue.** Expands reward to plaintiffs for costs of litigation stemming from private attorney general actions while providing no cost recovery for those who must defend themselves against such actions, even if those actions are found to be baseless.

● **SB 1717 (Perata; D-Oakland) Workers' Compensation Reform Roll Back.** Increases workers' compensation costs and rolls back the workers' compensation reforms from 2004 by arbitrarily doubling permanent disability benefits and altering the 15 percent bump up/down provision in current law.

### Special Session Bills

The following bills have not been acted upon since being introduced in the special session, but remain eligible for consideration:

● **ABX3 2 (C. Calderon;**

### D-Montebello) Internet Tax.

Encourages companies that provide services via the Internet and which operate and provide jobs in California to move their operations out of California by creating uncertainty in the nexus standard for purposes of sales and use tax collection.

● **ABX3 22 (C. Calderon; D-Montebello) New Internet Taxes.** Greatly increases the cost of doing business for a host of California technology sector and entertainment industry companies and harms consumers by ordering Board of Equalization to implement and impose through the regulatory process an expansive, unprecedented new tax on digital products, including software, e-books, music, videos, cell phone ring tones, cable television and movies on demand.

● **ABX3 23 (C. Calderon; D-Montebello) New Internet Taxes.** Greatly increases the cost of doing business for a host of California technology sector and entertainment industry companies and harms consumers by creating an expansive, unprecedented new tax on Californians who purchase digital media, including software, e-books, music, videos, cell phone ring tones, cable television and movies on demand.

### To Enrollment

● Sent to enrollment after the Senate concurred in Assembly amendments on August 5 was **SB 974 (Lowenthal; D-Long Beach) Tax on Freight Movement.** 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.

● Sent to enrollment after passing the Assembly on August 19 was **SB 1115 (Migden; D-San Francisco) Workers' Compensation Reform Roll Back.** Increases workers' compensation costs and rolls back the workers' compensation reforms from 2004 by making apportionment very difficult to prove.

### Updates on Web

For a full list of the 2008 "job killer" bills and links to status updates, visit [www.calchamber.com/jobkillers](http://www.calchamber.com/jobkillers).  
Staff Contact: Marc BURGAT

# CalChamber, Coalition Back Proposition 11 to Make Politicians Accountable to Voters

The California Chamber of Commerce is part of a broad coalition that is **supporting Proposition 11**, the November ballot measure to reform the redistricting process.

Proposition 11 creates a 14-member independent citizen commission to draw new boundary lines for the state Senate, Assembly and Board of Equalization districts using non-partisan criteria.

It requires the state auditor to randomly select commission members from a voter applicant pool to create a commission with five members from each of the two largest political parties, and four members unaffiliated with either political party.

## CalChamber Position

CalChamber President Allan Zaremborg is among the co-chairs for the Yes on Proposition 11 campaign.

The CalChamber has long believed that fair redistricting is the key to meaningful political reform. Proposition 11 will allow the citizens of California, rather than the Legislature, to create legislative districts that will help elected officials be more accountable to the voters.

## Commission Selection

The redistricting process established by Proposition 11 will begin in 2010 with subsequent redistricting each 10 years afterwards.

The state auditor (a position appointed by the Governor from among three candidates chosen by a joint legislative committee) opens the application process for the redistricting commission.

After the auditor removes persons with conflicts of interest, a three-person auditor panel picks 60 finalists — 20 Democrats, 20 Republicans and 20 others. From this group, the legislative leadership can remove eight from each group of 20.

The auditor then chooses eight commissioners and those eight choose the final six for the 14-member commission.

## Criteria for Drawing Districts

Proposition 11 is designed to respect communities of interest. Current district boundaries, designed to protect incumbent legislators, include some

**Yes on Prop 11**  
Time to Hold Politicians Accountable

districts that cut up counties, cities and communities.

Proposition 11 requires that districts comply with the federal Voting Rights Act and ensure that “the geographic integrity of any city, county, neighborhood or community of interest shall be respected.”

In addition, Proposition 11 calls for an open hearing process to permit public participation in the redistricting public review process.

## Supporters

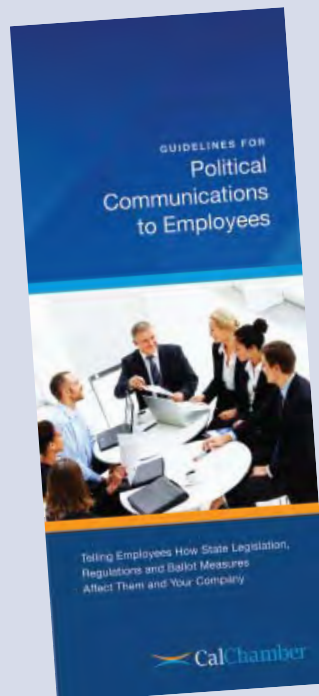
Proposition 11 is supported by a bipartisan coalition of consumer, senior, public interest, taxpayer, community and business groups and leaders.

Key proponents of Proposition 11 are California Common Cause, the American Association of Retired Persons and the League of Women Voters of California — all of which worked for two years to draft the initiative.

Governor Arnold Schwarzenegger announced his support for the initiative after it was written.

More information is available at the campaign website at [www.yesprop11.org](http://www.yesprop11.org).  
Staff Contact: Jeanne Cain

## Political Communications to Employees



As fall approaches, the California Chamber of Commerce is reminding employers to brush up on the dos and don'ts of political communications with employees.

Business owners are within their rights to inform employees and stockholders about the potential impacts of proposed ballot measures.

The CalChamber has prepared a brochure giving a quick overview of what employers can and cannot do, as well as when they need to report what they spend on political communications.

A pdf file of the *Guidelines to Political Communications to Employees* brochure is available on the CalChamber website at [www.calchamber.com/guidelines](http://www.calchamber.com/guidelines).

## Workers' Comp Reform Roll Back Passes Assembly

*From Page 1*

Appellate District in *Vaira v. Workers' Compensation Appeals Board*.

The principal issue in this case was the apportionment of 40 percent of the applicant's overall disability to osteoporosis. The applicant argued that this was "per se" discrimination because the osteoporosis was related to the applicant's age and gender, and that this discrimination is prohibited by California's anti-discrimination laws.

The court held that apportionment based solely on age and gender is inappropriate, but rejected the argument that any condition related to age or sex amounted to discrimination and could not be the basis for apportionment.

### Action Needed

SB 1115 will go to the Governor soon for consideration. Contact the Governor and urge him to **veto SB 1115**.

For a sample letter, visit [www.calchambervotes.com](http://www.calchambervotes.com).

### Key Vote

SB 1115 passed the Assembly on a vote of 46-31:

Ayes: Arambula (D-Fresno), Beall (D-San Jose), Berg (D-Eureka), Brownley (D-Santa Monica), Caballero

(D-Salinas), C. Calderon (D-Montebello), Carter (D-Rialto), Coto (D-San Jose), Davis (D-Los Angeles), De La Torre (D-South Gate), De León (D-Los Angeles), DeSaulnier (D-Concord), Dymally (D-Compton), Eng (D-Monterey Park), Evans (D-Santa Rosa), Feuer (D-Los Angeles), Fuentes (D-Sylmar), Furutani (D-Long Beach), Galgiani (D-Stockton), Hancock (D-Berkeley), Hayashi (D-Castro Valley), Hernandez (D-La Puente), Huffman (D-San Rafael), Jones (D-Sacramento), Karnette (D-Long Beach), Krekorian (D-Burbank), Laird (D-Santa Cruz), Leno (D-San Francisco), Levine (D-Van Nuys), Lieber (D-San Jose), Lieu (D-Torrance), Ma (D-San Francisco), Mendoza (D-Artesia), Mullin (D-South San Francisco), Nava (D-Santa Barbara), Núñez (D-Los Angeles), Parra (D-Hanford), Portantino (D-La Cañada Flintridge), Price (D-Inglewood), Ruskin (D-Redwood City), Salas (D-Chula Vista), Saldaña (D-San Diego), Solorio (D-Santa Ana), Swanson (D-Oakland), Torrico (D-Newark), Wolk (D-Davis).

**Noes: Adams (R-Hesperia), Aghazarian (R-Stockton), Anderson (R-La Mesa), Benoit (R-Bermuda Dunes), Berryhill (R-Modesto), Blakeslee (R-San Luis Obispo), Cook (R-Yucca Valley), DeVore**

**(R-Irvine), Duvall (R-Yorba Linda), Emerson (R-Redlands), Fuller (R-Bakersfield), Gaines (R-Roseville), Garcia (R-Cathedral City), Garrick (R-Solana Beach), Horton (R-Chula Vista), Houston (R-San Ramon), Huff (R-Diamond Bar), Jeffries (R-Lake Elsinore), Keene (R-Chico), La Malfa (R-Richvale), Maze (R-Visalia), Nakanishi (R-Lodi), Niello (R-Fair Oaks), Plescia (R-La Jolla), Silva (R-Huntington Beach), Smyth (R-Santa Clarita), Spitzer (R-Orange), Strickland (R-Moorpark), Tran (R-Costa Mesa), Villines (R-Clovis), Walters (R-Laguna Niguel).**

Absent/abstaining/not voting: Bass (D-Los Angeles), Sharon Runner (R-Lancaster), Soto (D-Pomona).

Staff Contact: Jason Schmelzer

## CalChamber Calendar

*Tourism Committee:*

September 4, Half Moon Bay

*Water Committee:*

September 4, Half Moon Bay

*Board of Directors:*

September 4-5, Half Moon Bay

*Council for International Trade:*

September 5, Half Moon Bay

## Fresno Leader Brings Local, State Relevancy Back to Chamber

*From Page 3*

your grandfather's chamber anymore" and Long Beach Area Chamber of Commerce President Randy Gordon for sharing what had been done at his chamber to be successful in the community.

She also said she is "very fortunate" to have great support from Huerta and from Shaun Lumachi, who helped reinvent the chamber's program and advocacy website.

Evans continues to serve as the vice chair of the Government Affairs Division of the chamber, chair of the Governmental Affairs Council, member of the Fresno Chamber Political Action Committee (PAC) and as current chair of the Board of Directors for the San Joaquin Political Academy — a partnership of several local organizations that trains leaders who are interested in running for political office.

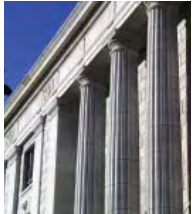
Evans herself says the revamp effort has turned out better than she expected.

"We are further ahead than I thought we would be. I credit that to the CEO, to the staff that he put together, to the current leadership of the board and to the entire board of directors," she said. "We are very focused and no longer taking off in a new direction every year."

**They won't know unless you tell them.  
Write your legislator.  
[calchambervotes.com](http://calchambervotes.com)**



# U.S. Court: Employees Have Privacy Right Over Information on Third Party Servers



The 9th U.S. Circuit Court of Appeals has issued a decision finding that employees have a right to privacy over information held on third party servers — as opposed to

company-owned and -controlled servers.

In the case of *Quon v. Arch Wireless Operating Company 2008 U.S. App*, the employer received information from a third party vendor that employees had transmitted through company-owned equipment. The court said the vendor should not have released that information to the employer.

Arch Wireless provided wireless text messaging services for the City of Ontario Police Department (OPD). OPD employees were given two-way pagers provided by Arch Wireless, but OPD did not provide a policy regarding employee use of the pagers' text messaging function, except that each pager was allotted 25,000 characters, after which OPD would have to pay overage charges.

OPD's general "Computer Usage, Internet and E-mail Policy" did specify that OPD-owned computers and associated equipment, software, programs, networks, Internet, e-mail and other systems operating on OPD computers were limited to work-related business. The policy also noted that there should be no expectation of privacy relating to the use of OPD equipment, all use will be monitored and inappropriate use will not be tolerated. All employees signed an acknowledgment they received and reviewed this policy.

## Audited Messages

Jeffery Quon, a sergeant and member of OPD's SWAT team, consistently used more than the 25,000 character limit on his pager. OPD's unofficial policy was to require the employee to repay it by check for any associated overage charges. Quon

was told the pagers were considered e-mail and all messages he wrote could be audited to determine whether the messages were work-related.

Quon was given the choice of either paying OPD the overage charges or having his messages reviewed by Internal Affairs. Each time Quon went over the limit, he paid the overage charges.

The fourth time Quon exceeded the limit, OPD Chief Scharf ordered a lieutenant to request the pager transcripts from Arch Wireless to determine if the messages were work-related.

A major account specialist with Arch Wireless printed out the transcripts associated with OPD pager numbers, put the transcripts in a manila envelope and brought them to OPD. The major account specialist did not read the messages, but after reviewing about four lines of one of the transcripts, she realized the messages were sexually explicit.

Internal Affairs conducted an audit of the records to determine if OPD time was being wasted by employees not working when they were supposed to be. The audit found that Quon had exceeded his monthly allotted characters by more than 15,000 characters, and that many of these messages were personal in nature and often sexually explicit.

## Fourth Amendment

Quon sued OPD for violating his Fourth Amendment protection from unlawful searches. A jury found in favor of Quon, but the 9th Circuit disagreed and found Arch Wireless violated Quon's privacy by releasing the transcripts to OPD.

The federal Stored Communications Act, part of the Electronic Communications Privacy Act, governs the analysis. Arch Wireless is considered an electronic communication service — defined as "any service which provides to users of the service the ability to send or receive wire or electronic communications"

— that stored communication relating to the use of the pagers on its own servers. This is to be contrasted with remote communication service that provides computer data storage and processing services to the public.

The court drew an analogy to the use of an Internet service provider that stores e-mails after delivery to an e-mail recipient for purposes of backup protection.

The messages were not stored on OPD's behalf or for its benefit. Arch Wireless served as a conduit for the transmission of messages between users and stored the messages as a "backup" for the user. The user in this case is the individual sending and receiving messages.

Arch Wireless knowingly released the transcripts to OPD, which was a subscriber to OPD's service and not a user or addressee or intended recipient of such communication. As such, the messages and privacy thereto belonged to Quon and not to OPD and Arch Wireless unlawfully released the transcripts to OPD, the court concluded.

## CalChamber Recommendations

The California Chamber of Commerce has recommended that employers:

- To the extent possible, maintain your own servers for all company-related equipment (BlackBerries, laptops, etc.).
- Notify all employees that they should not have a reasonable expectation of privacy related to communications on company-owned equipment that is stored on company servers.
- Train all employees in your discrimination and harassment policies, reminding them that use of electronic communication for inappropriate conversations is unacceptable under company policy.

**Staff Contact: Jessica Hawthorne**

## CalChamber Announces HRConsultant Program



HRConsultant Network Member

You turn to the CalChamber when you need current and accurate employment law information. Sometimes, however, your human resources needs go beyond clarifying California employment law.

That's why the CalChamber has developed the **CalChamber HRConsultant Network** in partnership with several California human resources consultants.

Each consultant went through an application process that included a background verification, professional reference check and interview with CalChamber employment law counsel. We went through this detailed process so you can be assured that if you are contacting a consultant partner in the network, you are reaching a highly knowledgeable professional who understands the complexity of California labor and employment laws.



**To learn more about the program or find an HRConsultant Network member near you, go to: [www.calchamber.com/hrconsultant](http://www.calchamber.com/hrconsultant)**



ADDRESS SERVICE REQUESTED

Helping California Business Do Business™

www.calchamber.com  
P.O. BOX 1736 SACRAMENTO, CA 95812-1736  
(916) 444-6670 FACSIMILE (916) 444-6685

CALIFORNIA CHAMBER OF COMMERCE

**ALERT**

Periodicals  
Postage  
PAID  
Sacramento, CA