

ALERT

VOLUME 35, NUMBER 3 • JANUARY 30, 2009



Hefty New Tax Payment Due Soon for Many Firms

Eleventh-hour legislation passed without public hearing as part of the California budget package in October 2008 has resulted in many law-abiding companies having to make a large, new and unexpected tax payment—possibly in the multimillions of dollars—soon, before May 31, 2009.

The legislation, **SBX1 28 (Committee on Budget)**, created a new, nationally unprecedented strict liability penalty, on top of significant penalties that already exist for underpayments and inaccuracies, which California companies will have to pay if the Franchise Tax Board (FTB) decides that a company has underreported taxes in excess of \$1 million after the bill's May 31, 2009 deadline. The amount of the penalty is 20 percent of the understatement amount.

The new penalty means that expansive amounts of capital that will ultimately have to be refunded may be tied up with FTB during this recession rather than being invested in the economy. The penalty's \$1.5 billion in projected revenues is effected by in essence forcing companies to overpay their taxes by May 31, 2009 to account for even unforeseeable changes in the taxes the companies owe.

Companies will eventually receive refunds of overpayments, but in the meantime, the state has received a forced, below-market-rate loan.

Affects Tax-Compliant Firms

For companies with large, complex tax returns, \$1 million or more can easily and

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New State Disability Access Law Reforms Help Business: Free Seminar Explains How



A free web seminar explaining how businesses can reduce their risk of disability access lawsuits is being offered by

CalBizCentral, the source for California business and human resource compliance products, presented by the California Chamber of Commerce.

The live web seminar focuses on *SB 1608: What California's New Accessibility Law Reforms Mean to California Employers*. The half-hour web seminar, set for February 19 beginning at 10 a.m., will outline how the new law can help businesses and illustrate the new protections the law creates for employers.

New Tools for Businesses

The CalChamber was involved in developing SB 1608 (Corbett; D-San Leandro, Chapter 549, Statutes of 2008), a "job creator" bill that increases access for individuals with disabilities while reducing unwarranted litigation.

SB 1608 established reforms in California law that provide new tools that businesses with locations open to the public in California can use to ensure they have complied with federal and state disability access laws and to reduce the risk of getting sued.

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CalChamber Offers Labor Law Updates



Sacramento attendees of the CalBizCentral *HR201: Labor Law Update Seminar* hear the latest this week on new laws for 2009. The six-location, in-person seminar series attracted 340 attendees. A live web seminar is scheduled for February 12. More information at www.calbizcentral.com/training.

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Labor Law Corner**New I-9 Form on Hold as Obama Administration Freezes Regulations**

Jessica Hawthorne
Employment Law
Counsel

I heard there is a new Form I-9 that we must use starting February 2. Is this true?

No, not for now, because on January 21, President Barack Obama's chief of staff, Rahm Emanuel, issued a memorandum to all federal agencies directing them to put a freeze on any federal regulations not yet published in the **Federal Register** and recommended a 60-day hold.

60-Day Delay—At Least

This means that any federal regulations recently issued for comment will be delayed, at a minimum, for 60 days.

For employers, the main regulations that may be affected by this freeze are those proposing to amend the Form I-9 by February 2, although the U.S. Department of Homeland Security and U.S. Citizenship and Immigration Services already have issued the new form. The new form and the related regulations are part of the freeze.

Until further notice, the current Form I-9, with an expiration date of June 30, 2009 and a revision date of June 5, 2007 should be used, *not* the February 2, 2009 form.

Family Leave Rules

For employers concerned about the impact on the Family and Medical Leave Act (FMLA) regulations effective January 16, those regulations are final and have been published in the **Federal Register**, so they are currently in effect.

The California Chamber of Commerce is tracking these developments. Once any new information is available, updates will be provided via the HRCalifornia **HRWatchdog** blog or **HRCalifornia Extra**.

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

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CalChamber-Sponsored Seminars/Trade Shows

For more information, visit www.calchamber.com/events.

Business Resources

Lower Colorado River Tour. Water Education Foundation. March 4–6, Las Vegas. (916) 444-6240.

Water 2009: Building on Change. Water Education Foundation. March 12–13, Sacramento. (916) 444-6240.

Central Valley Tour. Water Education Foundation. April 15–17, Bakersfield. (916) 444-6240.

International Trade

Second World Forum on Delta and Coastal Development. Aquaterra. February 10–12, Amsterdam, Netherlands. (202) 274-2618.

18th U.S. Trade Show. American Chamber of Commerce in Bangladesh. February 26–28, Bangladesh. amcham@amchambd.org.

Water China 2009. China Foreign Trade Centre Group. March 3–6, Canton (Guangzhou). contact@merebo.com.

CeBIT 2009: Take Your Business to the Next Level. Hannover Fairs. March 3–8, Hannover, Germany.

17th Convergence India. Exhibitions India Pvt. Ltd. March 18–20, Pragati Maidan, New Delhi, India. (650) 740-6064.

Asia Pacific Business Outlook Conference. University of Southern California. April 6–7, Los Angeles. (213) 740-7130.

63rd World Affairs Council Annual Conference. World Affairs Council of Northern California. April 2–3, San Francisco. (415) 293-4626.

Renewal Energy Conference. Center for International Trade Development. April 27–29, San Francisco. (858) 208-9227.

Labor Law

HR 201: Labor Law Update Live Web Seminar. CalBizCentral. February 12. (800) 331-8877.

CalChamber Calendar

Fundraising Committee:
March 5, San Diego

Water Committee:
March 5, San Diego

Board of Directors:
March 5-6, San Diego

Council for International Trade:
March 6, San Diego

AB 32 Climate Change Policy Committee: March 6, San Diego



Business Participation Vital as State Starts Green Chemistry ‘Wiki’ Site

State regulators at the Department of Toxic Substances Control (DTSC) are busy preparing to start a formal rule-making process to implement California’s new green chemistry program.

The program was authorized by the enactment of 2008 legislation, AB 1879 (Feuer; D-Los Angeles) and SB 509 (Simitian; D-Palo Alto).

These bills provide DTSC with authority to identify chemicals of concern, study them, prioritize chemicals of concern, and regulate certain products that contain these chemicals. According to the statute, DTSC can require labels, ban the use of chemicals in specific products, require reformulation of products, and much more.

Capturing Comments Via Web

Although the formal rulemaking process is slated to begin next month with three workshops, DTSC has started the process of capturing input from stakeholders by creating a “wiki” website. The “wiki” is a website that allows users to respond to questions posed by DTSC, as well as the postings of other users.

The website is essentially a single-page document that is open to the public for editing. When the site was first launched, it simply contained questions posted by DTSC. Since the site’s launch, users have answered questions posed by DTSC, posed some new questions, and posted information they deem to be relevant to the rulemaking process.

Comment on Green Chemistry Program

Post answers to green chemistry questions posed by the state Department of Toxic Substances Control (DTSC) at: <http://cagreenchem.wikidot.com/start>.

Workshops Coming

Details are not yet available, but DTSC has announced the green chemistry workshops are scheduled for:

- February 18 – Berkeley;
- February 26 – Chatsworth/Los Angeles;
- March 17 – Sacramento;
- April 1 – Sacramento.

Open to Editing

Although the “wiki” site is simply an information-gathering tool for DTSC, some stakeholders have expressed concern about this new tool:

- It is difficult for new users of the wiki to determine which questions were originally posted by DTSC so the users can focus their input on issues that DTSC believes to be vital to the rulemaking process.

- Content may be deleted or changed anonymously. Unfortunately, this means that the ideas presented are not protected.

Despite these concerns about the integrity of information posted on the site, the CalChamber is urging its members to visit the wiki and look at the information that has been posted. The rulemaking process for California’s green chemistry program will have a profound impact on how consumer products are made and sold in California.

Questions to Answer

Here is a sample of some of the questions:

- Should the process allow for chemicals to be “nominated” by external parties for consideration?
- Can a chemical identified as a chemical of concern later be “de-selected” based on new or additional information or by filling data gaps?
- What factors should be considered in assessing performance of a chemical in a product?
- Should testing be required by manufacturers to demonstrate compliance as a precondition for selling or offering for sale? If so, who would conduct laboratory analytical testing of consumer products? Under what conditions?

Businesses Need to Participate

The wiki is the first step in a regulatory process that will have a significant impact on the California business community. California will soon be in the business of telling companies how to formulate their products. It is vitally important for companies to engage in this process.

The California Chamber of Commerce is a founding member of the Green Chemistry Alliance, an informal group of business associations and companies that are advocating an approach to implementation that values sound science and economic sustainability.

The CalChamber is urging members to visit the wiki and post answers to the questions posed by DTSC. The website is at <http://cagreenchem.wikidot.com/start>.
Staff Contact: Jason Schmelzer



2009

MAY 18-19

LEGISLATIVE SUMMIT

Hefty New Tax Payment Due Soon for Many Companies

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reasonably be in dispute. For example, a company that owes \$100 million in taxes would have to be 99 percent accurate or be penalized.

A \$1 million understatement could result from circumstances outside of the company's control. For example, companies that sell products internationally are sometimes in the middle of pricing disputes between the Internal Revenue Service and other countries, which when resolved, can significantly change the company's federal and state tax liability after the fact. Normally, these complexities are resolved between companies and FTB over time.

The SBX1 28 penalty, however, is a strict liability penalty—meaning it will apply even if a company has no culpability—for example, regardless of whether the company had a reasonable basis for the understatement or the understatement was for reasons outside the company's control or knowledge. In addition, there is no appeal right.

This means that companies hoping to avoid the new penalty must make a

“defensive” overpayment of their taxes by May 31, 2009. To do so, companies will be forced to guess or speculate what the defensive payment must be in order to take into account a multitude of unknown or uncertain possibilities that could affect their tax liability after they file. This may mean paying two to three or more times the potential understatement amount.

Overpayments will eventually be refunded, but meanwhile, at a time when companies are cash-strapped, this is a forced loan at below-market interest rates to the state of California. In addition, the need to defensively overpay will mean expensive new administrative burdens and additional tax filings for companies.

Refunds of defensive payments made in the 2005 state amnesty program, which contained a similar penalty structure, are still being processed by FTB.

Types of Companies Affected

Companies of all types and sizes that have a significant business presence in California may be harmed by the new penalty. California's largest job-creating companies and investors—such as multistate or multinational companies—

will have less capital for jobs, research and development and economic sustainment and recovery.

Smaller companies, such as subcontractors that provide goods and services to these larger companies, may suffer from less business.

Retroactive, Permanent Penalty

The penalty retroactively applies to tax years going back to 2003. Because the penalty is permanent, tying up multimillions with FTB may be something companies will have to deal with every year on an ongoing basis.

Action Needed

The California Chamber of Commerce is actively involved with this issue, but needs to hear from businesses affected.

The CalChamber recommends that businesses consult with their tax professionals to determine whether the new tax requirements affect the business.

If the new penalty is a priority issue of concern for your company, please contact Kyla Christoffersen at kyla.christoffersen@calchamber.com.
Staff Contact: Kyla Christoffersen

Free CalBizCentral Webinar Explains New State Disability Access Law

From Page 1

One new tool is a process by which business owners can use state-certified disability access specialists (CASps) to ensure their building is in compliance.

California recently posted a list of certified, state-licensed inspectors who can confirm that a business location meets applicable accessibility standards or help a business quickly make changes to do so. Passing one of these inspections or even making good faith progress toward doing so may help a business avert an Americans with Disabilities Act (ADA)/accessibility lawsuit.

Webinar Topics

The webinar will be presented by David W. Peters, chief executive officer

and general counsel, Lawyers Against Lawsuit Abuse, APC, a San Diego-based firm helping businesses prevent and resolve accessibility claims. Peters has served as a consultant in more than 500 ADA/accessibility lawsuits throughout the United States.

Topics to be covered include:

- California's new state-licensed CASp inspectors and why a business should consider hiring one through a lawyer right away.
- How CASp inspectors can confirm that a business meets appropriate accessibility standards, or help the business do so.
- How a CASp inspection can provide important protections if a business does get served with a lawsuit.

● The new law's major reforms to ADA/accessibility litigation in California.

● New strategies for dealing with ADA/accessibility claims.

● Limitations to the protections of CASp inspections and SB 1608.

● New parking area changes that were required July 1, 2008—why have so many businesses failed to comply and will they be targets for claims?

● Common pitfalls and emerging claims.

Registration

Registration and more information on the webinar is available at www.calbizcentral.com/training or by calling (800) 331-8877.

Small Business Advocate of Year Award

Riverside Business Owner Uses Local Experience in Tackling State Issue



Sharon Tyrrell

Juggling employees' work schedules comes with the territory of owning a small business. Just ask Sharon Tyrrell, a winner of the 2008 California Chamber of Commerce Small Business Advocate

of the Year award.

Tyrrell has four young employees who have obligations outside of their responsibilities for her Riverside company, Capree Escrow Inc. Recently, two employees were nearly forced to leave the company because their schooling created a conflict in scheduling.

Flexible Workweek Support

"In a small business you have long-term employees who are almost like a part of the family, so you are trying to keep their dedication as well as further them in their studies," Tyrrell said. This illustrates, she said, why small businesses should be allowed to provide a flexible workweek for their employees.

Taking this personal connection with her, Tyrrell headed to Sacramento in April 2008 on behalf of the Greater Riverside Chambers of Commerce to testify before the Assembly Labor and Employment Committee in support of the CalChamber-sponsored flexible workweek bill, AB 2127 (Benoit; R-Bermuda Dunes).

Although the bill was voted down, Tyrrell and four others who testified from other chambers, marked it as a victory because there were two votes in favor.

"We made some progress, but each year we are chipping away at it," she said, adding that she plans to advocate for similar legislation this year.

Strong Voice for Business

Working on state and local governmental issues was something Tyrrell never saw herself doing when she began working at family-owned Capree Escrow in 1994. But after taking over the company for her mother and molding herself into a strong voice for the Riverside business community, Tyrrell

said she owes a lot of her success to the chamber for creating an "avenue of interest."

She has served on the chamber's executive committee for the last five years, and is vice chair of the governmental affairs council.

She also has been a member of the chamber's political action committee since its establishment.

"It is individuals such as Ms. Tyrrell who maintain countless hours of services, tireless work ethic and unyielding commitment to our chamber mission and its members which keep our businesses thriving," said Cindy Roth, president and chief executive officer of the Greater Riverside Chambers.

Political Transformation

The chamber has gone through a political transformation since Tyrrell became a member more than 12 years ago, at which time she remembers it being a lot about "surface stuff" such as mixers and social networking.

During that time, Tyrrell, along with the rest of the governmental affairs committee, began to see more and more fee increases on businesses at a time when development was booming.

"It was not the most business-friendly community and that's what the chamber really tried to help with," she said.

The local business community was paying attention to the chamber's efforts.

Following the creation of the governmental affairs council, and a switch in focus to local and state political issues, the chamber became *the* voice for the Riverside business community.

Respect

As the chamber's reputation has become more respected, cooperation with the Riverside City Council has also progressed. Although there are differences of opinion with the city council, there still has been open dialogue with issues affecting the community, Tyrrell said.

"Any time that we have had an opinion on business, they have certainly been willing to sit down with us and talk to us," she said.

Economic development is what spurs the relationship. The chamber, with Tyrrell's assistance, worked with the city council to transform a local shopping center built in the 1950s. Tyrrell and other chamber representatives met with city council members and the developers to help design a blueprint that met the needs of the business community while still maintaining the community's heritage, something very dear to the community at large.

After a four-year process of negotiations, the chamber helped refurbish the dilapidated shopping center.

"When we went to the grand opening, it was a great thing to be able to say, 'I was a part of that,'" Tyrrell said.

CalChamber Seeks Advocate Award Nominees

The California Chamber of Commerce has opened nominations for its Small Business Advocate of the Year award.

Nominees should have contributed significantly as an advocate for small business by being involved in such activities as taking leadership roles in or working on state or local ballot measures, testifying before the state Legislature, representing a local chamber of commerce before local government, and being actively involved on federal legislation.

Deadline: April 3

Award nominations are due to the CalChamber Local Chamber Department by April 3.

The CalChamber will recognize award winners at its Business Legislative Summit on May 18 in Sacramento.

The nomination form and criteria are available at www.calchambervotes.com or may be requested from the Local Chamber Department at (916) 444-6670.

Recession So Far: Not Mildest, Not Worst

So far in California, the recession has been neither the mildest nor the worst during the last several decades, comments the president of the California Foundation for Commerce and Education (CFCE).

In an article this week on the *Fox & Hounds* website, www.foxandhoundsdaily.com, CFCE President Loren Kaye reviewed employment numbers from the state Employment Development Department, personal income and inflation numbers from the state Department of Finance, recession dating information from the National Bureau of Economic Research and taxable sales figures from the state Board of Equalization.

Signs Not Encouraging

Although it is too early to tell where the recession will measure in comparison to others, such as the Great Depression of the 1930s or the downturn of the 1980s, Kaye notes, “none of the economic signs on the horizon are encouraging; most of the leading indicators point south.”

Kaye’s article continues as follows:

Change in Employment

“Employment is a lagging indicator of recessions, so the worst is probably yet to come. One year into the downturn, California’s employment losses have been material, but not nearly as bad as the two most recent recessions.

“Ultimate job losses from the 1990–93 recession amounted to a stunning 4.1 percent of employment from the 1990 peak. To reach that level of employment, California would have to lose another 365,000 jobs, about half-again the number lost so far.

Income Drop

“Income has also suffered, but again, not as severely as other recessions — so far. The 1981 recession saw a sharp 4.5 percent drop in real personal income, but the economy quickly recovered before the next downturn.

“The California economy took a severe beating in the 2001 recession, losing nearly 5 percent on an inflation-adjusted basis. So far, this recession has resulted in a 1.7 percent drop in real personal income, although no one believes it has hit bottom yet.

“To be sure, this recession has hit

certain sectors of the California economy disproportionately hard, including construction, financial services, and retail. The pullback in consumer spending has sharply affected retail sales.

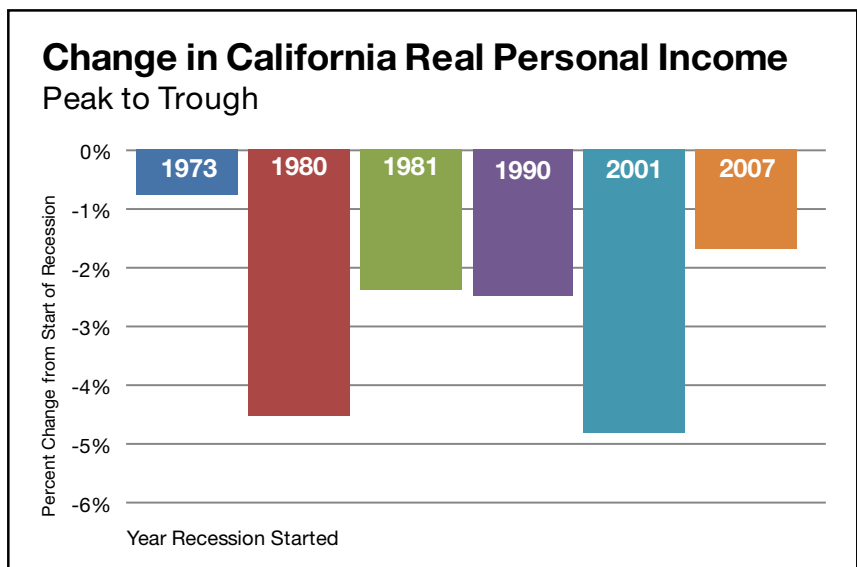
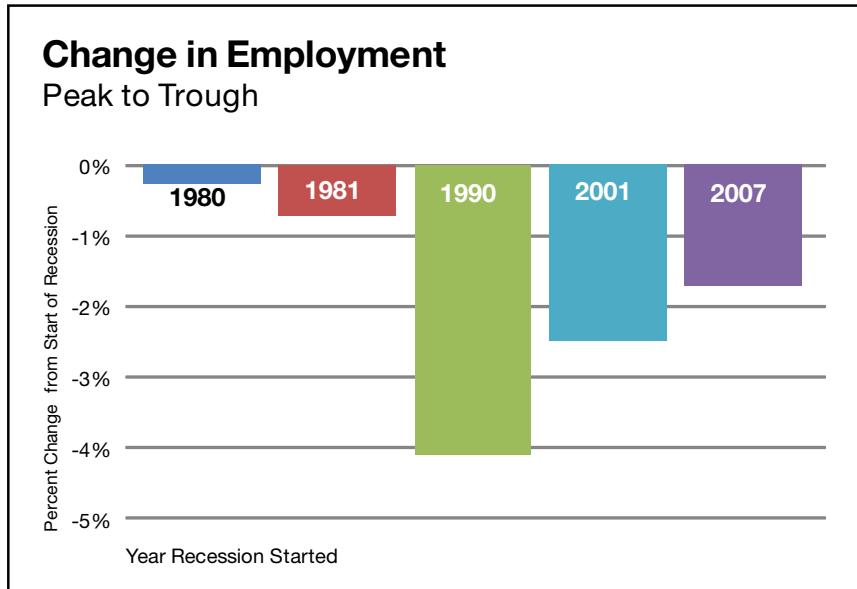
Taxable Sales

“Of course, the changing California economy has radically changed the effect of recessions on state and local treasuries. Regarding taxable sales, the current recession is on par with the severe downturn of the early 1990s (see chart on next page). A quarter-century

ago, California was more dependent on traditional manufacturing, with its strong wage base. The recessions in the 1970s and the early 1980s were relatively mild.

“Since then, more of the state’s revenues have come in the form of capital gains and stock options, which are far more sensitive to economic and financial signals. Therefore, the more recent recessions have had a worse effect on state and local budgets than earlier downturns.”

Contact: Loren Kaye



New Federal Rule Eases Endangered Species Consultation Process



A rule revising and easing the process for federal agencies to consult on endangered species questions with the U.S. Fish and Wildlife Service and the U.S. National Marine Fisheries Service went into

effect on January 15.

The rule is designed to reduce the number of unnecessary consultations and stretch the limited budgets of the two services.

Landowners, developers and others needing federal permits to use or develop land benefit from the rule to the extent that it reduces the occasions for consultations that are costly and time-consuming.

Environmentalists and the state of California have sued to invalidate the rule, claiming that it eviscerates the Endangered Species Act.

New Rule

Under the new rule, a federal agency must formally consult with the services if it determines its actions “may affect” a listed species or its habitat. However, if the agency further determines that its action will not result in a take of the species or any of the four following

circumstances exists, the agency can go forward without consulting with the services:

- The action has no effect on the listed species or its habitat.
- The effects of the action are “wholly beneficial.”
- The effects of the action are “not capable of being measured or detected in a manner that permits meaningful evaluation.”
- The effects of the action are “manifested through global process” that can’t be reliably predicted or measured in the species range or would result in extremely insignificant impacts or the potential risk of harm is remote (global climate change).

Climate Change Considerations

With this rule, the services limit their consideration of global climate change, explaining that consultation under the Endangered Species Act isn’t appropriate or effective in this circumstance. The rule doesn’t preclude consideration of climate change in establishing a baseline for future impacts to the status of endangered species.

Refining the trigger for when consultation is necessary allows the services to focus their resources on other actions that have a higher probability of harming listed species.

Critics of the rule say the agencies don’t have the expertise to determine if their actions will adversely affect listed species. Those same agencies, however, have been deciding whether to consult with the services for decades.

New Administration

Because the rule went into effect before the new administration took over, to reverse it requires a new rulemaking process that could take about a year to complete.

Alternatively, the President could ask Congress to invoke the Congressional Review Act that allows either the U.S. House or U.S. Senate to kill a rule after it goes into effect, but must be done within 60 legislative days.

Staff Contact: Valerie Nera

2009 CalChamber Issues Guide on Web



The 2009 edition of the California Chamber of Commerce **Business Issues and Legislative Guide** is available now at www.calchamber.com/businessissues.

The premier sponsors of this year’s **Guide** are Wells Fargo and Chevron. Premium sponsors are Goddard Claussen, Enterprise Rent-a-Car and Bridgestone Firestone.

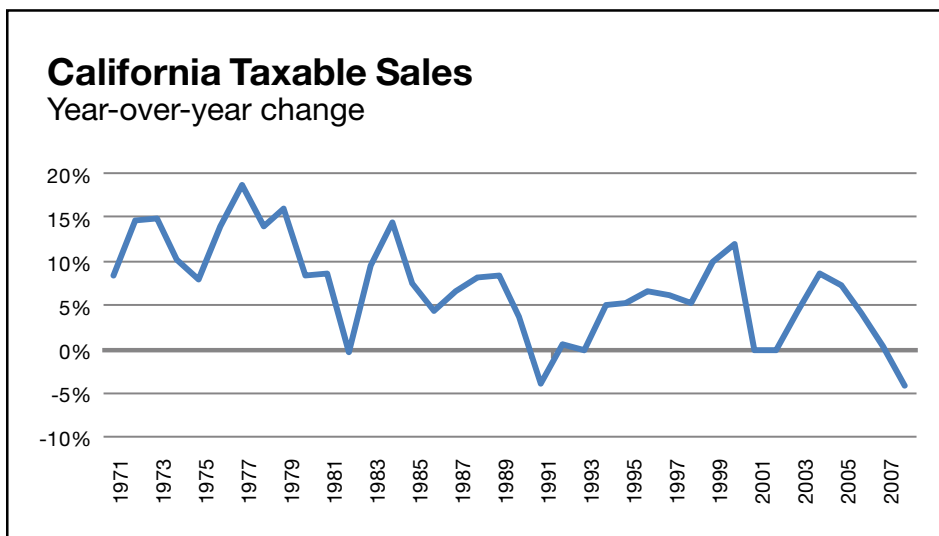
The **Guide** also acknowledges CalChamber Cornerstone members AT&T, Bank of America, BP, Chevron, Edison International, Pacific Gas and Electric Company, Safeway and Wells Fargo.

The policies outlined in the **Guide** can help California begin “Leading the Nation Out of the Recession.”

Preferred and executive CalChamber members receiving print copies of **Alert** will receive hard copies of the **Guide** in the mail.

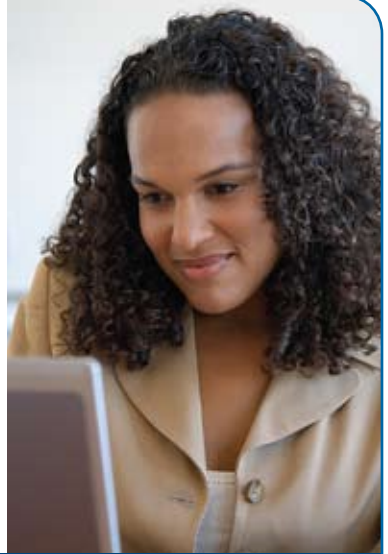
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Taxable Sales Match 1990s Downturn



Learn the Latest on Critical HR Topics

Get the latest information from attorneys with employment law expertise at our February web seminars. Attendees to the paid events will be able to: ask questions, receive a copy of the seminar slides and all questions and answers, and get access to a recording of the seminar.



Web Seminars
10 a.m.–11:30 a.m.
\$170 each*

- Layoffs 201: Layoffs and Downsizing Issues** February 4
- FMLA/CFRA 201: FMLA Update for California Employers** February 11
- Labor Law Update: HR 201 Live Web Seminar** February 12

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SB 1608: What California's New Accessibility Law Reforms Mean to Employers February 19, 10 a.m.–10:30 a.m. **FREE**

* CalChamber Preferred and Executive members will receive their 20% member discount.

Register at www.calbizcentral.com/training



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