

ALERT

VOLUME 36, NUMBER 32 • NOVEMBER 19, 2010



CalChamber Urges Extension of UI Interest Relief to States



The California Chamber of Commerce recently joined a nationwide coalition of business and trade associations urging Congress to continue waiving interest charges on federal loans for

paying unemployment insurance (UI) benefits.

The current interest waiver is part of the American Reinvestment and Recovery Act (ARRA) and is scheduled to expire on December 31. A payment is due in September 2011.

“Keeping the waiver could buy California time while it waits for the economy to strengthen,” said Marti Fisher, CalChamber policy advocate. “Benefit reductions alone won’t fix the fund and taxing employers right now is a bad idea because of the economy. If we have increased revenues and we get some relief from the federal government, we can figure out the best approach to fixing the system.”

California’s UI Debt

California has the largest UI system in the country. According to the U.S. Department of Labor, the California UI system provides the easiest access to

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Court Rules Employers Need Not Ensure Employees Take Breaks



The 2nd District Court of Appeal recently ruled that employers must provide employees with breaks, but do not have to make sure employees take meal and rest breaks.

In the case of *Hernandez v. Chipotle Mexican Grill* (2010 Cal. App. Unpub.), the court limited meal and rest break class action lawsuits by concluding that the employee’s meal and rest break claims were not appropriate for class certification.

The court’s opinion originally was left unpublished, which prohibits courts or parties from citing or relying on it. On October 19, the California Chamber of Commerce joined other interested organizations in sending a letter to the court asking that the court certify the opinion for publication.

Fortunately, after consideration, the appellate court did decide to certify the case for publication. The *Hernandez* case clarifies, for the time being, the very issue that is pending before the California Supreme Court in *Brinker v. Superior Court*, 165 Cal. App. 4th 25 (2008).

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Council Examines General Election Results



Photo by Megan Wood

CalChamber Board member Ronald Redfern (left) of The Press Enterprise in Riverside confers with special guest speaker Donna Brazile, Democratic strategist and CNN commentator, at the CalChamber Public Affairs Council Fall Retreat. More photos on Page 7.

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Labor Law Corner

Business Closure, Sale, Bankruptcy: Final Pay Obligations Remain



Gary Hermann
HR Advisor

How does an employer's closing, sale or bankruptcy affect final pay for accrued and unused vacation?

Due to the current instability of the business market, many companies are finding it hard to stay afloat. Some businesses are able to sell themselves to avoid substantial financial losses, but others are pushed into bankruptcy.

In circumstances such as these, it's important to know where your legal obligations lie, as an employer, to your employees.

Protections Under State Law

Any act that severs the employment relationship, such as a closing of the business, sale of the business or a bankruptcy, other than a reorganization, would operate as a termination for the purposes of the California Labor Code sections below:

- Section 201 requires an employer to pay all earned and unpaid wages immediately at the time of discharge.
- Section 202 requires an employer to have an employee's final wages available within 72 hours if the employee has not provided at least 72 hours notice of the quit, and at the same time of the quit, if such notice has been provided.
- Section 203 imposes a penalty of continuing an employee's wage for up to 30 calendar days.
- Section 227.3 requires an employer

to pay all accrued and unpaid vacation at an employee's final rate of pay at the time of termination.

Sale of a Business

In California, the sale of a business entails certain rights and responsibilities on the part of the employees and the employer.

California courts have held that a sale of the business constitutes a termination of the employment (*Chapin v. Fairchild Camera and Instrument Corp.* (1973) 31 Cal.App.3d 192).

The employer who owes the wages or benefits may not substitute another obligor (the buyer) in his/her place without the express written consent of the obligee (the employee).

In some sales, the purchasing entity may contractually agree to assume any wage liability to the employees and/or agree to continue the old employer's vacation accruals and policy. Although this may alleviate the burden on the employees, it does not eliminate the old

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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 Zaremborg. Executive Editor: Ann Amioka. Associate Editor: Sara Espinosa. Art Director: Marcy Wacker. Capitol Correspondent: Christine Haddon. Photographer: Megan Wood.

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.

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Business Resources

Preventing Workplace Fraud Webinar On Demand. CalChamber. (800) 331-8877.

International Trade

International Business Certificate Program. Northern California World Trade Center. November 29, December 3, December 13, Sacramento. (916) 447-9827.

3rd Annual Green Trade Network Summit. Monterey Bay International Trade Association. December 1, Salinas. (831) 335-4780.

International Traffic in Arms Regulations. El Camino Center for International Development. December 6, Hawthorne. (310) 973-3148.

Asia Society Green Finance Conference. Asia Society Northern California. December 8, San Francisco. (415) 421-8707.

Korea Trade Fair. Korea Trade-Investment Promotion Agency, Los Angeles (KOTRA). January 11,

2011, Korea International Exhibition Center. (323) 954-9500.

High Tech Mission to India. U.S. Department of Commerce. February 6-11, 2011, New Delhi, Bangalore, Mumbai. (202) 482-3663.

CalChamber Calendar

Business Services Committee:
December 2, San Francisco

Board of Directors:
December 2-3, San Francisco

International Trade Breakfast:
December 3, San Francisco

Annual Meeting:
December 3, San Francisco

Fundraising Committee:
December 3, San Francisco

**Next Alert:
December 3**



Electronic Medical Records Beneficial for Both Employers, Employee Health



There has been a great deal of discussion over the past few years about the importance of electronic medical records (EMR) in improving the quality of health care for patients—

and rightly so.

With a fully functional EMR system, physicians, nurses and technicians have 24-hour access to a patient's up-to-the-minute medical history, which means treatment is more coordinated. EMRs also make prevention more of a reality by automatically calculating, for example, when a patient is due for a screening exam.

Business Benefits

But the benefits of EMRs don't stop at the hospital or medical office building door. Depending on their size, businesses also can benefit from the power of EMRs by working with health care providers and health insurers to obtain aggregated high-level data to help encourage their employees to be healthy.

The businesses must be large enough—100 employees or more—so that this aggregated data does not reveal personal health information about individual employees.

With EMRs, health care providers and health insurers can arrange to provide employers with health information about their overall employee population—such as the percentage of employees who are current with their colorectal screening, or

the percentage who smoke, have high cholesterol or high blood pressure.

This is possible because EMRs allow computers to collect and organize information across large numbers of people in real time.

Targeted Programs

Then, employers can use this information to better support employee health needs through targeted workplace health programs and activities.

Guest Commentary By Tom Carter

“Thanks to the capabilities of electronic medical records, employers can learn more about the health needs of their overall employee population and then use that information to help their employees be healthy.”

For example, if an employer has a high percentage of employees who are overweight, it makes sense to have a workforce wellness program that addresses weight management—especially since the employer can track the effectiveness of the initiative by using the same high-level aggregated data.

Pilot Program

The California Public Employees' Retirement System (CalPERS) recently announced a comprehensive pilot workplace program with Kaiser Permanente that is designed to improve

the health of employees at risk for diabetes—as well as overall employee health. The pilot will be instituted this year at two CalPERS agencies: Solano County government employees, and the faculty and staff of California State University, Northridge.

CalPERS is targeting diabetes because Kaiser Permanente can produce aggregated data from Kaiser Permanente's EMR system, KP HealthConnect, which shows that the prevalence of diabetes among Kaiser Permanente members working for CalPERS agencies is higher than it is for Kaiser Permanente's California membership as a whole.

The CalPERS pilot program aims to improve the health of employees at the pilot agencies who are Kaiser Permanente members by motivating them to take a more active role in focusing on diabetes prevention. These employees will be encouraged to seek appropriate testing and take advantage of resources to improve their health—including telephone and online coaching.

Additionally, all CalPERS employees at the pilot agencies can participate in a range of wellness services, such as health promotion classes, online programs and healthy eating initiatives.

Thanks to the capabilities of EMRs, employers can learn more about the health needs of their overall employee population and then use that information to help their employees be healthy. That's not only good for the employees, it's also good for business.

Tom Carter is a vice president for Kaiser Permanente.

New Heat Illness Regulations Take Effect

The Office of Administrative Law recently approved and revised heat illness regulations, which went into effect on November 4.

The Cal/OSHA Standards Board unanimously adopted California Division of Occupational Safety and Health (Cal/OSHA)-recommended revisions, providing needed clarity to the state's heat illness prevention standard in August.

California Chamber of Commerce Policy Advocate Marti Fisher was among those presenting an employer perspective when the Cal/OSHA Standards Board met in Sacramento on August 19 to review several amendments to the state's heat illness standard.

Balanced Approach

The CalChamber supports the amended regulations and sees them as a balanced approach to protecting the health and safety of outdoor workers while recognizing the realities of outdoor workplaces for employers.

In summary, the rulemaking package institutes "shade up" provisions when the temperatures reach 85 degrees Fahrenheit and "high-heat" procedures at 95 degrees



Fahrenheit. The package also clarifies what constitutes a "shade break" and creates exemptions from the shade-up requirement for employers for whom it is not feasible, providing the alternative is just as effective as shade.

The amendments also require that employees on the job for 14 days or less be

closely supervised, unless they prove they are accustomed to working on hot days.

These rules apply to all outdoor workplaces, except the high-heat provisions, which apply only to agriculture, construction, landscaping, oil and gas extraction, and transportation of various industrial products.

The full text of the revised heat illness standards is on the Department of Industrial Relations website at www.dir.ca.gov/oshsb/Heat_Illness.html.

Comprehensive Standard

California became the first state in the nation to adopt a comprehensive heat illness prevention standard for outdoor workers in July 2006. The regulations, implemented by Cal/OSHA, mandated training for employees and supervisors on heat illness prevention, symptoms and treatment.

The regulations apply to all companies with employees working in outdoor places of employment. In addition to the training requirements, employers must provide potable drinking water, access to shade and compile heat illness prevention procedures, including employee training, in writing.

Staff Contact: Marti Fisher

Business Closure, Sale, Bankruptcy: Final Pay Obligations Remain

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employer's wage obligations.

Bankruptcy

An employer sometimes fails to pay wages because it is insolvent and lacks sufficient funds to meet the employer's wage and other obligations.

If the employer becomes insolvent and closes the business, it obviously has terminated the employment relationship. The employer's inability to pay is not a defense against a failure to timely pay wages under Labor Code Sections 201 and 202.

Furthermore, insolvency does not relieve the employer of penalties under Labor Code Section 203. The civil penalty assessed under Labor Code Section 203 does not require that the

employer intend the action; it merely requires that the action occurred and was within the employer's control (*Davis v. Morris* (1940) 37 Cal.App.2d 269, 99 P.2d 345).

Bankruptcy permits insolvent parties to discharge or limit their obligations to creditors. An employee who files a claim for wages against an employer in bankruptcy becomes a creditor.

A priority is granted for certain "wages, salaries, or commissions" earned by an individual within 90 days of the bankruptcy filing or cessation of the employer's business, whichever occurs first. The amount entitled to priority is now set at \$4,650.

Federal bankruptcy law expressly extends its coverage to include vacation, severance and sick leave pay. Unpaid

vacation pay accrued before the bankruptcy filing may be entitled to priority status. Claims for vacation pay earned after the 90-day period preceding the filing of the bankruptcy or the cessation of business are simply general unsecured claims.

When a debtor files a petition for bankruptcy relief, an automatic stay goes into effect. This stay prohibits creditors from proceeding on actions to collect any part of a debt except through the federal bankruptcy court.

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.

State Legislative Analyst Projects \$25 Billion Budget Problem by 2011–12



Without action, California will face a \$25.4 billion “budget problem” by the time the Legislature enacts a 2011–12 state budget plan, according to non-partisan state Legislative Analyst Mac Taylor.

Moreover, annual budget problems of \$20 billion will continue through 2015–16, Taylor predicts in his assessment of California’s fiscal outlook, released on November 10.

Deficit and ‘Gap’

The \$25.4 billion problem consists of a \$6 billion projected deficit for 2010–11, and a \$19 billion gap between projected revenues and spending in 2011–12, according to the legislative analyst.

The projection assumes the state will be unable to secure about \$3.5 billion in budgeted federal funding in 2010–11, and that prisons and several other programs will exceed budgeted costs. Moreover, the legislative analyst assumes the state will fall short of 2010–11 budget solutions

due to the passage of Proposition 22, which revoked state borrowing of local government property tax funds, and prohibits the state from borrowing voter-approved funding for transportation and mass transit.

Although the 2011–12 projected budget gap has dropped \$2 billion from a year ago due to reduced education spending, the slow economic recovery still leaves a large operating deficit.

Multi-Year Budget Approach

As he has done in previous budget analyses, the legislative analyst continues to recommend that the Legislature begin a multi-year approach to resolving the state’s structural budget gap.

For 2011–12, he suggests \$10 billion of permanent revenue and expenditure actions and \$15 billion of temporary solutions.

In each succeeding fiscal year, another few billion dollars of permanent actions could be combined with temporary budget solutions until the structural deficit is eliminated, the legislative analyst said.

“Barring another sharp economic decline, such an approach could fix California’s near-term budget problems

by the end of our forecast period in 2015–16 and give the state flexibility to begin (1) building reserves needed to address the next economic downturn and (2) addressing long-term fiscal liabilities,” the legislative analyst wrote.

Special Budget Session

The day after the legislative analyst released the budget review, Governor Arnold Schwarzenegger announced he will call a special budget session beginning December 6, the day legislators are scheduled to convene for the start of the new session.

In his weekly address on November 13, the Governor commented that the emergency special session of the Legislature “will allow us to make immediate mid-year cuts.”

He continued, “Sacramento has no choice but to face the reality and to make the cuts and finally bring spending in line with revenues...I’m going to work very hard on that. And like I said to you, I’m going to charge through the finish line. There is no such thing as ‘the lame duck Governor.’ I’m going to work for you until the last end and then beyond.”

The budget analysis is available at www.lao.ca.gov.

Court Rules Employers Need Not Ensure Employees Take Breaks

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Restaurant Policy

In the *Hernandez* case, the restaurant’s written policy requires managers to provide employees with meal and rest breaks, but managers are to determine when, or if, employees take breaks. Employees cannot self-initiate breaks, but are prohibited from skipping breaks.

The restaurant’s policy requires employees to take one uninterrupted 30-minute meal break if they work more than five hours and two 30-minute meal breaks if they work more than 10 hours. Managers must provide employees who work more than three and a half hours with a 10-minute rest break. Employees who work more than six hours must take

two rest breaks of at least 10 minutes each.

The restaurant pays employees for breaks, even though employees are relieved of duty and free to leave, so there is no financial incentive for employees to record their breaks accurately. Therefore, sometimes employees would forget to clock in or out, leading to records that did not always accurately reflect when meal breaks actually were taken.

Hernandez conceded that employers must merely permit rest breaks—not make sure they are taken—but he contended that a different standard applies to meal breaks such that employers must actually ensure employees take their meal breaks.

The appellate court disagreed with Hernandez and ruled that employers are

not required to make sure employees take their meal breaks.

As a result, the court deemed the matter was not suitable for class certification because individual issues predominated. Hernandez would have to present an analysis restaurant-by-restaurant and, perhaps, supervisor-by-supervisor to prove the restaurant violated break laws.

Caution

Employers should exercise caution in managing meal and rest breaks, however, because the Supreme Court is reviewing the matter in the *Brinker* case.

For more information, see the meal and rest break shortcut at HRCalifornia.com.
Staff Contact: Erika Frank

CalChamber Urges Extension of UI Interest Relief to States

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benefits; covers more workers—including part-time workers; pays more claims; and pays more weeks of benefits than any other state in the nation.

California's UI Fund debt is \$8.6 billion now, and is expected to reach \$10.3 billion for 2010, two-thirds greater than last year. Worse, the deficit is projected to hit \$13.4 billion by the end of 2011 and \$16 billion in 2012, according to the California Employment Development Department, which runs the program.

Interest on that debt will soon start piling up, forcing California to come up with a \$362 million payment to the federal government by the end of September 2011.

Continued borrowing, meanwhile, means that employers face an automatic hike in their federal UI taxes, pushing up annual payroll costs \$21 a year for each worker.

Those costs will continue to mount over the next five years if California continues to borrow from the federal government and until the loan is paid in full.

Glimpse of UI Nationwide

As of November 11, 32 states and jurisdictions continued to have outstanding loan amounts of \$40.7 billion with projections that the number of states borrowing could increase to 40 by 2013 with loans of \$65 billion. Assuming the current federal interest rate of approximately 4 percent continues,

without further relief, states would be required to pay approximately \$1.6 billion for 2011 and an increasing amount for 2012.

Although state UI tax rates are set by state legislatures and governors, federal law governs interest on loans to states to pay state unemployment compensation and federally imposed solvency taxes will add to the employer burden.

Federal law prohibits paying the interest from the unemployment fund; therefore, the interest payment must be made from other funds. This creates significant unfunded obligations for states and likely an imposition by state legislatures on employers to pay state surcharges to cover these costs.

In addition to losing the interest waiver after 2010, up to 25 states are scheduled to be subject to federal unemployment tax penalties if loans to pay unemployment compensation are not repaid by November 10, 2011.

CalChamber Letter

In the letter to the congressional delegation, the coalition and CalChamber urged that the following job-creating and deficit-reducing provisions be enacted:

- Extend the waiver of interest on loans to states to pay unemployment compensation through 2012. Without a waiver, employers in up to 32 states and jurisdictions are likely to see up to \$3.6 billion in increased state taxes to cover this increased cost.
- Waive Federal Unemployment Tax

Act (FUTA) penalties on employers in states borrowing to pay unemployment compensation through 2012. Without a waiver, FUTA taxes on employer payroll in approximately half of the states will be increased by \$2.5 billion for 2011 and a projected \$3 billion for 35 states for 2012.

- Enact integrity measures to increase effective UI overpayment recovery by providing for offset of benefit overpayments with income tax refunds and adding the reporting of the first day of earnings to the National New Hire data base to more effectively identify UI claimants who are working while being paid unemployment compensation.

- Provide \$30 million in additional targeted administrative UI funding in the 2011 and 2012 fiscal years for automated systems and personnel training to better identify fraud and collect overpayments.

CalChamber believes these provisions will reduce the costs of unemployment, enable employers to create jobs and provide savings to reduce the federal deficit.

Action Needed

The CalChamber is urging members of the business community to contact their congressional representatives and ask for a vote in favor of provisions to extend for two years the waiver from federally imposed interest on amounts borrowed by states to cover increasing UI costs.

For a sample letter, visit www.calchambervotes.com.

Staff Contact: Marti Fisher

2011 Required Notices Kit Available at CalChamber Store

The California Chamber of Commerce is warning employers that their 2010 California and federal notices poster and certain pamphlets are no longer current.

Updated required posters and pamphlets include:

- the Cal/OSHA Safety and Health Notice;
- the unemployment insurance pamphlets; and
- the workers' compensation notice (employers were required to post the updated notice by October 8, 2010).

Through the CalChamber Store, employers can order the **2011 Required**

Notices Kit—all 16 state and federal required employee notices on one space-saving poster, plus all five required employee pamphlets, updated as necessary for 2011 in packs of 20.

Also available for purchase is the Poster Protect service, ensuring customers will receive a new poster at no additional charge if there are any mandatory changes in state or federal employment law posting requirements during the calendar year.

Special Offer: Purchase any **Required Notices Kit** with poster by January 7, 2011 and get a See's Candies certificate. Use priority code KPS3 when ordering.



CalChamber Preferred and Executive members receive an additional 20 percent off the purchase price.

For more information, visit www.calchamberstore.com/kit.

CalChamber Public Affairs Council Retreat Gives Insider's Look at Election Results

Photos by Megan Wood



Assessing the legacy of Governor Arnold Schwarzenegger are (from left) Ian Halperin, investigative journalist; Margita Thompson, former press secretary for Governor Schwarzenegger; and Joe Mathews, journalist and Irvine senior fellow at the New America Foundation. The panel moderator was Patricia Clarey, former chief of staff to the Governor and now chief operating officer for Health Net.



Donna Brazile, Democratic strategist and CNN commentator, presents her interpretation of the November election results.



CalChamber Public Affairs Council Chair Gillian Zucker, a CalChamber Board member and president of Auto Club Speedway, welcomes council Fall Retreat attendees to the opening reception.



Panelists for a discussion offering a behind-the-scenes look at the race for California Governor and U.S. Senate are (from left) Julie Soderlund, Carly Fiorina campaign; Rob Stutzman, Meg Whitman campaign; Rose Kopolcynski, Barbara Boxer campaign; Roger Salazar, independent expenditure campaigns; and Darryl Sragow, *Los Angeles Times* poll. The panel moderator was Bill Devine, AT&T.



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