

# ALERT

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## Coalition Says Notice Rule Exceeds Agency's Authority



A federal agency is exceeding its authority under the law in proposing that private sector employers notify employees of their right to unionize, according to the California Chamber of

Commerce and a coalition of employers.

In a February 9 letter to the National Labor Relations Board (NLRB), the CalChamber and coalition pointed out that numerous components of the proposal exceed the NLRB's authority.

### Proposal

The proposed notice requirement covers all employers subject to the National Labor Relations Act (NLRA) and would be mandatory in almost all workplaces, regardless of whether union employees are present.

The notice is to be placed where other notices typically are posted. If an employer customarily communicates with employees electronically, the notice would need to be posted electronically.

Failure to post the notice would

be treated as an unfair labor practice under the NLRA and as evidence of an employer's unlawful motives in cases involving such allegations.

Furthermore, the NLRB will allow an employee to delay the six-month statute of limitations to report a complaint under the NLRA until the employer posts the notice.

### Coalition Letter

In the letter, the CalChamber and coalition said that in its proposed mandate, the NLRB is overstepping its authority by:

- **Imposing a posting requirement on employers.** The NLRA does not provide the NLRB with the authority to require employers to post a notice in the workplace regarding workers' rights. "The NLRB is only charged with preventing, investigating, and remedying unfair labor practices, as defined in the NLRA," the letter states. "However... the Proposed Rule seeks to impose an affirmative obligation onto employers before the NLRB's jurisdiction is even invoked with regard to an unfair labor practice."

Furthermore, while a similar posting notice is required for federal contractors

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## Bill Proposes Removing Tax on Adult Child Health Care Premiums



Legislation has been introduced to conform California with federal law regarding the taxable status of the health care premium paid for adult children between the ages

### SUPPORT

of 19 and 25.

California Chamber of Commerce-supported **AB 36 (Perea; D-Fresno)** has been referred to the Assembly Revenue and Taxation Committee and is set for a hearing on February 14.

### Non-Conformity

As recently reported (see January 28 *Alert*), on or before September 23, 2010, the eligibility age for a child to remain on a parent's health care plan in California was extended to children up to 26 years old in order to conform to federal law—the Patient Protection and Affordable Care Act and the Health Care and Education Reconciliation Act, both passed in March 2010.

When California extended the eligibility age of health care coverage to adult children up to 26 years of age, however, it failed to revise its tax code to conform to federal law as to the taxable treatment of such coverage.

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## Labor Law Corner

# Uncashed Payroll Checks Remain Employee's Property or Escheat to State



**Barbara Wilber**  
HR Adviser

*Our payroll checks are no longer negotiable after six months. May I have a policy in our employee handbook warning that after six months any uncashed paychecks will be cancelled and not reissued?*

No, the employer may not take possession of uncashed payroll checks. Although the employee did not cash the

check, the wages remain the employee's property and the employer may not refuse to reissue the check.

Also, the employee may file a claim for unpaid wages according to the applicable statute of limitations.

### Unclaimed Paycheck

If the employer is unable to locate the employee, the property escheats to the state pursuant to provisions of the Unclaimed Property Law, Code of Civil Procedure, Section 1500 et seq. The rules established by these sections are administered by the State Controller's Office.

In listing property that escheats to the state, Code of Civil Procedure, Section 1513(a)(7) includes "Any wages or salaries that have remained unclaimed by the owner for more than one year after the wages or salaries become payable."

Sections 1510 and 1511 of the Code of Civil Procedure contain inclusions and exclusions to Section 1513.

In addition, the Labor Commissioner's office is authorized to collect unclaimed wages if employees cannot be located. After the Labor Commissioner makes

a diligent effort to locate employees, the wages are remitted to the Industrial Relations Unpaid Wage Fund and escheat to the state.

This law was enacted to prevent holders of unclaimed property from placing the funds back into their business accounts and to provide a method of retrieval for the property owners.

### Recovering Wages

In both funds, the property submitted does not become the property of the state permanently. The owner/employee may recover the wages by submitting a claim to the State Controller's Office. Instructions are provided on the controller's website.

Reporting rules are found in Code of Civil Procedure, Section 1530, and on the website of the State Controller's Office, [www.sco.ca.gov](http://www.sco.ca.gov).

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*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).*

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## CalChamber-Sponsored Seminars/Trade Shows

More information at  
[www.calchamber.com/events](http://www.calchamber.com/events).

### Business Resources

New ADA Rules Panel Discussion.  
State Board of Guide Dogs for the Blind. February 23, Sacramento/Live Webcast. (916) 574-8167.

Solutions for Leaders That Will Drive Performance. Wilcox Miller & Nelson. March 16, Sacramento. (916) 977-3700.

### International Trade

The Americas Business Forum.  
March 2-3, Los Angeles.  
(213) 580-7500.

Berkeley Asia Business Center Conference 2011. UC Berkeley Haas School of Business. March 22, Shanghai. (510) 643-6883.

Complying with U.S. Export Controls. U.S. Department of Commerce, Bureau of Industry Security. March 24-25, San Diego. (858) 467-7040.  
Asia Pacific Business Outlook 2011.

University of Southern California/U.S. Department of Commerce, U.S. Commercial Service. March 28-29, Los Angeles. (213) 740-7130.

### Labor Law

Pregnancy Disability Leave and Family Medical Leave Act/California Family Rights Act 201. CalChamber. February 21, On Demand. (800) 331-8877.

## CalChamber Calendar

*Environmental Regulation Committee:*  
March 10, San Diego

*Water Resources Committee:*  
March 10, San Diego

*Board of Directors:*  
March 10-11, San Diego

*International Trade Breakfast:*  
March 11, San Diego

*CalChamber Fundraising Committee:*  
March 11, San Diego



# Action Needed on Free Trade Agreements to Open New Markets for U.S. Companies

**Roy Paulson**

Paulson Manufacturing is a manufacturer of safety equipment specializing in eye and face protection. This is a family business with about 140 employees, yet it is a high technology

business that utilizes state-of-the-art equipment and modern methods.

You have seen our products many times as the face shields on firemen's helmets or the heat reflective face shields worn by steel workers in the mills. What you have not seen are the many forms of eye and face protection, used in so many ways, from medical surgery to high technology.

We have a growing and expanding business that is thriving even in this difficult economy. Because of our involvement in industry, we get to experience the return of the economy, before the general public.

We design and manufacture our products in California with domestic materials and local labor. I am able to compete domestically and abroad with my product line, as long as I am selling innovative cutting-edge products. The keys are innovation, quality and customer service.

## International Markets

As I moved into the international markets, I brought along our business philosophy. This helped to develop our long-term relations with the foreign customers, and we have been successful at building our distribution and creating repeat sales in many countries. There was a time that I viewed foreign countries as competitors and I made a whole series of defensive moves to protect my sales in the domestic market.

However, my perspective has changed. This came about gradually and grew through my direct experience in building up my international sales. Now I am playing offense and I view the foreign countries as customers. I love my customers!

With this change in attitude, I discovered that I could successfully

sell to most countries, with the proper application of our business methods and a large dose of patience.

## Opportunities

Today we are specifically speaking about the three pending free trade agreements (FTAs) with South Korea, Colombia and Panama. Take a moment and think of the opportunity these agreements will present to the small business community here in the United States.

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## Guest Commentary By Roy V. Paulson

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I have had success selling such varied items as patented eye care products on South Korean cable television to electrical safety equipment in Colombia.

The security products sold to Panama are a continuing source of repeat business, and safety equipment with a 6 percent duty that will be eliminated will be a viable item as the canal is widened over many years.

In addition to my own sales, I encourage other manufacturers to sell their products in these countries and freely supply my contacts and experience gained from my years of effort.

In all three countries with pending FTAs, the reduction in tariffs will have a direct impact on sales of our products. I just spoke to my Korean contact, Bryan Kim, and he is extremely excited about the 8 percent tariff being removed immediately because now he is in a stronger competitive position and the market immediately becomes broader, allowing sales into mainstream applications.

He also commented that the Korean consumer's perception of U.S. products is one of quality and that the Made in the USA label is very important. He went on further to say that the price is critical and import duties are generally paid by the importer along with the freight charges. Eliminating the 8 percent tariff will

have a direct and immediate benefit and increase sales.

Colombia is truly a special case in South America. The FTA has been sold to the people as tremendous improvement and everyone is waiting for this to occur. My customers have been paying 20 percent tariffs on hundreds of thousands of dollars of my imported products and this has reduced the range of items that they could purchase from me.

In other words, from my broad product offering, only the items that they could not purchase from Europe, Brazil or China were being brought in from the USA. After the agreement, we can all begin to enjoy a more competitive environment for my full product range.

## Clear Results; Action Needed

I am convinced of the effects related to the FTAs because I have seen the reduction in tariffs and government regulations improve my sales in other countries. The results are clear; we just need action.

Only 40 percent of U.S. exports benefit from existing FTAs. The other 60 percent face trade barriers, particularly in fast-growing emerging nations.

Using the U.S. International Trade Commission methodology for estimating the export expansion effect of existing trade agreements, and extrapolating to the major markets where the United States does not have FTAs, the National Association of Manufacturers estimates that a robust program of FTAs with significant trading partners could generate as much as an additional \$100 billion in U.S. exports by 2014—accounting for one-third of the \$300 billion increase needed to reach President Barack Obama's stated goal to double exports by that point.

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*Roy V. Paulson is president of Paulson Manufacturing Corporation and a member of the California Chamber of Commerce Council for International Trade. He was recently appointed to the President's Export Council. This commentary is adapted from testimony presented to the U.S. House Ways and Means Committee on behalf of the National Association of Manufacturers on January 25.*

## Bill Proposes Removing Tax on Adult Child Health Care Premiums

*From Page 1*

Accordingly, the health care coverage provided for children between 19 and 25 years of age through the parent's health care plan is considered taxable income for the parent in California, unless the child meets one of the following exceptions:

- The child is (a) under the age of 24; (b) a full-time student in the calendar year; (c) maintains the same principal residence as the parent for at least half of the year; and (d) receives more than one-

half of his/her annual financial support from the parent; or

- The child is permanently and totally disabled, regardless of age.

### CalChamber Position

Given that the intent of the federal health care law and the state law was to expand insurance coverage to adult children, California should not hinder that intent by creating a tax burden on the expanded coverage.

If federal tax rules for adult child medical coverage are not adopted in California, businesses and employees will be faced with the administrative and financial burden of determining the fair market value of the insurance coverage provided solely for the adult child in order to properly calculate the state taxes owed.

The CalChamber is asking legislators to support AB 36.

**Staff Contact: Jennifer Barrera**

## Coalition Says Notice Rule Exceeds Agency's Authority

*From Page 1*

by the U.S. Department of Labor, that requirement was enacted in accordance with the President's Executive Order. No such authority exists for the NLRB to impose a similar obligation on private employers.

- **Construing failure to post the notice as an "unfair labor practice."** Section 8(a)(1) of the NLRA states that it "shall be an unfair labor practice for an employer 'to interfere with, restrain, or coerce employees in the exercise of the rights'" under the NLRA.

Under the NLRB proposal, an employer's failure to post the notice would be deemed as an "unfair labor practice," violating 8(a)(1). A failure to post, however, does not restrict an employee from exercising his/her rights, nor does it pressure an employee to act a certain way, the coalition argues.

"As Congress intended and the Courts have confirmed, there must be evidence that [failing to post the notice] had a reasonable tendency to, or actually interfered with, coerced, or restrained the employees' rights under the NLRA," the letter points out. "Therefore, the NLRB's proposed interpretation of an employer's failure to post the notice as an automatic violation of section 8(a)(1) is unlawful."

- **Creating an exception to the six-month statute of limitations for an employer's failure to post.** The NLRB has proposed giving employees an open-ended time frame in which to file unfair labor practice charges.

This exception sharply undermines the strict six-month time frame during which an employee can file a claim under the NLRA. The only exception to this six-month period is made for employees in the military in Section 10(b) of the NLRA.

The NLRB's authority is limited by Congress to create regulations in adherence to the NLRA's provisions, which includes the six-month statute of limitations, according to the letter. Therefore, the NLRB is overstepping its authority by adopting an open-ended time frame, instead of adhering to the time limits set by the NLRA.

### Coalition Suggestions

If the NLRB decides to establish the notice requirement, despite objections, the coalition suggested changes to the proposal:

- **Amend broad language.** The coalition isolated several sections in the proposed mandate that were overly broad or vague to ensure that employers had a clear understanding of what was required, and to avoid loopholes through which employees could sue otherwise compliant employers.

For example, Section 102.202(f) of the NLRB proposal requires employers to distribute the notice electronically "if the employer customarily communicates with employees by such means." The coalition suggested that "customarily communicates" is an overly broad phrase that fails to provide clear guidance. After all, some employers communicate via e-mail with employees regarding

personnel issues, but only communicate with employees regarding statutory notices via physical posters.

The coalition urged the NLRB to amend the language of the section to require employers distribute the proposed notice electronically only if the employer also has distributed other notices required by law to employees electronically.

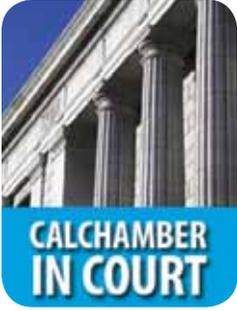
- **Statute of limitations.** Even though the coalition does not agree that the NLRB has the authority to create an exception to the six-month statute of limitations set forth in the NLRA, the coalition suggested the NLRB add language to confirm that the six-month statute of limitations will not be waived if a union is already in place.

### Coalition

Joining the CalChamber on the coalition letter were the Associated General Contractors, California Association for Health Services at Home, California Association of Health Facilities, California Business Properties Association, California Farm Bureau Federation, California Grocers Association, California Hospital Association, California Independent Grocers Association, California League of Food Processors, California Manufacturers & Technology Association, National Council of Agricultural Employers, and Western Electrical Contractors Association.

**Staff Contact: Jennifer Barrera**

# CalChamber Urges State Supreme Court to Review Working Conditions Case



The California Chamber of Commerce and five other employer groups have asked the California Supreme Court to review a California Court of Appeal ruling that could

open the door to class action lawsuits on working conditions, unless it is overturned.

In a January 27 letter, the CalChamber and other employer groups asked the Supreme Court to grant review of the 2nd District Court of Appeal decision in *Bright v. 99¢ Only Stores*, 189 Cal. App.4th 1472 (2010).

The Court of Appeal decision in *Bright*, when coupled with a similar decision in *Harris v. Home Depot U.S.A., Inc.*, exposes all California employers to severe penalties, in addition to costly litigation, based on obscure provisions contained in California's Wage Orders.

## Background

The California Wage Orders establish minimum wage and overtime requirements in various industries. In addition, the orders describe in minute detail what employers must provide in the workplace. For example, Wage Order 7 requires retail employers to provide "suitable seats" where "reasonably permit[ted]" by the work.

In *Bright*, a retail cashier claimed to have been denied a chair while working. The plaintiff claimed that the failure to provide suitable seating also violated Labor Code Section 1198, and based upon this claim, sought penalties under the Private Attorney General Act (PAGA).

Despite the plaintiff's contentions, the trial court ruled that such a failure was not a condition "prohibited" by Wage Order 7, and dismissed the case.

The Court of Appeal, however, reversed the trial court decision and reinstated the claim. No appellate court had ever recognized a monetary penalty for wage order requirements.

The appeal court said that suitable seating is a "standard condition of labor" established by Wage Order 7 and thus a failure to provide suitable seating is a violation of Labor Code Section 1198, which states it is unlawful for an employee to be employed "under conditions of labor prohibited by" the wage orders.

## Penalties

What makes this case of particular concern is it opens the door for new PAGA claims. Section 1198 does not provide for civil penalties. As the letter points out, Wage Order 7 "wisely limits monetary recovery to those violations that result in the underpayment of wages. Thus, the penalty for a working condition violation is zero, presumably because the employee has suffered no actual economic loss, and can rely upon the Labor Commissioner to enforce the relevant working condition through injunctive relief."

In *Bright*, the appeal court extended PAGA to create fallback penalties for all wage order working conditions, even though the Industrial Welfare Commission (IWC) had limited wage order penalties to the "underpayment of wages" and not to working conditions.

## Impact on Business

PAGA establishes civil penalties of \$100 per employee, per pay period for the first violation and \$200 for each subsequent violation. The act also allows "representative actions" on behalf of similarly situated coworkers.

Under *Bright's* extension of PAGA, a retail employer with 40 employees, biweekly pay periods, and five technical violations per pay period, could accrue \$204,000 in penalties per year, in addition

to potential liability for attorneys' fees.

Even though Wage Order 7 applies only to retail employers and is the wage order at issue in *Bright*, similar working condition provisions apply to employers in all major industries in California.

*Bright*, therefore, opens the door to class action litigation of similar cases in all industries, with potential devastating results for many small to mid-size California employers

## Letter of Support for Review

The amicus letter urged the Supreme Court to review the *Bright* decision, noting that the ruling "has created dire financial consequences for employers regarding obscure working conditions where no penalties were intended."

The letter points out that the appeal court's ruling and its mistaken interpretation of the Labor Code extends PAGA "beyond its intended purpose—the enforcement of important employment laws—into a weapon allowing employees and their lawyers to sue for large penalties for technical infractions that the IWC viewed as unworthy of penalties."

Cases such as *Bright*, the letter commented, are only the beginning of "a wave of destructive class action litigation over hyper-technical wage order provisions—bathroom temperatures, clock placement, basement elevators, 'clean' changing rooms, extensive recordkeeping—that do not involve the underpayment of wages."

For a more detailed discussion of this case, see the "Law in Brief" section of the February *California Employer Update* newsletter.

The letter was submitted on behalf of the CalChamber, the Employers Group, the California Employment Law Council, the California Hospital Association, the California Manufacturers & Technology Association, the California Restaurant Association and the California Retailers Association.

**Staff Contact: Erika Frank**

## *Small Business Advocate of Year Award*

# Finance Consultant/Community Leader Helps Keep Jobs in Long Beach

Joanne Davis' advocacy efforts can be traced back to her college days when her constant praise of her hometown Long Beach piqued the curiosity of friends. When Davis went home, Davis brought her sorority sisters and girlfriends with her.

"I used to talk so much about Long Beach that they used to kid me and say I should go work for the chamber because I was such a Long Beach supporter," Davis said.

Now head of her own public affairs and political consulting firm, The Davis Group, Davis did end up working with the Long Beach Area Chamber.

### **Chairman of the Board**

She will be installed as chairman of the board in June, having served as vice chair of public policy for two years and a member of the government affairs council and political action committee.

Moreover, she has become such a passionate and dedicated advocate for the small businesses of Long Beach that she was a recipient of the California Chamber of Commerce 2010 Small Business Advocate of the Year Award.

Randy Gordon, president/CEO of the Long Beach Area Chamber, praised Davis for having "led one of the most productive and results-driven years in recent memory."

Davis has done extensive political work and when she grew frustrated that businesses did not seem as engaged to support business-friendly legislation as those fighting against business interests, she looked to the chamber. It was the chamber, Davis said, that stood out as the perfect organized group to fight for businesses in California.

### **Advocacy**

Advocacy is important for chambers because chambers represent business, Davis said. Just as labor groups tend to be organized and structured, businesses also need to have that same degree of organization.

Furthermore, like labor groups, businesses need to express their views and issues. Chambers, from the local



Photo by Megan Wood

**Joanne Davis**

to the national level, help big and small businesses alike get their voices heard, Davis said. That is why chambers should not be afraid to voice their opinions and thoughts to elected officials that are in opposition.

"Your job is to promote business," Davis said. "Don't be afraid to express that."

### **Red Team**

To better focus on the economic issues in Long Beach, Davis helped the chamber secure a \$200,000 grant to form a "Red Team." The Red Team looks at ways the chamber can help promote business, identifies opposition for business, and focuses on issues and opportunities the chamber can share with its members.

The committee is made up of both liberal and conservative members, but all have the same interest of promoting business, Davis said.

### **Long Beach Airport**

In spring 2009, JetBlue President and CEO Dave Barger told an aviation blog that "dealing with the Long Beach Airport has been such a headache for his business that he would not rule out the

idea of picking up and leaving for good," the Long Beach quarterly newsletter reported.

Under Davis' leadership, the chamber garnered the support of more than 1,600 people in a massive letter campaign directed at city officials, urging them to improve the airport's infrastructure. The campaign worked, bringing city officials to agree to terminal upgrades at the airport.

Davis attributes the success of the campaign to the consultant who organizes the chamber's website. The site enabled the chamber to receive letters from the community and have them on hand within 48 hours.

A long controversial issue in Long Beach, the airport upgrades are essential because they promote the city, Davis said.

"When people come to California for the first time, the airport is the first image they have of California," Davis said. "A better airport brings in jobs and tourism."

### **Community Organization**

The chamber is an important community organization, Davis said. The Long Beach Chamber helps raise money for various non-profit organizations and partners with school districts, implementing a "Principal for a Day" program to instill pride in the community. The program allows community leaders in K-12 schools to "see what our education system is really about," Davis said.

The residents of Long Beach and the chamber staff want to make the city the best it can be.

"The chamber's staff love Long Beach and they love promoting Long Beach," Davis said. "Many have stayed for a long time. It's truly a testament to the chamber that they've stayed so long."

In 2009 the Los Angeles Economic Development Corporation named Long Beach the most business-friendly city in Los Angeles County. Nevertheless, Davis said, the work doesn't stop there.

"It's wonderful to be recognized. But you can't sit back," she said. "You've got to move forward and move forward."

# CalChamber Reiterates Importance of Free Trade Agreements to Economy



The California Chamber of Commerce is emphasizing again to a congressional committee the importance of the pending free trade agreements to both the California and U.S. economies.

The CalChamber submitted comments on February 7 to the U.S. House Ways and Means Committee, which held a hearing February 9 on President Barack Obama's trade policy agenda.

"Trade offers the opportunity to expand the role of California's exports. In its broadest terms, trade can literally feed the world and raise the living standards of those around us," CalChamber President and CEO Allan Zaremberg wrote to the committee.

## CalChamber Positions

The CalChamber urged approval of

the pending free trade agreements with South Korea, Colombia and Panama.

The CalChamber also:

- supported the extension of trade promotion authority so the President of the United States may negotiate new multilateral, sectoral and regional trade agreements;

- expressed hope that appropriate funding will be made available to make the U.S. Commercial Service and export assistance a core part of the economic recovery package;

- opposed protectionism as a move that only invites retaliation from U.S. trading partners;

- encouraged continued participation in negotiations leading to U.S. accession to the Trans-Pacific Partnership;

- voiced support for a successful Doha Round of negotiations by the World Trade Organization (WTO); and

- urged a quick resolution to the cross-border trucking dispute with Mexico under the North American Free Trade Agreement.

The committee hearing focused on current trade issues, such as:

- the pending trade agreements with Colombia, Panama and South Korea;

- the full range of issues impeding U.S. companies from selling goods and services in China and distorting trade flows through unfair trade practices;

- the ongoing Trans-Pacific Partnership negotiations;

- the prospect for trade expansion in agriculture, industrial goods and services through the Doha Round negotiations at the WTO and issues surrounding Russia's efforts to accede to the WTO; and

- management of trade disputes and concerns and other trade issues.

## Comments

The CalChamber is encouraging businesses to comment on the President's trade policy agenda.

Written comments are being accepted by close of business on February 23 at <http://waysandmeans.house.gov>.

**Staff Contact: Susanne Stirling**

## CalChamber Seeking Nominees for Small Business Advocate Award

The California Chamber of Commerce is seeking nominations for its Small Business Advocate of the Year Award.

Each year, the CalChamber recognizes several small business owners who have done an exceptional job with their local, state and national advocacy efforts on behalf of small businesses.

The CalChamber will recognize the award winners at its Business Summit on June 1 in Sacramento.

### Application

The application should include information regarding how the nominee has significantly contributed

as an outstanding advocate for small business in any of the following ways:

- Held leadership role or worked on statewide ballot measures;

- Testified before state Legislature;

- Held leadership role or worked on local ballot measures;

- Represented chamber before local government;

- Actively involved in federal legislation.

The application also should identify specific issues the nominee has worked on or advocated during the year.

Additional required materials:

- Describe in approximately 300 words why nominee should be selected.

- News articles or other exhibitions as supporting materials.

- Letter of recommendation from local chamber of commerce president or chairman of the board.

### Deadline

Award nominations are due to the CalChamber Local Chamber Department by April 15. The nomination form is available on the CalChamber website at [www.calchamber.com/smallbusiness](http://www.calchamber.com/smallbusiness) or may be requested from the Local Chamber Department at (916) 444-6670.



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