

ALERT

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 **CalChamber**
CALIFORNIA CHAMBER OF COMMERCE

Historic High Court Ruling Blocks Class Action Lawsuit



The U.S. Supreme Court issued its long-awaited ruling in *Wal-Mart Stores, Inc. v. Dukes* (No. 10-277, June 20, 2011) and provided a victory for the nation's largest retailer and em-

ployers nationwide on June 20.

The Supreme Court blocked "one of the most expansive class actions ever," ruling that 1.5 million female employees could not file a class action lawsuit against Wal-Mart. The decision is the most significant business case of the

Supreme Court's term and is wholly welcomed by the business community.

The lawsuit dates back to 2001 and involved employment practices dating back to 1998. Current and former female employees claimed that Wal-Mart discriminated against them on the basis of their sex by denying them equal pay or promotions. The employees alleged that Wal-Mart's strong and uniform corporate culture fostered gender stereotyping and led to adverse treatment of women in all of the retailer's 41 domestic regions.

Claims Too Varied

The court held that the lawsuit brought by this diverse group of employees was

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State Controller Says No Pay for Legislators



The majority vote 2011-12 state budget vetoed last week by the Governor also was criticized this week by state Controller John Chiang, who said it was not the balanced spending

plan required by Proposition 25 and therefore legislators should not get paid.

According to Chiang, legislators will not be eligible for retroactive pay once a balanced budget is enacted.

Some pundits have opined that Chiang's move may give the Governor more leverage to win support for his plan to have a vote of the people on

continuing the temporary increases in the sales tax, vehicle license fee and personal income tax approved in 2009, and to seek an extension of those taxes (due to expire on June 30) until Californians have a chance to vote.

As *Alert* went to print, Senate Republicans called a press conference to say they want the people also to be able to vote on controls on future spending, pension reform and regulatory reform.

It also has been reported that the public employee unions don't want to see an election on the tax extensions.

An open question is: will there be litigation over whether the Legislature allows the controller to determine if a budget is balanced under the provisions of Proposition 25?

Federal Budget on Unsustainable Path, Congressional Budget Office Report Finds



By the end of the year, federal debt will reach roughly 70% of the gross domestic product (GDP) — the highest percentage since shortly after World War II, the Congressional Budget Office

(CBO) reported this week.

On June 22 the agency released the latest in its series of reports on the long-term budget outlook. The report examines the pressures on the federal budget under two different scenarios over the next 25 years. In keeping with CBO's mandate to provide objective, impartial analysis, the report makes no recommendations.

The report can be found on the CBO website, www.cbo.gov.

Budget Outlook

The report states that given the combination of the aging population and growing health care costs, the budget outlook for both the coming decade and beyond is "daunting."

Although the sharp rise in debt is partially a result of lower tax revenues and higher federal spending related to the recent severe recession, the report is

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Labor Law Corner

Lawsuit for Unused Vacation Time Pay Must Await Termination



Gary Hermann
HR Adviser

Can an employee bring a legal action for unused vacation time if he is still working?

No. California Labor Code Section 227.3 requires that whenever a contract of employment or employer policy provides for paid vacations, and an employee is terminated without having taken his vested vacation time, all vested vacation shall be paid to him as wages at his final rate in accordance with the contract of

employment or employer policy concerning eligibility.

However, an employment contract or employer policy cannot provide for forfeiture of vested vacation time upon termination.

Vested Vacation

The 2006 California Court of Appeals case, *Church v. Jamison* (143 Cal.App. 4th 1568), addressed the question of vested vacation. The court concluded that an employee's claim under Labor Code Section 227.3 for payment of vested, but unused vacation time is perfected on the day the employee is terminated, which is when the statute of limitations would begin to run.

The court did not determine which statute of limitations would apply because the employee's case was filed within one year of the termination date and was therefore timely under any of the potential statutes of limitations.

In Section 15.1.9 of the *Policy and Interpretations Manual*, the Labor Commissioner references the *Jamison* case, but states that pursuant to the California Code of Civil Procedure, the statute of limitations is four years on a written contract and two years on an oral contract.

Although the court was silent on which statute of limitations might apply,

it might also be reasonable to assume that a three-year statute of limitations might apply because Labor Code Section 227.3 creates a statutory obligation.

Vacation Pay at Termination

The court also addressed the applicable Labor Commissioner policy that the statute of limitations applied a second time, but in reverse from the date of termination, to limit the employer's liability for vacation time to only that which vested within, but not before that look-back period.

The court stated that the creation of a look-back period, such as four years, that limits an employer's liability for vested vacation is contrary to the fundamental principles of law governing statutes of limitations and is contrary to the text of Labor Code Section 227.3.

The result of this decision is that an employer who allows an employee to accrue a large vacation bank over a period of years, would be liable at termination for that amount no matter how long it had accumulated.

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

More information at www.calchamber.com/events.

Business Resources

Economist Online Franchise Fair. The Economist. June 28–29, Webinar. (212) 541-0565.

9th Annual Workers' Compensation Conference. California Coalition on Workers' Compensation. July 20–22,

Anaheim. (916) 441-4111.

Northern California Tour. Water Education Foundation. October 12–14, Sacramento. (916) 444-6240.

Licensing Executives Society Annual Meeting. Licensing Executives Society (USA and Canada). October 16–19, San Diego. (703) 836-3106.

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Ban on Credit Report Use for Employment Passes First Senate Policy Committee



California Chamber of Commerce-**opposed** legislation banning most employers from using consumer credit reports for employment purposes won approval from a Senate policy committee this week.

AB 22 (Mendoza; D-Artesia) hampers employment decisions by unfairly limiting private employers' ability to use credit reports for legitimate employment purposes, unless the information in the report is "substantially job-related" and for a "managerial position."

Objective Information

The CalChamber and a coalition of employer associations has been pointing out to legislators that employee credit reports provide objective information about an individual's past behavior or character that can help employers reduce future litigation and loss.

Objective Information

The Federal Deposit Insurance Corporation (FDIC) encourages financial institutions to incur the cost of comprehensive background checks to minimize "theft and embezzlement; and prevent litigation over hiring practices."

Similarly, the U.S. Police Jobs website states that "a solid responsible financial history. . . is a strong indication of the applicant's reliability, dependability and integrity," while "bad credit (especially substantial debt) may be an indicator of someone who may be prone to corruption."

The desired employee characteristics are not unique to financial institutions or police officers, but rather are values that all employers seek when determining whether to hire an applicant, the coalition and CalChamber note.

Employees in many industries, such as in-home care, hospitals, restaurants and retail stores, have access, not only to the employer's assets and financial information, but also the assets and financial information of the public, as well as access to medical and personal information.

Moreover, unlike similar legislation passed in other states, AB 22 limits the use of credit reports to only "managerial positions" where the credit history is "substantially job-related," thus ignoring the numerous non-managerial positions in the workforce where employees have unsupervised access to employers' and consumers' financial information, trade secret information, and assets.

Existing Safeguards

Existing law provides the needed protections for applicants and/or consumers with regard to employee credit reports.

The Federal Fair Credit Reporting Act and California's Consumer Credit Reporting Agencies Act require an employer to:

- notify the individual that it may obtain a credit report for the employment action at issue and also provide information about the company used to obtain the report;
- obtain the employee's consent to obtaining the report, and if requested, give a copy of the report to the employee;
- provide the individual with a copy of the report and a "Summary of Your Rights Under the Fair Credit Reporting Act" if the employer intends to take an adverse action, such as not hiring the applicant based upon information contained



Photo by Megan Wood

CalChamber Policy Advocate Jennifer Barrera outlines for the Senate Labor and Industrial Relations Committee how AB 22 (Mendoza; D-Artesia) hampers employment decisions.

in the credit report; and

- if an adverse action is taken, disclose to the individual the credit reporting agency that provided the report as well as give notice of the individual's right to dispute any information in the report and obtain another free report from the credit reporting agency.

Key Vote

The June 22 vote in Senate Labor and Industrial Relations was 5-1:

Ayes: DeSaulnier (D-Concord), Leno (D-San Francisco), Lieu (D-Torrance), Padilla (D-Pacoima), Yee (D-San Francisco).

No: Wyland (R-Escondido).

Absent: Runner (R-Antelope Valley)

AB 22 will be considered next by the Senate Judiciary Committee.

Staff Contact: Jennifer Barrera



"CalChamber does the heavy lifting for businesses in California by educating those of us in leadership positions, and those in state government, about how current and proposed state laws create hurdles for employers trying to create jobs."

THOMAS CAWLEY
CHIEF FINANCIAL OFFICER
PEET'S COFFEE & TEA, INC., EMERYVILLE

Historic High Court Ruling Blocks Class Action Lawsuit

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too large and the claims too varied to be certified. A party that wants to certify a class must show commonality of the claims—that there are common questions of law or fact capable of class-wide resolution.

The class members tried to claim a pattern and practice of discrimination that was nationwide and involved nearly 3,400 individual stores. Here, the female employees “wish to sue about literally millions of employment decisions at once,” Justice Antonin Scalia wrote for the majority.

The court found that there was no “glue” holding together the reasons for individual decisions made by individual managers in these stores across the country.

No Discriminatory Policy

While class-certification may be ap-

propriate if there is “significant proof” of a policy of general discrimination, the court said absolutely no such evidence was presented. In fact, Wal-Mart demonstrated the exact opposite:

- Wal-Mart had an announced policy forbidding sex discrimination and imposing penalties for denial of equal employment opportunity.
- Wal-Mart did not have any testing procedure or evaluation method that could be shown to be biased.
- Wal-Mart had a policy of leaving decision making over employment matters up to the discretion of local supervisors—just the opposite of a uniform employment practice.

The court noted that: “In a company of Wal-Mart’s size and geographical scope, it is quite unbelievable that all managers would exercise their discretion in a common way without some common direction. Respondents attempt to make that

showing by means of statistical and anecdotal evidence, but their evidence falls well short.”

The class members sought to use testimony of a sociologist who claimed that Wal-Mart’s strong corporate culture made it “vulnerable” to gender bias. The court rejected any notion that this testimony amounted to “significant proof” that Wal-Mart operated under a general policy of discrimination.

Scalia’s opinion was joined by four of the more conservative justices on the court. The other four members joined part of Scalia’s opinion, but dissented from other parts of the court’s holding.

The employees were seeking back pay, punitive damages and changes to how Wal-Mart makes its pay and promotion decisions. These employees can no longer continue with their class action lawsuit but can pursue individual claims.

Staff Contact: Gail Whaley

Congressional Budget Office: Federal Budget on Unsustainable Path

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quick to note that the “growing debt also reflects an imbalance between spending and revenues that predated the recession.”

Key Points

The report found that the retirement of the baby-boom generation is a key factor in the nation’s long-term fiscal outlook.

It anticipated a significant and sustained increase in the share of the population receiving benefits from Social Security, Medicare and Medicaid.

As a result, if current laws remain in place, the federal government’s spending on Social Security and the other major mandatory health care programs (Medicare, Medicaid, the Children’s Health Insurance Program and the health insurance subsidies that will be provided through insurance exchanges) is projected to grow from roughly 10% of the GDP today to about 15% of the GDP 25 years from now. The combined increase of approximately 5 percentage points of GDP is about \$750 billion today.

Long-Term Scenarios

The CBO presented the long-term budget outlook under two scenarios that

incorporate two different assumptions about future revenues and spending:

- The Extended–Baseline Scenario follows closely to current law. This scenario paints a rosier picture, but contains a number of unrealistic assumptions.
- The Alternative Fiscal Scenario incorporates several changes to current law that are judged as the more politically likely.

CBO’s Analysis

The CBO’s analysis of the Extended–Baseline Scenario finds that economic growth would result in steadily higher revenues relative to GDP. At the same time, government spending on everything other than the mandatory health care programs, Social Security, and interest of the federal debt—activities such as national defense and a wide variety of domestic programs—would decline to the lowest percentage of GDP since before World War II.

That significant increase in revenues and decreases in the magnitude of other spending would offset much—but not all—of the rise in spending on health care programs and Social Security, the report found.

The budget outlook is much bleaker under the Alternative Fiscal Scenario, which incorporates very different assumptions about revenue. Under this scenario, the CBO reports that with significantly lower revenues and higher outlays, debt held by the public would grow much more quickly than under the extended-baseline scenario, reaching levels far above any ever experienced in U.S. history.

Impact of Growing Deficits/Debt

The implications of the CBO analysis are clear: there is a substantial mismatch between what the government would have to spend to maintain existing programs in their current form and the revenues that taxpayers are accustomed to providing the government to pay for those programs.

To keep deficits and debt from climbing to unsustainable levels, policymakers will need to increase revenues sustainably as a percentage of GDP, decrease spending significantly from projected levels or adopt some combination of those two approaches, the report found.

The report cautions policymakers

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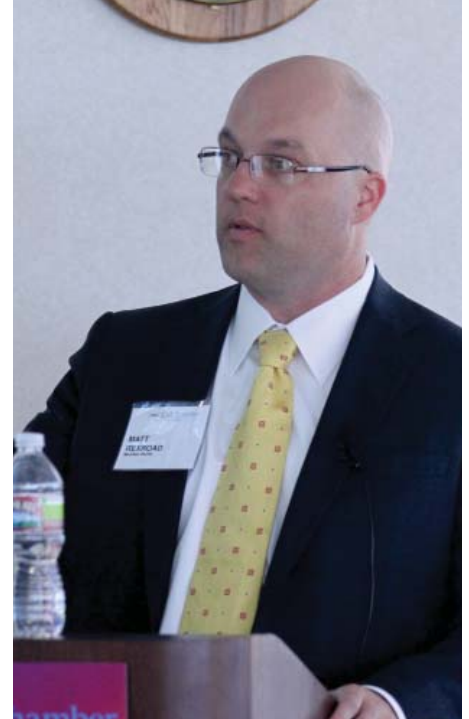
CalChamber Hosts Workshop to Review First Draft Redistricting Commission Maps



Gillian Zucker, Chair, Public Affairs Council; President, Auto Club Speedway



Paul Mitchell



Matt Rexroad

The first draft of the new political maps released June 10 by the Citizens Redistricting Commission were the subject of a day-long workshop at the California Chamber of Commerce on June 20. The session was presented by the CalChamber Public Affairs Council, chaired by Gillian Zucker, President of Auto Club Speedway. Presenting the maps for Congress, state Senate, Assembly and Board of Equalization were Paul Mitchell, Redistricting Partners, Inc., and Matt Rexroad, Meridian Pacific, Inc., which developed maps enhanced with political and voting history data for each district. The CalChamber is encouraging businesses to get involved in the public review process for the new political district maps, which will take effect for the 2012 elections. Once set, the redrawn lines will be in place through 2020. The commission is accepting public comments on the first draft maps by e-mail, fax or mail. Hearing dates and locations, CalChamber-enhanced maps, tips on providing testimony and criteria for fair redistricting are available at www.calchamber.com/redistricting.

Photos by Megan Wood

Legislative Outlook

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

Bill Sets Stage to Improve Promotion of Trade with California



Legislation that will increase state exports and produce jobs by creating a new framework for marketing trade with California will be considered by the Assembly Jobs, Economic Development and the Economy Committee on July 6.

The California Chamber of Commerce **supports SB 460 (Price; D-Los Angeles)**, which supports California's international trade efforts by giving the Business, Transportation and Housing Agency more authority over trade promotion, and requires the organizing of a statewide business partnership for international trade and promotion.

Marketing California

Since the demise of the Technology, Trade and Commerce Agency, California has lacked a fully funded state program dedicated to promoting trade and the jobs that come with it.

SB 460 will set the stage to explore options to prevent missed opportunities to promote trade.

One success story is the Tourism and Travel Commission, which spends its own funds outside of the legislative char-

ter it has been given, and successfully markets a California brand to the world. Such a model could potentially be built around trade.

International Trade

More than 40% of the total containerized cargo entering the United States arrives at California ports and nearly 30% of the nation's exports flow through the state's ports, according to the California Marine and Intermodal Transportation System Advisory Council.

Port activities employ more than 500,000 people in California, with international trade and investment activity supporting one in every seven jobs in the state.

In addition, port activities generate an estimated \$7 billion in state and local taxes annually.

The CalChamber supports SB 460 as a way to work with the state to improve the competitiveness of California's ports of entry (land, sea and air) and create jobs.

Staff Contacts: Thomas Vu, Susanne Stirling

Amendments Remove Most Onerous Aspects of 'Job Killer' Bill



The California Chamber of Commerce **removed its opposition** to a "job killer" bill that could have unintentionally created new lawsuits against small business, after it was amended on June 21.

SB 111 (Yee; D-San Francisco) could have resulted in new shakedown lawsuits against business establishments by making it a strict liability violation of the Unruh Civil Rights Act, subject to minimum damages of \$4,000, if a business limits the use of a customer's language, even unintentionally.

Due to the bill's vague and ambiguous language, the CalChamber was concerned the bill would result in higher business costs and increase liability for litigation.

For example, the original bill did not clearly indicate whether businesses would be required to provide written notice in

all recognized languages to all customers regarding any required language used in the establishment, or whether business would have to ensure that all menus, signage and services offered were provided in all recognized languages.

The most recent amendments to SB 111 provide needed clarity, making it easier for employers to comply with these new requirements and minimizing the risk that employers will be exposed to unnecessary and costly litigation.

SB 111 passed the Assembly Judiciary Committee on June 21, on a 6-3 vote. The bill will be considered next by the full Assembly.

The CalChamber now has **no position on SB 111**.

Staff Contact: Mira Guertin

In Memoriam: George Sawyer, Former CalChamber Vice President



George Sawyer

George Sawyer, vice president for legislation and program at the California Chamber of Commerce from 1971 through 1984, died on June 15 in Sacramento at age 90.

He was born October 4, 1920 in Oklahoma City, Oklahoma, and attended Oklahoma City University on a music scholarship. He rewrote news at an Oklahoma City radio station, and was news and general announcer at radio stations in Tulsa, Oklahoma, and Wichita, Kansas, before enlisting, first in the U.S. Army Air Corps and then transferring to aviation cadet pilot training.

Upon completing training as a P-51 fighter pilot, he served until June 1947, including duty in the Fifth Air Force in occupied Japan. He continued as a captain in the U.S. Air Force active reserve until 1960.

As a holder of commercial and instructor pilot ratings, he worked as a flight instructor while obtaining a B.A. in editorial journalism from the University of Oklahoma. Moving to California, he was city editor of the *Lodi News-Sentinel* and correspondent for *The Sacramento Bee* while in Lodi.

His chamber of commerce career began with stints as manager of the Oakdale and Tracy chambers. He joined the California Chamber in 1960 as district manager of the 19-county Sacramento Valley Region. He attended McGeorge College of Law in Sacramento for three-and-one-half years.

In 1964, he became director of the

California Chamber Industrial Insurance Department. He was named director of legislative affairs for the Chamber's program in Sacramento and Washington, D.C. in 1967, then assumed the number two staff position in 1971, retiring at the end of 1984.

He was preceded in death by his wife of 50 years, Donna Marie Sawyer; a brother, U.S. Marine Corps Corporal Joel W. Sawyer; and a sister, Nancy Carole Chick.

Sawyer is survived by a daughter, Peggy Lynn Osborn of Sacramento; two grandsons, Christopher S. Schafer and wife, Traci Rebecca; and Joel M. Schafer and wife, Elizabeth Ann; a granddaughter, Maura Marie Osborn; a sister, Janette Sawyer Lundy; and five nieces.

A memorial service was held June 20 at Northminster Presbyterian Church in Sacramento.

CalChamber-Sponsored Seminars/Trade Shows

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International Trade

Russian American Pacific Partnership.

July 13–14, Kamchatskiy Territory, Russia.

International Traffic in Arms (ITAR)

Export Compliance Training. El Camino Center for International Trade Development. July 14, Hawthorne. (310) 973-3173.

Food/Beverage Show. Exhibition

Management Services. July 17–19, Johannesburg, South Africa.

Harmonized Tariff Schedule (HTS)

Revision Seminar. El Camino Center for International Trade Development. July 19, Hawthorne. (310) 973-3173.

U.S. Customs Broker Prep Course. El

Camino Center for International Trade Development. July 19, Hawthorne. (310) 973-3173.

Export Tax Break/Interest Charge-

Domestic International Sales Corporation Webinar. El Camino Center for International Trade Development. July 26, Webinar. (310) 973-3173.

Understanding Antidumping and

Countervailing Duties. Women in International Trade. August 17, Torrance. (800) 514-6407.

Trade Mission to South Africa. U.S.

Chamber of Commerce. September 19–23, South Africa. (202) 482-5496.

Cargo Loss: Natural Disasters and Piracy

Theft. Women in International Trade. September 21, Long Beach. (800) 514-6407.

Incoterms. Women in International Trade.

October 19, Torrance. (800) 514-6407.

Labor Law

How to Conduct Workplace

Investigations. CalChamber. July 14, Webinar; July 25, On Demand. (800) 331-8877.

Determining Independent Contractor

Status. CalChamber. September 8, Webinar; September 19, On Demand. (800) 331-8877.

Exempt—When You've Properly

Classified. CalChamber. On Demand. (800) 331-8877.

How to Conduct Effective Performance

Evaluations. CalChamber. On Demand. (800) 331-8877.

How to Hire Employees and Reduce

Liability. CalChamber. On Demand. (800) 331-8877.

Workplace Safety

Heat Illness Prevention—How to Comply with New Rules. CalChamber. On Demand. (800) 331-8877.

Federal Budget on Unsustainable Path

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against making changes while economic activity and employment remain well below their potential levels because it would likely slow the economic recovery.

However, the sooner that medium- and long-term changes to tax and spending policies are agreed on, and the sooner they are carried out once the economy recovers, the smaller will be the damage to the economy from growing federal debt, according to the report.

Earlier action would permit smaller or more gradual changes and would give people more time to adjust to them, but would require more sacrifices sooner from current older workers and retirees for the benefit of younger workers and future generations.

Visit www.calchamber.com for products and services to help you do business in California.



Register for Our Webinar on How to Conduct Workplace Investigations

Whenever an allegation is made, you need to investigate and verify that the allegation is true before taking any disciplinary action. California courts require you to reach reasonable conclusions from an adequate, impartial investigation.

In this webinar, our employment law experts will guide you through the process of conducting effective and legal workplace investigations. You won't want to miss this webinar!

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- Training investigations
- Third party investigations
- Conducting different types of investigations

WEBINAR Thursday, July 14, 2011

10 a.m.–11:30 a.m. PST

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