ALERT

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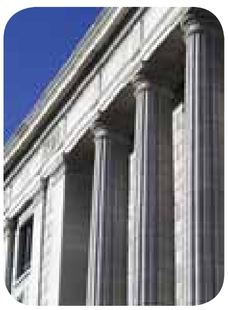
CALIFORNIA CHAMBER OF COMMERCE

Ruling on Health Care Law Shifts Focus to Cost Control



In a highly anticipated decision, the U.S. Supreme Court upheld the main elements of the Affordable Care Act in a 5-4 ruling issued on June 28.

"The Supreme Court's decision means we need to redouble our efforts to contain the costs of health care. The new law is going to put more pressure on employers to pick up the cost of providing coverage to individuals who have not previously had health insurance, and may shift even more costs to private payers from underfunded government programs," said Allan Zaremberg, California Chamber of Commerce president and CEO.

The act aims to provide health insurance coverage to previously uninsured individuals through the creation of new entities like state health insurance exchanges, dedicated funding for subsidies, and expansion of public programs like Medi-Cal.

"People who don't have health care today can't afford it because it is not affordable or because they have an expensive pre-existing condition," Zaremberg noted. "Therefore, someone else will have to subsidize insurance for these individuals, either through higher taxes or higher premiums due to cost shifts. Thus, the Supreme Court's decision emphasizes the need to control health costs, or premiums and taxes will spiral out of control."

In the current economic climate, the enormous pressure of additional costs could drive employers, particularly smaller firms, to reduce coverage or make employees buy their own insurance through the health exchanges.

Health care experts have pointed out that the requirement for guaranteed

See Ruling: Page 5

Will Mortgage Bills Increase Cost of Lending?

A new study raises the question of whether the foreclosure and mortgage bills moving through the Legislature will increase the cost of lending and make it more difficult for the housing market to recover.

On June 27, a two-house conference committee approved California Chamber of Commerce-**opposed** SB 900 (Leno; D-San Francisco) and AB 278 (Eng; D-Monterey Park).

The bills are part of a package supported by the California Attorney General, called the "California Homeowner Bill of Rights." Provisions of the bills would likely move the state closer to the type of lengthy judicial foreclosure process followed in places like Florida and New Jersey.

Despite amendments to the original versions of the bills, the continued lack of clarity would allow borrowers in default on their mortgages multiple opportunities to apply for a loan modification in order to forestall legitimate foreclosures.

Furthermore, the bills create attractive opportunities for litigation that would delay the foreclosure process over

See Will: Page 4

20% Tax Refund Penalty Falls to Business Pressure

Strong opposition from the California Chamber of Commerce and a coalition of job creators discouraged legislators from imposing a 20% penalty on tax overpayments as part of a budget trailer bill this week.

The proposal would have authorized the Franchise Tax Board (FTB) to impose the penalty.

'Outrageous'

Among the most outspoken opponents of the proposal was CalChamber President and CEO Allan Zaremberg, who said: "It is outrageous that average taxpayers, including small business owners, would face penalties for overpaying their taxes.

"It is equally outrageous that, to my knowledge, this proposal would make California the only state to have both a large corporate underpayment penalty and a proposed overpayment penalty. Proposals like this are why California has one of the worst reputations for having a bad business climate."

He added, "Overpayment of taxes is like having an interest-free cash flow loan to the state. Every business in America

See 20%: Page 4

Inside

Labor Law Corner

Terminating Injured Worker: Use Caution in Citing 'Business Necessity'

Dana Leisinger
HR Adviser

Ours is a business with only eight employees. We have a new employee who hurt himself on the job last month. Can I terminate him?

California law is very protective of employees who suffer on-the-job injuries, and Labor Code Section 132(a) specifically holds: "It is the declared policy of this state that there should not be discrimination against workers who are injured in the course and scope of their employment."

Consequently, a termination would be the ultimate form of discrimination. Injured workers can make a "132(a) claim" in addition to their injury claim, and if they prevail, that code section contains several additional remedies.

Further, your carrier cannot represent you on a 132(a) claim; companies charged with such a claim need to engage in separate counsel to represent them before the Workers' Compensation Appeals Board.

Hardship Rule

Employers are faced with having to fill the position, yet knowing that the injured worker is entitled to get his/her job back can make filling the post a difficult chore.

A defense to such a claim is the "business necessity" rule. This rule applies when holding the injured worker's job open for an open-ended period creates a hardship for the employer.

Although there is no hard and fast general length of absence rule, the cases seem to favor employers whose policies allow at least 18 months to two years of disability absence before termination.

Business necessity is an affirmative defense, meaning the burden of producing the evidence lies with the employer. Evidence that the job requires a relatively high degree of skill, a limited number of employees available to cover the job, and inability of the company to function properly without filling the job should be presented as part of the defense.

To put it simply, the more important the job and the fewer the available employees, the stronger the defense.

In addition, smaller employers are able to assert this defense more easily than larger employers, for the larger the employer, the easier it is to cover the absent worker's job by using other employees.

Medical Benefits

Although the employer must keep the job open for a period of time, a 2002 case finally established that discontinuing health benefits is not a violation of 132(a). Before that case was decided, the code section protected not only the job, but the benefits.

Now, an injured worker who qualifies for coverage under the Family Medical Leave Act (FMLA) can be put on FMLA concurrently with workers' compensation, and then after 12 weeks, the employer can discontinue benefits and offer continuation coverage in keeping with the Consolidated Omnibus Budget Reconciliation Act (COBRA).

A smaller employer not subject to family and medical leave laws should follow its policy or practice regarding continuation of health benefits. Consult with your health insurance carrier if in doubt as to how long coverage continues.

This is a very sensitive area of the law, and employers should seek the advice of legal counsel before making any termination decision.

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.

CalChamber-Sponsored Seminars/Trade Shows

More information at
www.calchamber.com/events.

Labor Law

Hiring and Onboarding Basics Webinar. CalChamber. July 19. (800) 331-8877.

Conducting Effective Performance Appraisals Webinar. CalChamber. August 16. (800) 331-8877.

Employee Discipline Webinar. CalChamber. September 20. (800) 331-8877.

FMLA/CFRA Webinar. CalChamber.

See CalChamber-Sponsored: Page 3

Next Alert:
July 13

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Bill Removing Class Action Waiver to Face Hearing in Assembly Policy Committee

A California Chamber of Commerce-**opposed** "job killer" bill that undermines dispute resolutions and increases costs for businesses will be up for consideration in the Assembly Judiciary Committee on July 3.

SB 491 (Evans; D-Santa Rosa) creates uncertainty for businesses regarding the enforceability of arbitration agreements, and dramatically increases litigation costs by encouraging more class actions and pushing more cases into the courts.

Attack on Arbitration

SB 491 would jeopardize arbitration agreements because it strikes or invalidates one of the most substantive provisions: the class action waiver. Although the language of SB 491 appears to create a general contract rule, in reality class waivers are used only in arbitration agreements, meaning the bill actually creates a rule targeting arbitration.

A similar proposal was recently found unlawful by the U.S. Supreme Court in *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011).

In *Concepcion*, the court held that the Federal Arbitration Act (FAA) prohibited states from conditioning the enforceability of an arbitration agreement on the availability of class-wide arbitration procedures, as such a requirement would be inconsistent with the intent of the FAA.

SB 491 seeks the very same outcome as that proposed in *Concepcion*—either force parties to accept class-wide arbitration or strike the agreement as unlawful. Based on the Supreme Court's decision, it is almost certain that SB 491 will be struck down as unlawful.

Creates Uncertainty

Businesses use arbitration agreements in a wide variety of contracts as a way to control litigation costs and preserve business resources for other important purposes, including paying workers. Although it is likely that SB 491 will ultimately be invalidated by the courts, the final outcome could take years, leaving businesses in limbo wondering whether their use of these clauses would ultimately be upheld.

The *Concepcion* case, for example, took five years to make it to the U.S. Supreme Court. During the time it takes SB 491 to work its way through the courts, businesses would have to plan for the worst-case scenario that it would be upheld, increasing costs for consumer products, and limiting hiring and expansion in the meantime.

Burden for Courts

If SB 491 goes into effect, there are two potential outcomes:

- the company is forced to go through class action arbitration as it cannot include a class action waiver in its arbitration agreements; or
- the company already has contracts that include class action waivers in its arbitration agreements and a court strikes the agreements as unenforceable/unconscionable due to SB 491.

Either outcome significantly drives up costs. For existing contracts that already include class action waivers, however, SB 491 will basically invalidate the contracts and force the parties into class action litigation.

The California court system has already undergone more than $650 million in cuts over the last year. In this year's recently revised budget proposal, Governor Edmund G. Brown Jr. recommended the Legislature cut another $544 million in funding.

Arbitration is faster and less costly than litigation, which benefits both parties in a dispute. According to the American Arbitration Association (AAA), federal civil trials take an average of two years to resolve, while arbitration proceedings require less than 10 months, on average, under the AAA's commercial rules.

SB 491 discourages litigants from using arbitration and drives them into slow and overworked courts.

Action Needed

Contact Assembly Judiciary members and your Assembly representative and urge them to **oppose SB 491**.

For an easy-to-edit letter, visit ***www.calchambervotes.com***.

Staff Contact: Jennifer Barrera

CalChamber-Sponsored Seminars/Trade Shows

From Page 2

October 18. (800) 331-8877

International Trade

California Pavilion at Farnborough 2012. U.S. Department of Commerce. July 9–15, Farnborough, England. (949) 660-7105.

Intersolar-North America. Northern California Regional Center for International Trade Development (CITD). July 10–12, San Francisco. (916) 563-3222.

Webinar: Satisfying International Product Certification. U.S. Department of Commerce. July 11. (202) 482-4422.

Webinar: Website Optimization. U.S. Department of Commerce. July 25. (202) 482-3787.

Webinar: New INCO Terms. U.S. Department of Commerce. August 8. (202) 482-4422.

Export Regulations Seminar. Bureau of Industry and Security, Southern California Regional District Export Council, and U.S. Commercial Service in Southern California. August 8–9, Los Angeles.

Hong Kong Food Expo. Hong Kong Trade Development Council. August 16–20, Hong Kong, China. (310) 973-3175.

CA Cleantech Company Trade Mission to China. El Camino College CITD. August 20–September 2, China. (310) 973-3161.

Will Mortgage Bills Increase Cost of Lending?

From Page 1
violations that may or may not have changed the outcome.

Conference committee chairs expect a vote on the bills on Monday.

The study, released June 28, concluded that the vast majority of California homeowners will not be helped by the bills.

Will Slow Housing Recovery

The analysis found that prolonging the foreclosure process would make it more costly for loan servicers, would be unlikely to help more than a tiny fraction of homeowners who are behind on payments, and would be likely to slow the housing recovery, ultimately reduce home values, and diminish the future availability of credit for California homebuyers.

The study was conducted by independent research firm Beacon Economics, LLC and commissioned by the California Bankers Association, California Credit Union League, California Mortgage Bankers Association, MERSCORP Holdings Inc. and United Trustees Association.

"However well intentioned, these bills are unneeded in a housing market that has just begun to find its footing and is starting to recover from one of the worst crashes in history," says Beacon Economics founding partner and the study's lead author Christopher Thornberg. "These kinds of interferences that lengthen foreclosure processes have been shown to do little for current borrowers who are behind on payments and can actually incentivize some to default, increasing foreclosure rates. They have also been shown to be detrimental to new borrowers because they result in reduced availability of credit. "

Foreclosures in California have already fallen from their peak, sales are beginning to trend upwards, and prices have risen off their 2011 bottom.

Judicial states have foreclosure timelines that are, on average, 2.5 times longer than non-judicial states, and a wide variety of research cited in the study shows important negative effects, such as delaying market recovery and incentivizing some consumers to strategically remain delinquent.

Other Findings

The study also found that provisions which prolong the foreclosure process:

- Are unlikely to help borrowers who are behind on their payments. There is little empirical evidence to suggest that states with longer foreclosure processes have greater rates of loan modifications or a lower share of delinquent borrowers moving into foreclosure.
- Will reduce home values. Allowing defaults to idle in the system keeps discounts high on foreclosed units, placing downward pressure on home prices across the board.
- Will reduce the availability of credit for future homebuyers by raising the risk of lending in California, which will cause mortgage companies to toughen credit standards and increase the down payment needed to purchase a home. This will effectively reduce long-run homeownership rates in the state.
- Could end up costing homeowners with distressed mortgages. An important aspect of non-judicial foreclosure processes is that they do not allow lenders to pursue borrowers' other assets as compensation for mortgage losses. If the non-judicial route is made more costly, many lenders may choose a judicial foreclosure (which is their right), and seek reimbursement from borrowers' other assets, costing financially strained homeowners even more.

Coalition Opposition

In a letter to members of the conference committee, a coalition of associations, including the CalChamber asked to continue negotiations on the bills, saying the measures "reflect an overly complicated approach" and "lack clarity around critical definitions."

Staff Contact: Marti Fisher

20% Tax Refund Penalty Falls to Business Pressure

From Page 1
would love to have that, but not the state of California. How stupid is that?"

Not only would average taxpayers have been affected by the proposal, but large employers in the state would have faced a "whipsaw effect." Currently, certain taxpayers are subject to a 20% "understatement penalty" for understatements in excess of $1 million with no right to appeal. This penalty has caused many of these taxpayers to substantially overstate their taxes to avoid the penalty that may result from unexpected federal adjustments.

Adding an erroneous refund penalty like the one proposed would have unfairly penalized taxpayers who overstated their liabilities to avoid the understatement penalty, and would have been subjected to penalties because they paid more taxes than were owed.

Lost Revenues

In opposition arguments, the coalition pointed out that the proposal would have:

- Resulted in revenue loss to the state and increased the budget deficit;
- Barred taxpayers from protesting the penalty;
- Created confusion and potential litigation for the state because terms in the proposal were undefined and unspecified, including references to "reasonable basis";
- Established a penalty that would not have served a legitimate purpose and was disproportionate to the severity of noncompliance.

Proponents of the proposal painted the issue as a "fraudulent claim" penalty or a penalty on unreasonable claims. However, the FTB already has an arsenal to combat both.

According to the FTB's own documents, the agency has at its disposal 69 penalties that can be imposed on taxpayers for a variety of tax-related activities. If the FTB believes a refund claim to be without merit, opponents argued, the FTB has ample options under existing penalties.

Staff Contact: Jennifer Barrera

Newly Identified 'Job Killer' Legislation Hurts Struggling Small Firms, Start-Ups

The California Chamber of Commerce is **opposing** a newly identified "job killer" bill that creates an inequity in the tax structure, thereby harming struggling small businesses and start-ups.

AB 2408 (Skinner; D-Berkeley) repeals the Net Operating Loss (NOL) carryback deduction, a lifeline that helps employers stay afloat, retain employees, and continue investing in their businesses in an economic downturn.

The bill is similar to AB 1936 (De León; D-Los Angeles), which was held on the Assembly Appropriations Committee Suspense file in 2010 due to its fiscal impact.

AB 2408 is scheduled to be considered on July 3 by the Senate Governance and Finance Committee.

Resolving Inequity

The NOL deduction resolves an inequity in the net income tax structure. California businesses of all sizes and structures report and pay tax on their net income based on an arbitrary 12-month reporting period. An NOL occurs when a taxpayer's business expenses exceed revenue during that arbitrary 12-month reporting period.

The NOL deduction allows a business taxpayer to offset current losses against future taxable income (carryover) or prior liabilities (carryback).

Without an NOL deduction, the income tax fails to adequately match investment expense with revenue earned on that investment, essentially penalizing capital investment. The NOL therefore serves to ensure that taxable income more closely resembles the actual net income of the business enterprise. NOLs are not economic incentive tools; they are integral to a fairly applied net income tax regime.

Reasons to Oppose

In opposing AB 2408, the CalChamber and a coalition of employer groups points out that:

- Without the NOL deduction, two businesses can have the same profits and losses, but different tax liability.
- The NOL carryback is particularly important for keeping struggling businesses afloat, allowing a company experiencing losses to amend the prior two years' tax returns to offset tax liability going backward in time, making cash immediately available for paying bills and employee salaries, and for making business investments.

The carryback deduction is particularly critical for new businesses that struggle with profitability during their initial years, and need help to get off the ground.

California is not alone in seeing the value of an NOL carryback deduction. The federal government also provides one, and recently expanded the carryback period from two to five years for small businesses, and will allow all businesses to carry back their 2009 losses for five years. AB 2408 cuts off this lifeline for California businesses at a time when California's economic growth continues to lag.

- Unreliable tax environments deter employers from investing in California. Predictability is as important to employers as overall tax burden to economic investment. Employers cannot adequately evaluate potential costs if they cannot predict future tax liabilities.

The NOL carryback was included in the 2008 budget package to help partially offset the harm to California businesses caused by a two-year suspension of the NOL deduction. The promise of a positive change in the near future helped demonstrate that California is committed to keeping employers in the state, despite the hit to businesses that year.

Unfortunately, California again suspended the NOL deduction for the 2010 and 2011 tax years. In contrast, the federal government has extended its carryback provision from two to five years.

AB 2408 not only reverses the 2008 compromise just as the taxpayers' benefit from that agreement begins to materialize; it also reinforces with employers that California's taxing environment is unpredictable.

Lack of predictability adds to risk, increased risk adds to overall cost of doing business, further hindering California's economic recovery.

Action Needed

Contact members of Senate Governance and Finance and your senator to urge them to **oppose AB 2408**.

Staff Contact: Jeremy Merz

Ruling on Health Care Law Shifts Focus to Cost Control

From Page 1

issuance of a health insurance policy to any applicant must be coupled with an effective mandate that individuals purchase coverage. Without that link, people will move into the system only when they are sick—the equivalent of being able to buy fire insurance after one's house has burned down.

Private sector initiatives to promote quality while making health care more affordable include greater transparency and reforms to streamline payments.

A key for keeping employer costs in line is reducing the private sector subsidy for government underpaying the cost of services provided to individuals covered by federal and state government health care programs.

The CalChamber will continue to support public policy to ensure affordable access to health care in a market-driven environment. This includes supporting policies in the California Exchange that encourage competition, choice and value, allowing all federally qualified plans to participate.

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.

Senate Committee OKs 'Job Killer' Limiting Ability to Manage Employees

A California Chamber of Commerce-**opposed** "job killer" that hampers California employers' ability to conduct business and unfairly subjects them to costly litigation passed the Senate Judiciary Committee on June 26.

AB 1999 (Brownley; D-Santa Monica) makes it virtually impossible for employers to manage their employees and exposes them to a higher risk of litigation by expanding the Fair Employment and Housing Act (FEHA) to include a protected classification for any person who is, perceived, or associated with a family caregiver.

California already protects employees from discrimination on the basis of sex and pregnancy. Similarly, California provides employees with leave to care for the serious medical condition of family members, which may be compensated through California's Paid Family Leave Act. Additionally, California also requires "kin care" that mandates an employee be allowed to use at least half of any accrued sick leave to care for family members.

Extending employment protections to individuals simply on the basis that they provide "medical" care for a family member or "supervise" the care a family member receives, will burden employers and subject them to costly litigation.

Approximately 19,500 discrimination claims were filed in 2010 with the Department of Fair Employment and Housing under FEHA, which was 1,000 complaints more than in 2009. Adding this new expansive classification to FEHA will only cause such cases to dramatically increase, placing California employers at a significant disadvantage.

Key Vote

The Senate Judiciary vote was 3-1:

Ayes: Corbett (D-San Leandro), Evans (D-Santa Rosa), Leno (D-San Francisco).

No: Harman (R-Huntington Beach).

Absent/abstaining/not voting: Blakeslee (R-San Luis Obispo).

Staff Contact: Jennifer Barrera

Workers' Comp Bill Encouraging Litigation Passes

OPPOSE

A California Chamber of Commerce-**opposed** bill that incentivizes litigation and drives up attorneys' fees passed the Senate Judiciary Committee this week on a vote of 4-0.

AB 1687 (Fong; D-Mountain View) unnecessarily increases costs and incentivizes litigation by permitting the Workers' Compensation Appeals Board (WCAB) to award attorneys' fees to an applicant who challenges a utilization review decision regarding a future medical treatment award.

AB 1687 seeks to award attorneys' fees to injured workers receiving medical treatment under a future medical award who succeed in overturning a utilization review decision at the WCAB. This bill unnecessarily incentivizes more litigation in an area of workers' compensation that is already heavily regulated and contains appropriate penalties.

The Labor Code requires all California employers to establish and maintain a utilization review program to ensure all injured workers receive appropriate, evidence-based care.

Each utilization review program must meet restrictive guidelines laid out by both the Labor Code and Division of Workers' Compensation (DWC), and must be approved with the DWC's administrative director. Employers face a myriad of penalties if their utilization review program does not comply with these guidelines.

Given the existing rigid framework and stiff penalties relating to utilization review, the attorneys' fees penalties in AB 1687 are unnecessary and increase system costs.

Key Vote

The June 26 vote on AB 1687 in Senate Judiciary was:

Ayes: Corbett (D-San Leandro), Evans (D-Santa Rosa), Harman (R-Huntington Beach), Leno (D-San Francisco).

Absent/abstaining/not voting: Blakeslee (R-San Luis Obispo).

Staff Contact: Jeremy Merz

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Trans-Pacific Partnership Agreement Can Boost Market Share, Jobs for California

California companies have much to gain from the 13th round of the Trans-Pacific Partnership (TPP) negotiations set to take place in San Diego from July 2–10.

The California Chamber of Commerce supports the continuing negotiations. In 2011, U.S. exports with the Trans-Pacific Partnership members reached $105.4 billion and California exports topped $14 billion.

The broad agreement outlines announced by leaders of the nine TPP countries last year at the Asia Pacific Economic Cooperation (APEC) meetings in Hawaii will enhance trade and investment among the TPP partner countries, promote innovation, economic growth and development, and support the creation and retention of jobs.

The TPP countries are Australia, Brunei Darussalam, Chile, Malaysia, New Zealand, Peru, Singapore, Vietnam and the United States.

Earlier this month, Mexico and Canada were invited to join the TPP negotiations. Japan's application is still pending.

This is the second negotiating round held in California; the earlier was in San Francisco, June 14–18, 2010.

Expanding Exports, Jobs

During his first trip to Asia as President of the United States, President Barack Obama announced on November 14, 2009 the United States' intention to engage with the original TPP countries to shape a regional agreement, with the objective of shaping a high-standard, broad-based regional pact helping to expand U.S. exports, saving and creating good U.S. jobs.

The Asia-Pacific region is a key driver of global economic growth, representing nearly 60% of global gross domestic product (GDP) and roughly 50% of international trade.

The average GDP growth rate in the dynamic countries in this region was 5.3% in 2007, compared with the world average of 3.8%. Since 1990, Asia-Pacific goods trade has increased by 300%, while global investment in the region has increased by more than 400%.

Trans-Pacific Agreement

According to the Office of the U.S. Trade Representative, the TPP agreement will include:

- Core issues traditionally included in trade agreements, including industrial goods, agriculture and textiles, as well as rules on intellectual property, technical barriers to trade, labor and environment.
- Cross-cutting issues not previously in trade agreements, such as making the regulatory systems of TPP countries more compatible so U.S. companies can operate more seamlessly in TPP markets, and helping innovative, job-creating small and medium-sized enterprises participate more actively in international trade.
- New emerging trade issues, such as addressing trade and investment in innovative products and services, including digital technologies, and ensuring state-owned enterprises compete fairly with private companies and do not distort competition in ways that put U.S. companies and workers at a disadvantage.

Even though U.S. exports to Asia continue to rise, the United States is gradually losing market share. Asian countries have negotiated more than 160 trade agreements among themselves, while the United States has signed only two (Singapore and Australia).

Accession to the agreement will be possible after completion of the TPP negotiations with the current members. Other APEC member countries will be able to join or "dock" on to the TPP agreement at a later date without the right to amend the text.

CalChamber Position

The California Chamber of Commerce, in keeping with long-standing policy, enthusiastically supports free trade worldwide, expansion of international trade and investment, fair and equitable market access for California products abroad and elimination of disincentives that impede the international competitiveness of California business.

New multilateral, sectoral and regional trade agreements ensure that the United States may continue to gain access to world markets, resulting in an improved economy and additional employment of Americans.

The CalChamber supports new countries joining the TPP, thereby agreeing to comply with current international norms and obligations, and committing to the high standards currently being negotiated for trade and investment, as well as intellectual property protection and enforcement.

Agreements like the TPP ensure that the United States may continue to gain access to world markets, resulting in an improved economy and additional employment of Americans.

More information is available at ***www.calchamber.com/TPP***.

Staff Contact Susanne Stirling

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