

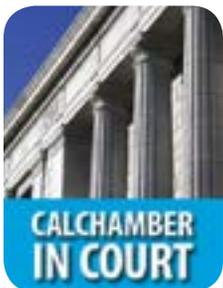
ALERT

VOLUME 39, NUMBER 33 • NOVEMBER 22, 2013



Analysis

Cap-and-Trade Auction Decision Ripe for Appeal



The Sacramento Superior Court last week **denied** the California Chamber of Commerce petition to overturn the Air Resources Board's cap-and-trade auction.

Last year, we filed a lawsuit challenging the validity of the auction on two grounds:

- whether the ARB had legal authority to conduct an auction; and
- whether the auction constituted an illegal tax in violation of Proposition 13.

While we were certainly disappointed by the **decision**, we were not surprised. As we discussed before filing the lawsuit,

it would be a huge lift for a superior court judge to scuttle an internationally renowned, multibillion-dollar program.

And after reading the decision, we've concluded that Judge Timothy Frawley was basically sending the message to let the appellate court throw it out.

Air Board Authority

On the issue of whether the ARB had authority to establish the auction, the judge said that by authorizing the cap-and-trade program, the Legislature in effect authorized ARB to come up with a method for allocating allowances.

He said that the Legislature in 2006 was likely aware that auctions were included in cap-and-trade by virtue of the U.S. Environmental Protection Agency (EPA) acid rain and European Union

See Cap-and-Trade: Page 6

CalChamber White Paper Recaps New 2014 Employment Laws for Business



The California Chamber of Commerce has released a list of new employment laws scheduled to take effect in 2014 or later that will have an impact on businesses in California.

Some of the new laws for 2014 make significant changes in key areas, such as the new minimum wage, new protections for immigrants and expanded leaves of absences.

Other new laws make small changes to different parts of existing law or relate to specific industries, such as garment manufacturers or the car wash industry.

Unless specified, the new laws listed below go into effect on January 1, 2014.

More details are available in a free CalChamber white paper, available at www.calchamber.com/2014newlaws.

Wage and Hour

- **Minimum wage:** **AB 10** raises the minimum wage from \$8 per hour to \$9 per hour effective July 1, 2014, and to \$10 per hour effective January 1, 2016.

- **Domestic work employees:** **AB 241** enacts the Domestic Worker Bill of Rights, which provides for specific overtime pay for certain in-home employees; a "domestic work employee who is a personal attendant." Those with in-home help will need to determine carefully whether the new law applies to them because AB 241 contains many specific definitions and exclusions.

California's rules take effect on

See CalChamber White Paper: Page 4

Poster Updates in 2014

Pre-Order at calchamber.com/2014poster



Labor Law Corner

Alternative Workweek: Two-Thirds of Employees Must Vote to Adopt



Gary Hermann
HR Adviser

Can an employer adopt an alternate workweek schedule before having employees?

An alternative workweek schedule cannot be adopted by an employer before having employees. Section 511 of the California Labor Code and Section 3 of the Industrial Welfare Commission wage order provide that upon the proposal of an

employer, the employees may adopt a regularly scheduled alternative workweek by voting for it in a secret ballot election.

An alternative workweek schedule authorizes work by the affected employees for no longer than 10 hours per day within 40 hours, or no longer than 12 hours in a day within a 40-hour workweek in the health care industry. This schedule creates an exemption from the obligation to pay daily overtime.

Vote Required

A proposal to adopt an alternative workweek schedule is deemed adopted only if it receives approval in a secret ballot election by at least two-thirds of affected employees in a readily identifiable work unit.

An identifiable unit can be a division, a department, a job classification, a shift

or any recognized subdivision of any work unit.

Following the election, the employer is required to report the results of the election to the state Department of Industrial Relations (DIR). It is the record of that reporting which protects the employer from claims of regularly required unpaid overtime.

Obviously no such vote by employees could be taken and no reporting of an election to the DIR could be made before there are employees in place.

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: calchamber.com/events.
Labor Law

HR Boot Camp. CalChamber. December 4, San Francisco. (800) 331-8877.

International Trade

INTRADE Malaysia 2013. Malaysia External Trade Development Corporation. November 26–28, Kuala Lumpur, Malaysia.

Interwine China 2013. MEREBO Messe Marketing. November 28–30, Guangzhou, China.

Export Compliance. U.S. Commercial Service and Southern California District Export Council. December 3, Los Angeles. (310) 235-7206.

StartmeupHK. InvestHK. December 4–7, Hong Kong.

10th Annual Global California Conference. Monterey Bay International Trade Association and TradePort. December 5, Redwood City. (831) 335-4780.

Export Compliance. U.S. Commercial Service and San Diego and Imperial District Export Council. December 5, San Diego. (858) 467-7037.

Cuba Educational and Policy Trip. Institute of the Americas. December 7–14, Havana, Cienfuegos and Trinidad, Cuba. (858) 453-5560.
International Investment Forum Chile

2014. Chile Foreign Investment Committee (CIEChile). January 13–16, 2014.

Offshore Technology Conference 2014. Malaysia External Trade Development Corporation. March 25–26, 2014, Kuala Lumpur, Malaysia. (213) 892-9034.

CalChamber Calendar

Business Services Committee:
December 5, San Francisco

Environmental Committee:
December 5, San Francisco

Fundraising Committee:
December 5, San Francisco

Health Care Policy Committee:
December 5, San Francisco

Board of Directors:
December 5–6, San Francisco

International Trade Breakfast:
December 6, San Francisco

Annual Meeting:
December 6, San Francisco

**Next Alert:
December 6**



Small Business Advocate of the Year Award

Riverside Engineer Tackles University Medical School Funding, Disability Access Reforms to Improve Business Climate

A Riverside resident since 1988, Robert Stockton, vice president and principal-in-charge at Rick Engineering, is keenly aware of the myriad of economic issues his community and city face.

As chair of the Greater Riverside Chambers of Commerce Economic Development Council for the last two years, Stockton has been instrumental in leading the chamber's efforts to build a strong local economy through business attraction and retention strategies, as well as advocating practical and business-friendly policies in environmental regulation and land use.

Last year, Governor Edmund G. Brown Jr. appointed Stockton to the California Board for Professional Engineers, Land Surveyors and Geologists.

When the Riverside Board of Supervisors voted to start charging new solar-power developers a fee, balanced with incentives, to pay for land use rights, Stockton represented the chamber before the board and stressed that the city should be in partnership with the solar industry in order to not discourage new development and job creation.

Stockton also testified before U.S. Representatives Ken Calvert (R-Corona), Jerry Lewis (R-Redlands) and Tom McClintock (R-Roseville) on the negative impacts that a critical habitat designation for the Santa Ana sucker fish would have on the region's access to water.

Last year, Stockton assisted efforts of the Greater Riverside Chambers to partner with the City of Riverside in commissioning the Regional Intelligence Report, a study to identify the baseline economic indicators in specific industries that will have an impact on inland Southern California in the future.

Key Issues

Yet, out of all the issues Stockton has brought to the attention of elected officials, one of the most significant to him has been securing funding for the new University of California, Riverside medical school.

The first medical school built in 40 years west of the Mississippi River, the establishment of the UC Riverside School of Medicine was approved in 2008, but

faced many funding challenges due to the state's economic downturn and resulting budget cuts. This year, however, Governor Brown approved \$15 million in annual funding that the University of California system will direct toward the school.



Robert Stockton

The mission of the school is to expand and diversify the physician workforce in inland Southern California and to develop research and health care delivery programs that improve the health of medically underserved populations. This is especially pertinent to Riverside, as the city currently lacks primary care physicians, Stockton said.

In addition to easing the health care demands the city faces, the school will have an economic "multiplier effect" on local industries, he added.

This is why for Stockton and the Greater Riverside Chambers, the school is especially important.

"Our top priority was to get the Legislature to approve funding for the school," he said. "It was a long, drawn effort, but it finally came into fruition."

Another significant issue for Stockton was advocating for disability access reform. Stockton and the Greater Riverside Chambers advocated heavily for reforms in both Sacramento and Washington, D.C., where they met up with

Senator Dianne Feinstein (D-San Francisco) to bring up the issue of making reforms to the Americans with Disabilities Act (ADA) to curb frivolous lawsuits against businesses.

The ADA reform effort eventually led at the state level to the introduction of SB 1186 (Steinberg; D-Sacramento/Dutton; R-Rancho Cucamonga). The bill, which was supported by the California Chamber of Commerce in 2012, sought to limit frivolous litigation regarding technical violations concerning access by reducing statutory damages, increasing pleading requirements and banning pre-litigation, monetary demand letters.

"Lawsuits were being filed prevalently, especially against small business," Stockton said. "They were essentially being blackmailed."

The bill was signed by the Governor last year.

Advocacy Is Important

The success of these efforts demonstrates why it's so important to be active in advocacy. Many times, elected officials rely heavily on what they hear from their constituents, Stockton said.

"If you don't have a voice at the seat of the table, you're not going to get heard," he said. "When someone else gets heard, that means that your issues are not going to end up being a priority."

In recognition of Stockton's extensive advocacy on behalf of small businesses, the CalChamber presented him with a "2013 Small Business Advocate of the Year" award in May before more than 200 attendees at the CalChamber Legislative Briefing.

In nominating Stockton for the award, Greater Riverside Chambers President and CEO Cindy Roth said, "It is individuals like Robert who maintain countless hours of service, tireless work ethic and unyielding commitment to our chamber mission and its members, which keeps our businesses thriving."

For those wanting to be more involved in the business community, Stockton recommends joining a chamber business council and then finding a committee that suits an individual's particular passion.

CalChamber White Paper Recaps New 2014 Employment Laws for Business

From Page 1

January 1, 2014. The U.S. Department of Labor also issued new rules on personal attendants that take effect on January 1, 2015.

● **Meal and rest periods—expansion to heat illness recovery periods:** **SB 435** expands meal and rest break prohibitions to “recovery” periods taken to prevent heat illness.

● **Damages for minimum wage violations:** **AB 442** expands the penalty available for citations issued by the Labor Commissioner for failing to pay minimum wage to include a requirement that the employer pay liquidated damages to the employee, in addition to existing penalties.

● **Protections for exercising rights under Labor Code:** **AB 263** amends Labor Code Section 98.6, which protects employees who assert their rights under the Labor Code; for example, by complaining of wage theft. Critically, **AB 263** adds a civil penalty of up to \$10,000 per employee per violation.

● **Labor Commissioner lien on property for employee complaints:** **AB 1386** requires that the amount due under a Labor Commissioner order, decision or award that has become final shall create a lien that the Labor Commissioner may record on the employer’s real property.

● **Attorneys’ fees—prevailing party wage claims:** **SB 462** states that employers who win wage-claim lawsuits may recover attorneys’ fees and costs from the employee only if a trial court finds that the employee filed the lawsuit in bad faith.

● **Employee wage withholdings—criminal penalty:** **SB 390** creates a criminal penalty for an employer that fails to remit withholdings from an employee’s wages that were made pursuant to state, local or federal law.

● **Garment manufacturer requirements:** **AB 1384** creates a civil penalty for a garment manufacturer’s failure to display his/her name, address and registration number at the front entrance of the premises.

● **Car wash industry:** **AB 1387** increases the bond requirement for employers in the car wash industry from \$15,000 to \$150,000, but exempts an employer from the requirement if a collective bargaining agreement in place meets specified criteria.

● **Farm labor contractors—successor liability:** **SB 168** makes a successor farm labor contractor liable for wages or penalties owed by a predecessor farm contractor under certain circumstances.

● **Prevailing wages:** A number of bills signed this year relate to prevailing wages. Employers that provide services or construction work for the government or public entities must pay the prevailing wage, which usually is significantly higher than the minimum wage. One notable bill (**SB 54**) expands payment of prevailing wages to privately financed refinery construction projects.

● **Discrimination/Retaliation Protections**

Discrimination/Retaliation Protections

● **Protection for military and veterans:** **AB 556** adds “military and veteran status” to the list of categories protected from employment discrimination under the Fair Employment and Housing Act.

● **Sexual harassment definition clarified:** **SB 292** clarifies that sexually harassing conduct does not need to be motivated by sexual desire.

● **Whistleblower protections:** **SB 496** expands whistleblower protections to include reports alleging a violation of a local rule or regulation and to protect certain internal reports.

Immigrant Protections

New protections will address retaliation against immigrant workers who complain about unfair wages or working conditions (**AB 263**, **SB 666**, **AB 524**). Privileges such as driver licenses for undocumented immigrants also were extended.

AB 60 requires the state Department of Motor Vehicles (DMV) to issue a driver license to an undocumented person who can prove identity and California residency and can meet all other licensing requirements, such as the written and behind-the-wheel exams. **AB 60** takes effect January 1, 2015, or on the date the DMV director executes a specified declaration, whichever is sooner.

Leaves and Benefits

● **Time off for crime victims:** **SB 288** adds new protections for crime victims to take time off from work to appear in any court proceeding in which a right of the victim is at issue.

● **Time off for victims of stalking**

and accommodation for domestic violence, sexual assault and stalking victims: **SB 400** extends existing protections for victims of domestic violence or sexual assault to victims of stalking. It adds a reasonable accommodation requirement for victims of domestic violence, sexual assault or stalking.

● **Time off for emergency duty:** **AB 11** requires an employer with 50 or more employees to provide a temporary leave of absence of up to 14 days per calendar year for reserve peace officers and emergency rescue personnel to receive training.

● **Paid Family Leave benefits:** **SB 770** expands Paid Family Leave wage-replacement benefits for employees to include benefits for time taken off to care for a seriously ill grandparent, grandchild, sibling or parent-in-law. This law takes effect July 1, 2014.

● **San Francisco Family-Friendly Workplace Ordinance:** The ordinance will require covered employers with employees working in San Francisco to consider requests for “flexible or predictable working arrangements to assist with care giving responsibilities.”

● **Background checks:** **AB 218** prohibits a state or local agency from asking an applicant to disclose information regarding a criminal conviction until after the agency determines the applicant meets minimum employment qualifications. There are specified exceptions. This law takes effect July 1, 2014.

Workers’ Compensation

● **AB 1309** limits the ability of professional athletes who work for out-of-state sports teams to bring workers’ compensation claims in California.

● **AB 607** relates to death benefits for dependent children.

● **AB 1376** relates to language assistance and interpreters.

● **SB 146** deals with medical treatment and billing and copies of prescriptions.

● **SB 809** involves reporting of controlled substances.

Members-Only Analysis

A more in-depth analysis of the new employment laws affecting businesses in 2014 is available to CalChamber members in the October 24 edition of *HRCalifornia Extra*.

Study: Latino College Achievement Critical to Meeting Workforce Needs

Increasing the rate at which Latino students complete college will have a huge positive impact on California's competitiveness in a global economy, according to a study released November 5.

The State of Latinos in Higher Education in California report, released by the Campaign for College Opportunity, found that the Latino population in California is large, growing rapidly and on its way to attaining majority status by 2050, but college degree attainment is low in spite of a significant increase in college-going rates.

Workforce Implications

The trend has significant implications for the California workforce and development of the state's economy. California is forecasted to face a shortage of 2.3 million college graduates by 2025.

Given the large and increasing size of the Latino population, the college-degree gap cannot be bridged without addressing the issue of degree completion by Latinos, the study concludes.

California's economic growth is increasingly tied to growth of industries with high-skilled jobs, many requiring college degrees. In addition, lifetime earnings for college graduates dwarf earnings for residents with a high school diploma or less.

More Four-Year Degrees

The study cites a 2012 report that concluded California could produce

another 790,000 students with four-year degrees if enrollment and achievement gaps between underrepresented minority students and white and Asian students were to be closed.

Nationally, Latinos are projected to contribute 5.5 million higher education degrees by 2020. In order for the United States to reach a goal of 60% higher



education attainment in the next seven years, Latinos will need to earn an additional 3.3 million degrees and certificates—almost 25% of the total.

The education attainment gap between native-born whites and Asians and native-born Latinos is wider in California than in most other states.

Closing Education Gap

The study recommends five actions that California policymakers and college leaders, along with students and their families, can take immediately to close this education gap and get the state's workforce growing in the right direction:

- **Create a statewide plan for higher education:** Establish statewide and college-by-college benchmarks for increasing Latino enrollment and completion rates, and for decreasing the number of students and time spent in remedial education courses.

- **Fund colleges for both enrollment and success:** Establish a new funding mechanism that creates incentives for increasing graduation and completion rates.

- **Get everyone on the same page:** Improve coordination between high schools and colleges on college preparation and assessment.

- **Invest in services students need to succeed:** Prioritize resources that support student success and completion, including orientation, counseling and services to close information gaps

for low-income, first-generation Latino students.

- **Strengthen financial support options for students:** Ensure that all eligible students apply and receive federal and California student aid for which they qualify.

Report

The complete report, "The State of Latinos in Higher Education in California: The economic and social imperative for advancing Latino college achievement," is available at www.collegecampaign.org.

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Governor Announces Changes at California Labor Agency

Governor Edmund G. Brown Jr. has appointed David Lanier as secretary of the California Labor and Workforce Development Agency, succeeding Marty Morgenstern.

Although Morgenstern is retiring as agency secretary, a position he has held since 2011, he will continue to serve the Governor as a senior adviser without compensation, the Governor's news release stated.

California Chamber of Commerce President and CEO Allan Zaremborg thanked Morgenstern on behalf of California employers for his service and dedication to the state.

"His commitment to good government and public service has been remarkable. We congratulate him on a long and distinguished career and wish him well in

his much-deserved retirement," Zaremborg said.

Zaremborg called Lanier's appointment "welcome news."

"We look forward to a strong partnership with Secretary Lanier as we work together to grow California jobs and improve our economy," Zaremborg said.

Morgenstern was a consultant for the University of California on labor relations matters from 2003 to 2011 and director of the California Department of Personnel Administration from 1999 to 2003 and from 1981 to 1982, according to the Governor's news release. He was a consultant in private practice from 1994 to 1999, chair of the Center for Labor Research and Education at the University of California, Berkeley from 1987 to 1994 and a member of the California

Public Employment Relations Board from 1982 to 1987. Morgenstern was appointed director of the Governor's Office of Employee Relations in 1975.

According to the Governor's news release, Lanier previously served as chief deputy legislative affairs secretary in the Office of Governor Edmund G. Brown Jr. since 2011. Lanier served as special adviser to the Speaker at the California State Assembly Speaker's Office of Member Services from 1999 to 2011. He was chief of staff for California Assemblywoman Grace Napolitano from 1997 to 1998, consultant for the Joint Legislative Government Oversight Task Force from 1996 to 1997 and legislative director for California Assemblywoman Carole Migden from 1995 to 1996.

Cap-and-Trade Auction Decision Ripe for Appeal

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emissions trading programs (but he neglects to mention that both of those programs contained specific authorizing language and the EPA program was revenue-neutral), and the California Climate Action Team Report.

(Of course, there was no mention of either program or of the report in the legislative history of AB 32, which stated as its goal reducing greenhouse gas emissions (GHG) in the state to 1990 levels by the year 2020.)

The judge also concludes that the subsequent 2012 legislation confirms this original authorization. He mentions ARB's enrolled bill report (which failed to discuss the auction at all) only in a passing footnote.

Tax or Fee

On the tax issue, Judge Frawley was much more tentative and essentially admitted he is in uncharted water. After going back and forth, he said he is treating the allowances as regulatory fees. He then analyzes this fee under what is called the *Sinclair* test (the legal standard establishing that in order for a fee to be a fee and not a tax, there must be a nexus between the fee and the payers' burdens on or benefits from the regulatory activity in question).

Judge Frawley goes on to opine that

Sinclair is not an appropriate test for the auction and then turns to establishing a new legal test.

Trying to apply *Sinclair*, he first concludes the primary purpose of the charges is regulatory. Then he says, "Granted, this is an unusual case. Unlike a typical *Sinclair*-type regulatory fee, the charges at issue are not intended to shift the costs of any particular regulatory program or programs... The proceeds of the sales of allowances will not be used to offset the costs of the cap-and-trade program, but to support additional regulatory programs that further the emissions reduction goals of AB 32. It is true that neither ARB nor this court currently know what those programs might be. However, because the proceeds can only be used to advance the regulatory purposes of AB 32, by definition the total amount of fees collected will not exceed the costs of the regulatory programs they support."

As to the final *Sinclair* criteria, nexus between the fees charged and regulatory burden imposed, he says, "There is no clear test for determining when a fee is 'reasonably related' to the adverse effects addressed by the regulatory activities for which the fee is charged."

After discussing several opinions that he says are conflicting, he makes up his own nexus test. He says the charges are

not intended to shift the costs of a particular regulatory program to those responsible, but are instead a "byproduct" of the regulatory scheme.

New Test

He then creates a new nexus test for this situation: "Under the unique circumstances of this case, the court is not persuaded that the amounts charged for allowances must be closely linked to the payers' burdens on the specific regulatory programs that will be funded by them. Rather, all that is required is a reasonable relationship between the charges and the covered entities' (collective) responsibility for the harmful effects of GHG emissions. As the State's largest sources of GHG emissions, the court is persuaded that a reasonable relationship exists."

The bottom line is that the judge is making new law and, in the opinion of our lawyers, the test he created would seem to open the door to all types of new taxes disguised as fees.

By establishing this new test, Judge Frawley created the escape hatch he needed to deny our petitions. But the subtext of the opinion—which gives due recognition to all our arguments—is that this issue is appropriately in the bailiwick of the court of appeal. As we suggested from the earliest days of this case, this is where the battle will truly be fought.

CalChamber Renews Trade Connections at Annual Export, International Gatherings

Longtime CalChamber Council Member to Chair National Export Group

International trade is a continuing bright spot in the economic landscape, with export markets providing advantages for both California and the United States.

To support this trend, California Chamber of Commerce Vice President of International Affairs Susanne Stirling attended the 2013 District Export Council (DEC) forum and the International Trade Symposium in Washington, D.C. November 7–8.

California Exports

In 2012, California exports totaled \$161 billion, according to the U.S. Department of Commerce. This was an increase from \$159 billion in 2011. California maintained its perennial position as a top exporting state, exporting to more than 225 foreign markets.

Exports from California accounted for nearly 10% of total U.S. exports, with Mexico, Canada, China, Japan and South Korea being the state's top trading partners.

The national forum consisted of a series of panel discussions on DEC best practices and exporting best practices, and was designed to engender substantial audience participation.

Export Council Chairman

During the DEC meeting, the chairmanship of the National Export Council was passed to Roy Paulson of the San Diego DEC. Paulson is president of Paulson Manufacturing Corporation in Temecula—a longtime member of the CalChamber Council for International Trade.

Paulson follows former National

DEC Chair Daniel Ogden of the North Texas DEC.

The District Export Councils contribute leadership and international trade expertise to complement the U.S. Commercial Service's export promotion efforts through counseling businesses on the exporting process and conducting trade education and community outreach. The DEC members are appointed by the Secretary of Commerce. Stirling is a longtime member of the council.

The CalChamber maintains a *DEC information page*.



Roy Paulson

Susanne Stirling

Symposium on Trade Issues

The 2013 International Trade Symposium, jointly presented by the National DEC and the U.S. Chamber of Commerce, is an annual program that provides an update of current trade issues via a series of panel discussions by key government and nongovernment personnel and experts.

The symposium focused on current trade issues of importance to U.S.

exporters, including export control reform, trade promotion authority, Trans-Pacific Partnership and the Transatlantic Trade and Investment Partnership, all CalChamber priorities.

All trade agreements are critical elements of the U.S. strategy to liberalize trade through multilateral, regional and bilateral initiatives. Passage of these agreements will eliminate billions of dollars in tariffs for U.S. exports, as well as increase market visibility and benefits to California and the United States as a whole.

Exports Up

In 2012, U.S. exports hit an all-time record of \$2.2 trillion and supported 9.8 million U.S. jobs. Growth in exports of goods and services outpaced the growth of imports of goods and services in both dollar and percentage terms for the first time since 2007, with exports growing by \$92.6 billion or 4.4%.

Exports as a share of U.S. gross domestic product (GDP) were 13.9% in 2012, tying the record set in 2011.

Jobs supported by exports increased to 9.8 million in 2012, up 1.3 million since 2009. The growth in exports came despite a slowdown in the world economy and in world trade volumes.

The CalChamber supports 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.

Staff Contact: Susanne Stirling

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