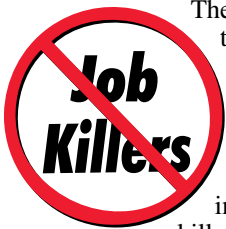


ALERT

VOLUME 40, NUMBER 22 • AUGUST 8, 2014

 **CalChamber**
CALIFORNIA CHAMBER OF COMMERCE

Fate of ‘Job Killer’ Bills Waits on Action in Senate



The Senate Appropriations Committee delayed action on four “job killer” bills on August 4 pending consideration of their fiscal impacts. A fifth “job killer” awaits a vote by the entire Senate.

Suspense File

Sent to the Senate Appropriations Committee Suspense File to be considered again on August 14 were the following California Chamber of Commerce-opposed “job killer” bills:

- [AB 52 \(Gatto; D-Los Angeles\)](#)

Substantial Expansion of CEQA. Creates more opportunities for litigation and substantially increases project cost and delay by creating mandatory consultation requirements with Native American

Tribes and by requiring lead agencies to analyze a project’s impacts to an entirely new resource area called Tribal Cultural Resources.

- [AB 1522 \(Gonzalez; D-San Diego\)](#)

Paid Sick Leave. Increases employer mandates by requiring all employers, large and small, to provide all employees in California with paid sick leave, and threatens employers with statutory penalties and litigation under the Private Attorneys General Act (PAGA) for alleged violations.

• [AB 1897 \(R. Hernández; D-West Covina\)](#) **Contractor Liability.** Unfairly imposes liability on a contracting entity for the contractor’s wage and hour violations and lack of workers’ compensation coverage despite the lack of any evidence that the contracting entity controlled the working conditions or wages of the contractor’s employees.

See Fate of ‘Job Killer’: Page 4

CalChamber Opposes Legislation Expanding Franchise Lawsuits



OPPOSE

A California Chamber of Commerce-opposed bill opening franchise contracts to litigation will be voted on soon in the Assembly.

The coalition

opposing [SB 610 \(Jackson; D-Santa Barbara\)](#) includes franchisors ranging from restaurants to retailers, movers, senior care, maid service, storage units and sports nutrition.

Opponents note that SB 610 will hurt small businesses, undo key elements of existing contracts, promote costly litigation and make it more difficult for a franchisor to terminate an underperforming franchisee. The risk of potential litigation will reduce investment opportunities for franchisees and discourage franchisors from expanding in California.

Reasons to Oppose

• **SB 610 Will Hurt Small Business Owners.** For franchise small business owners, brand reputation is everything.

See CalChamber Opposes: Page 5

NLRB Authorizes Complaints Against Franchisees/Franchisor



The National Labor Relations Board (NLRB) Office of the General Counsel announced on July 29 that it authorized complaints against 43 McDonald’s franchisees for

violating employees’ rights during worker protests that occurred around the country demanding a “living wage.”

Moreover, NLRB also authorized complaints against the franchisor, McDonald’s, USA, LLC, and held that McDonald’s could be held jointly liable for actions by its franchise operators.

Impact

This is a departure that could have a significant impact on the normal franchisor/franchisee business model. Usually, the franchisor licenses its trademark and sets some standards relating to products and quality but the franchisee is solely responsible for all employment decisions—hiring, firing, supervising, discipline, etc.

Franchisors are typically not liable as joint employers unless they exert substantial control over the franchisee’s day-to-day operations.

Criticism

Several business groups, including the U.S. Chamber of Commerce, the National

See NLRB Authorizes: Page 4

Inside

[Oppose Unproven
Wage Liens: Page 3](#)

*Labor Law Corner***Job-Related Travel: Things to Consider in Setting Daily Reimbursement**

Barbara Wilber
HR Adviser

Our employees will travel on behalf of the company. What is the California per diem we have to pay when an employee travels?

The term “per diem” is used in so many ways, but from the context of your question, I am assuming you mean a daily expense rate owed to an employee for traveling on your behalf, not including mileage reimbursements.

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California Labor Code Section 2802 addresses expense reimbursement. However, the section does not stipulate what amount must be paid. The code simply states that each employee has to be indemnified, or reimbursed, for anything he/she necessarily expends on the employer’s behalf.

Reasonable Amounts

This does not mean that an employer is obligated to pay for the highest priced hotels and meals. Although the section is silent about the actual amounts and any limits the employer is able to set, a clear policy should be in place that delineates reasonable amounts based on the area of travel.

For example, daily limits for lodging and meals will be higher in larger cities such as San Francisco and Los Angeles.

Establish System

To ensure that employees are reimbursed for all expenses, employers should design the reimbursement system they wish to institute. Decide whether you want to pay a daily per diem rate that covers meals and lodging or whether you want employees to submit expense receipts for each expense and set acceptable limits. Of course, the latter method requires more paperwork and recordkeeping.

Develop an expense reimbursement policy stipulating how to claim expenses, forms to use, submission and payment schedules, and any prior authorization requirements.

Although submission deadlines are important, if an employee misses the deadline, withholding the owed expense payment is not an option. Current and former employees may claim payment according to the applicable statute of limitations for up to four years.

Expense reimbursements are not subject to final pay time limits and may be paid according to your established schedule.

Useful Guidelines

For help determining reasonable per diem rates, review both the state of California and the federal government allowances for their employees at the websites for the California Department of Human Resources, www.calhr.ca.gov/employees/Pages/travel-meals.aspx, and the U.S. General Services Administration, www.gsa.gov. The Internal Revenue Service also provides information on per diem rates.

Private California employers are not required to use these rates, but they are useful guidelines and may be more readily accepted as reasonable by a court or the state Division of Labor Standards Enforcement.

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: calchamber.com/events.

Labor Law

HR Boot Camp. CalChamber. September 3, Anaheim. (800) 331-8877.

Leaves of Absence: Making Sense of It All. CalChamber. October 9, Sacramento. (800) 331-8877.

Business Resources

Olix Awards. Olix Global. September 1–2, Hollywood. (949) 679-6066.

International Trade

California Asian Business Summit. CalAsian Chamber, Asian and Pacific Islander American Chamber of

Commerce and Entrepreneurship, ChinaSF. September 18–19, San Francisco. (916) 444-7883.

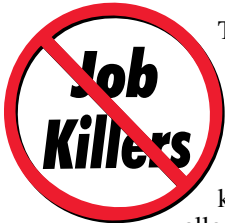
K-TECH Silicon Valley 2014 Conference/Expo. Korea Trade-Investment Promotion Agency (KOTRA) and National IT Industry Promotion Agency (NIPA). September 24–25, Santa Clara. (408) 432-5044.

Trade Expo Indonesia. Ministry of Trade of the Republic of Indonesia. October 8–12, Jakarta, Indonesia.

Tissue Middle East Show. Nile Trade Fairs. October 22–24, Cairo, Egypt.



CalChamber Urges Opposition to Bill Allowing Unproven Wage Liens



The California Chamber of Commerce is urging members to ask senators to oppose a “job killer” bill that would allow employees to

harass employers by filing prejudgment unproven wage liens on their property.

The bill, [AB 2416 \(Stone; D-Scotts Valley\)](#), creates a dangerous and unfair precedent in the wage and hour arena by allowing employees to file liens on an employer’s real or personal property, or property where work was performed, based upon alleged-yet-unproven wage claims.

The Senate Appropriations Committee put AB 2416 on its suspense file on August 4, pending a review of the bill’s fiscal impacts. The committee is scheduled to consider bills on the suspense file on August 14.

Innocent Property Owners

AB 2416 would cripple California businesses by allowing any employee, governmental agency, or anyone “authorized by the employee to act on the employee’s behalf” to record liens on an employer’s real property or property where an employee “performed work” for an alleged, yet unproven, wage claim. The bill also would severely disrupt commercial and personal real estate markets in California.

At the time of recording the lien, the employee would have no burden to provide any actual evidence that the employer violated any wage and hour law.

There is no question that improper liens will be recorded on the employer’s or third party’s property. In fact, as set forth in the Assembly Appropriations Committee analysis dated May 13, 2014, the Labor Commissioner’s office will incur significant costs due, in part, to needing to investigate and/or remove the lien in the majority of all wage claims.

These liens will not necessarily be recorded in bad faith by the employee. Rather, as the Labor Commissioner indicates, the underlying allegations may just be wrong or mistaken, which is why it is so necessary for there to be a third-party review of the lien, wage claim and property identified before the lien is recorded on the property.



CalChamber Policy Advocate Jennifer Barrera summarizes problems with the unproven wage liens allowed by AB 2416 (Stone; D-Scotts Valley) in a [Capitol Report video](#).

Other Concerns

The CalChamber also is concerned that AB 2416:

- **Holds Nonemployer Third Parties Liable for Unpaid Wages.** AB 2416 allows an employee to record a wage lien on any real property at which the employee performed work.

- **Allows an Employee’s Creditor the Right to Record a Lien.** Any person or entity that has standing under the law to collect any portion of the compensation owed the employee may record a lien.

- **Still Puts Someone’s Home at Risk.** Amendments attempting to preclude the recording of a lien on someone’s home did not remove the risk that a homeowner will have to pursue legal action to have an improper lien removed.

- **Precludes Any Financing Option for Real or Personal Property.** AB 2416 will interfere with commercial investments or lending in California, as well as personal home loans.

- **Contains No Effective Statute of Limitations on Timing to Record Lien.**

AB 2416 states that the employee must record the lien within 180 days after ceasing work for the employer, not 180 days from when the alleged wage violation occurred. This significantly expands the existing statute of limitations for wage violations.

- **Forces Property Owners to Courts That Already Are Underfunded.**

Under AB 2416, if a lien is improperly filed against an employer’s property or third party’s property, and the employee fails to withdraw the lien but does not necessarily act in bad faith or with the intent to defraud, there is no consequence. Rather, the employer or property owner must petition the court for removal of the lien before being able to fully utilize their property.

Sufficient Protections Already Exist

There already are sufficient protections in place for the failure to pay wages, including the following:

- An employee may file a claim with the Labor Commissioner’s office;
- An employee may file a civil claim, with the right to obtain attorneys fees and costs;
- The Labor Commissioner can require an employer who has been convicted of any provision of the Labor Code to file a bond in an amount deemed sufficient by the Labor Commissioner;
- The Labor Commissioner can record a lien on an employer’s property within the state for final orders; and
- A court can order a judgment lien or a bank levy on an employer’s property.

Action Needed

The CalChamber is urging members to ask their Senate representatives to **oppose AB 2416.**

An [easy-to-edit sample letter](#) is available at www.calchambervotes.com.
Staff Contact: Jennifer Barrera

Deadline Looms for Putting Bonds on Ballot

Proposals to give California voters an opportunity to vote on bonds to fund water and school facilities were in the news this week, with reports differing on the true deadline for getting the measures on the November ballot.

The calendar on the website of the Secretary of State lists August 11 as the deadline for the Secretary of State to send the voter information pamphlet for the November ballot to the printer.

Already on the ballot is the \$11.1 billion water bond developed in 2009. It was scheduled to go before voters in 2010 and then 2012, both times being delayed because supporters feared it would be defeated during the economic downturn and opponents considered the amount too large.

The 2009 measure includes funds for drought relief, water supply reliability, Delta sustainability, improving the state-wide water system, conservation and watershed protection, groundwater protection and water quality, and water recycling and conservation.

Governor Edmund G. Brown Jr. said Monday he would support a \$6 billion water bond for November as offering sufficient investment for needed water infrastructure while eliminating what he considers “pork” in the 2009 bond package.

On Tuesday, an environmental coalition announced its version of a water bond, tagged for about the same amount, with allocations for recycling and conservation, waste water treatment and drinking water projects.

Wednesday, a group including Central Valley officials and farmers called for a larger water bond.

Bills pending in the Legislature include water bond proposals by Assemblyman Henry T. Perea (D-Fresno), Senator Ben Hueso (D-Logan Heights) and Senator Lois Wolk (D-Davis).

A hearing on one school bond measure, AB 2235 (Buchanan; D-Alamo) was scheduled for August 11 in the Senate Appropriations Committee, having been deferred once from August 4. The bill has been amended to designate an unspecified sum to be used to help upgrade, modernize and construct school facilities.

Fate of ‘Job Killer’ Bills Waits on Action in Senate

From Page 1

• **AB 2416 (Stone; D-Scotts Valley) Unproven Wage Liens.** Creates a dangerous and unfair precedent in the wage and hour arena by allowing employees to file liens on an employer’s real or personal property, or property where work was performed, based upon alleged yet unproven wage claims. ([See story on Page 3.](#))

On Senate Floor

Awaiting a vote by the entire Senate as *Alert* went to press was CalChamber-opposed **AB 2617 (Weber; D-San Diego) Interference with Arbitration Agreements and Settlement Agreements.** Unfairly prohibits the enforcement of arbitration agreements or prelitigation settlement agreements that

require the individual to waive their right to pursue a civil action for the alleged violation of civil rights.

Action Needed

The CalChamber is urging members to contact their senators to ask them to **oppose** these “job killer” bills.

Easy-to-edit sample letters are available at www.calchambervotes.com.

NLRB Authorizes Complaints Against Franchisees/Franchisor

From Page 1

Restaurant Association and the National Retail Federation, issued statements criticizing the NLRB’s announcement.

“This Memorandum has broad implications and appears to undermine settled law defining who is the employer under the National Labor Relations Act,” said Randy Johnson, the U.S. Chamber’s senior vice president for labor, immigration and employee benefits. “This upends existing law and is part of a larger agenda at the NLRB to overturn the joint-employer standard.”

The *New York Times* reports that McDonald’s plans to contest the NLRB’s decision, warning that it could have an impact on all types of franchisor/franchisee businesses, such as dry cleaners and car dealerships.

Franchisor Comment

The NLRB memo “threatens the franchise business model that has encouraged countless American small business owners, creating jobs and broad-based economic growth,” wrote Andrew Puzder, CEO of CKE Restaurants, in a July 31 opinion piece for the *Wall Street Journal*.

“The franchisor/franchisee relationship is built on a division of roles and responsibilities. The franchisor owns a unique system, which it licenses and protects as a brand. The franchisee operates an independent business under the brand’s trademarks at one or more locations as a licensee...”

“If the NLRB’s new interpretation of the rules...becomes the law of the land, it will be tantamount to rewriting an exist-

ing contractual relationship by government fiat in ways the parties never contemplated and to their mutual detriment.”

California Case

In California, an important case relating to franchisor liability for franchisee conduct is pending before the California Supreme Court (*Patterson v. Domino’s Pizza*). The case involves whether the franchisor, Domino’s Pizza, is vicariously liable for certain conduct, sexual harassment and assault, by an assistant manager at a franchisee.

Oral argument was heard by the court on June 4, and the case was submitted.

The *HRWatchdog* blog will provide an update once the court issues an opinion.
Staff Contact: Gail Cecchetti Whaley

California Supreme Court Decides Commission Issue



A recent California Supreme Court ruling interprets how to apply a key test to determine whether a commissioned inside sales employee is exempt from overtime.

Commissioned inside sales representatives in California are entitled to earn overtime unless they meet specific exemption requirements. Under California law, a commissioned inside sales representative who is covered by Wage Order 4 or Wage Order 7 is exempt from overtime if:

- The employee's earnings exceed 1.5 times the state minimum wage; and

- At least 50% of the person's total compensation comes from commissions.

The California Supreme Court's July 14 decision in *Peabody v. Time Warner Cable Inc.* interprets the first prong of the test: the compensation requirement.

The question before the court was whether, to meet this prong, an employer may attribute commission wages paid in one pay period to another pay period.

The unanimous answer from the court was "No":

"[A]n employer satisfies the minimum earnings prong of the commissioned employee exemption only in those pay periods in which it actually pays the required minimum earnings. An employer may not satisfy the prong by reassigning wages from a different pay period."

The case was brought by a Time

Warner account executive who sold cable TV advertising. She argued that her biweekly paychecks included only an hourly wage and often did not exceed 1.5 times the minimum wage.

Time Warner argued that if you factored in the employee's monthly commissions, the exemption's minimum earnings prong was met. Time Warner argued that the commissions, which were paid on the final biweekly payday of each month, should be attributed to the weeks of the preceding month.

Although the decision sets new legal precedent in California, it is consistent with the earlier interpretation of the exemption by the Division of Labor Standards Enforcement.

Staff Contact: Gail Cecchetti Whaley

CalChamber Opposes Legislation Expanding Franchise Lawsuits

From Page 1

SB 610's one-size-fits-all regulation damages the brand, hurts small franchise businesses and could cost California jobs. It will also lower the value of small businesses and put the owner's hard-earned equity at risk. This bill could put more small businesses at risk of shutting their doors and severely limit further brand expansion in the state.

• **California Law Already Governs Franchised Small Business.** California law and the Federal Trade Commission (FTC) require the franchisor to provide extensive disclosure documents to franchisees before entering into a franchise agreement to help ensure that both parties understand each other's expectations and obligations.

Franchise agreements set forth guidelines and expectations that each party reviews, understands and agrees to (or negotiates upon) before mutually signing. These agreements and the standards under which franchise businesses operate are designed to help ensure a uniform and quality experience for their customers.

Both franchisees and franchisors invest significant capital and resources in their businesses and take pride in delivering quality goods and services that customers have come to expect. SB 610 undoes key elements of the existing contracts that protect the brand.

- **SB 610 Will Make Terminating Underperforming Operators Difficult.**

The bill dramatically changes the burden under which a franchisor can terminate a contract from "good cause" to a "substantial and material breach."

"Substantial and material breach" is a very high standard for a franchisor to overcome and would enable underperforming operators to continue to operate. This is a dangerous precedent, not only damaging the reputation of other franchisee business owners, but also putting the brand at risk, both locally and nationally.

• **SB 610 Will Only Benefit Lawyers.** SB 610 will create more costly litigation in California. The dramatic changes of this bill will open up thousands of contracts already signed to potential litigation.

Additionally, the bill will reduce the future investment and growth opportuni-

ties for franchisees in the state and could discourage development from franchisors looking to expand into California.

California franchisors (based in or seeking franchises in California) must file each year with the California Department of Business Oversight. The department reports processing 3,545 franchise filings (both new and renewals) in 2013. Many national franchisors are exempt from California registration due to filing with the FTC.

Action Needed

The CalChamber is urging members to ask Assembly members to **oppose SB 610**.
Staff Contact: Jennifer Barrera

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Commerce Officials Give Update on U.S. Program to Boost Investment

Economic development organizations in California and across the nation can turn to a program within the U.S. Department of Commerce for help in attracting, retaining and expanding business investment—SelectUSA.

Commerce Department officials stopped by the California Chamber of Commerce recently to explain the program, the first federal-wide effort to promote and facilitate business investment in the United States.

U.S. Department of Commerce officials meeting with Allan Zaremberg, CalChamber president and CEO, and Susanne Stirling, CalChamber vice president, international affairs, were:

- Arun M. Kumar, director general of the U.S. and Foreign Commercial Service and assistant secretary for global markets;
- Vinai Thummalapally, executive director, SelectUSA; and
- Greg Mignano, director, Pacific Northwest Region, U.S. Commercial Service.

SelectUSA

SelectUSA provides entities interested in investing in the United States a single point of contact at the federal level,



From left are Arun M. Kumar, Susanne Stirling, Allan Zaremberg, Vinai Thummalapally and Greg Mignano.

coordinating business investment-related resources across all federal agencies.

The program offers information about: establishing and operating a business; federal programs and services available—including grants, loans and other assistance programs; and the competitive and regulatory landscape of doing business in the United States.

For U.S. economic development organizations, SelectUSA can leverage contacts in offices in more than 70 countries around the world. In addition, subject matter experts are available to help recruit and retain investment and share best practices.

SelectUSA also serves as an ombudsman for investors on issues involving federal agencies.

Foreign Direct Investment

Majority-owned U.S. affiliates of foreign firms employ approximately 590,100 workers in California, according to the U.S. Bureau of Economic Analysis and fDiMarkets.com.

Commerce department officials report that since 2003, 1,765 foreign direct investment projects have been announced in California. In February, for example, Proseal America (U.K.), a packaging equipment manufacturer, announced it would open a machinery center in Sacramento to provide more localized service and support for West Coast customers.

If projects are completed at their announced levels, they would represent more than \$8.61 billion in capital investment, the Commerce Department reports.

More information about SelectUSA is available at SelectUSA.gov or by calling (202) 428-6800.

Staff Contact: Susanne Stirling

ONE-DAY SEMINAR AT CALCHAMBER IN DOWNTOWN SACRAMENTO

Leaves of Absence: Making Sense of It All

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Managing leaves of absence is confusing, especially since California has some very unique leave laws. To avoid costly litigation, it's essential to understand various types of leaves and any state and federal legal requirements that apply to them.

CalChamber's employment law experts will cover the most common and more difficult-to-resolve issues related to leaves of absence when you join them at our upcoming seminar in Sacramento.

Thursday, October 9, 2014

9:00 a.m. – 4:00 p.m.

California Chamber of Commerce

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PURCHASE at calchamber.com/LOAseminar or call (800) 331-8877 and mention priority code REG.

Small Business Advocate of Year Award

Focus on Community Motivates Turlock Chamber Leader



“I care about where I live, the community,” says **2014 Small Business Advocate Award** recipient Mike Lynch.

Perhaps that sentiment best explains Lynch’s tireless efforts in

advocacy with his local chambers in both Turlock and Modesto over the last 11 years.

He joined both chambers in 2003, the same year he started his consulting firm after years working at the local, state and national level as a staffer for the Sacramento County Board of Supervisors from 1974 to 1979, the State Assembly from 1979 to 1989, and the U.S. House of Representatives from 1989 to 2002.

As chairman of the Government Relations Committee at the Turlock Chamber, Lynch has organized meetings and a forum that brought in stakeholders and speakers to discuss the water challenges facing the city of Turlock and California as a state. He also orchestrated a letter-writing campaign of chamber members to the State Water Resources Control Board last year.

Water in Stanislaus County

“The water issue here is fundamental to our economy and our quality of life,” Lynch says. “Our very lifestyle.”

Water usage has a profound effect on Stanislaus County, a place Lynch has called home since 1995. Although the county generally is viewed as an agricultural community, “The word ‘agricultural’ doesn’t mean that we’re a bunch of farmers,” Lynch says. “It means 650,000 people here in the county that have either direct or indirect linkages to a long-standing agriculturally active economy and tradition.”

Lynch notes that he and the Turlock Chamber have raised public awareness of the stakes involved and cautions that the onus of this water challenge is not on just one group of people.

“The issue isn’t just farmers, the issue is the people who live here,” Lynch says. “It’s the kids in our schools, it’s the senior citizens, it’s the whole community that is invested in this, and we have tried to convey that discussion and that perspective to the appropriate policy makers.”

Problems Facing Businesses

Lynch sees two issues as the biggest concerns facing businesses in his region and that contribute to a lack of certainty in the community.

“In our area, it’s water and immigration, bottom line.”

A sustainable groundwater supply is crucial going forward, he argues, and building more dams to address the drought is imperative.

His region also needs comprehensive immigration reform, Lynch states.

“People are desperate to come here,” Lynch says. “And that’s a good thing. We have something here in this unique creation of a secular government and a basic commitment to freedom and equal rights and equal protection under the law that has resulted in an enormous economic engine that drives what has become the wealthiest economy in the world.”

Importance of Advocacy

Lynch views advocacy at the local level as critically important. And his experience tells him that elected officials and legislators are interested in solutions to problems.

“If you’re not at the table, if you’re not engaged, if you’re not explaining the problem, then you don’t even know what it’s doing to you,” Lynch says.

Lynch sees advocacy as a way of vocalizing to legislators how their policies are affecting people and business. If the legislators are not made aware of the effects then they will not know if they are making mistakes with policies or causing a problem, Lynch says. Therefore it is incumbent upon the business community to get involved.

“[A chamber’s] got to be very straightforward and nonpartisan, but that does not mean that it has to be nonpolitical,” Lynch says. “It should be political. I really believe the chamber has to be involved at all levels of political activity. But it has to be involved in a way that’s credible and that advances the interests of the business and overall communities.”

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