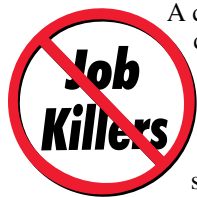


# ALERT

VOLUME 43, NUMBER 26 • SEPTEMBER 1, 2017



## Bill Attacks Equal Pay Deal, Expands Litigation Chances



A careful and historic compromise forged by the Legislature and the California Chamber of Commerce is under attack by legislation seeking to expand workplace litigation.

**AB 1209** by Assemblymember Lorena Gonzalez Fletcher (D-San Diego) is being considered this week by the Senate Appropriations Committee. CalChamber has tagged AB 1209 a job killer.

CalChamber and numerous employer organizations oppose AB 1209 because it will expose employers to significant litigation costs and create a false impression of wage discrimination or unequal pay where none exists.

The bill also threatens employee privacy by inappropriately forcing the disclosure of their wages.

"This takes direct aim at the 2015 compromise," said Jennifer Barrera, CalChamber senior policy advocate. "AB 1209 thumbs the scale for plaintiffs' litigators to ease their ability to make a pay equity case."

The current law makes plain that the standard for equal wages is "substantially similar work," not merely the job title or description. It also carefully allocates the litigation burdens between the employee and employer.

The new measure disregards this careful balance, and instead requires employers to collect statistical data on salaries of all well-paid white collar employees in selected private and non-profit corporations.

By using the smokescreen of transparency, the measure would unravel a carefully structured compromise that advanced both employee and employer interests.

## CalChamber Legal Affairs Welcomes New Employment Law Counsel



**Virginia K. Young**

employment law counsel.

She will be overseeing CalChamber coverage of the ever-expanding area of labor-related local ordinances and serving as a co-presenter for CalChamber compliance seminars and webinars.

Before joining the CalChamber, Young was a labor and employment senior counsel at Rogers, Joseph, O'Donnell, PC in San Francisco. She also was a labor and employment associate attorney at SNR Denton U.S. LLP.

In the two decades encompassing both positions, she handled employment litigation with large and small corporations, representing clients before state and federal agencies and courts, mediation and arbitration, including single plaintiff and class action matters. She specialized in state, federal and local wage-and-hour cases; disability accommodation; discrimination; training and investigations; and employment issues facing government contractors.

Young also presented seminars and

*See CalChamber Legal Affairs: Page 7*

Virginia K. Young, an experienced labor and employment attorney, has joined the California Chamber of Commerce Legal Affairs Department as employment law counsel.

## Get Latest Updates with CalChamber Alert App



The fate of many of the most contentious priority bills will be decided after this week's Alert goes to print. Install the CalChamber Alert app to get Tuesday's update on what the Senate and Assembly Appropriations committees did with those bills.

[www.calchamberalert.com/app](http://www.calchamberalert.com/app)

## Inside

**Pay Data Reporting Mandate Halted: Page 3**

## Cal/OSHA Corner

# California Dramatically Increases Penalties for Violations



**Mel Davis**  
Cal/OSHA Adviser

*I saw that the penalties are increasing for Cal/OSHA violations. Can you clarify what these increases entail?*

In a budget trailer bill this year (SB 96), the California Legislature increased the amount of several penalties for violations of state occupational safety and health laws. The California legislative action was taken to address federal Occupational Safety and Health Administration (OSHA) penalty increases and to reflect future increases in the Consumer Price Index (CPI).

## Includes Poster Violations

Nonserious violations of Cal/OSHA rules now may be assessed up to \$12,471 per violation (versus a \$7,000 cap before). This includes posting and record-keeping violations.

In other words, if you fail to comply with the requirement to post the required Cal/OSHA notice "Safety and Health Protection on the Job" in a conspicuous location frequented by employees, you could be facing a \$12,471 penalty.

Moreover, the minimum and maximum civil penalties for willful or repeat violations increased:

- The new minimum penalty increased from \$5,000 to \$8,908;
- The new maximum penalty increased from \$70,000 to \$124,709—an increase of almost 80%.

These penalty amounts can increase on an annual basis, even as soon as January 1, 2018. The budget bill ties the Cal/OSHA penalty amounts to the CPI to allow for annual inflation adjustments.

The bill further deletes maximum penalty limitations for violations of certain crane safety standards and carcinogen standards (previously a \$2,000 maximum).

## No Retaliation for Reporting

The budget trailer bill also specifically clarifies that it is unlawful for an employer to discharge or discriminate against employees for:

- Reporting a work-related fatality, injury or illness;

- Requesting access to occupational injury or illness reports and records; or
- Exercising any rights protected by federal OSHA.

These provisions are incorporated into Labor Code Section 6310, which now mirrors the federal OSHA anti-discrimination mandate.

Charges of retaliation for bringing a workers' compensation claim (Labor Code 132a claims) remain under the jurisdiction of the Workers' Compensation Appeals Board.

## Status

These legislative mandates will be adopted into Title 8 of the California Code of Regulations, specifically 8 Cal. Code Regs. Section 336, which governs the assessment of penalties.

Cal/OSHA prepared a rulemaking package that was submitted to the Office of Administrative Law (OAL) under the streamlined process for changes without regulatory effect. The deadline for OAL to approve these regulations is September 14, 2017. No rulemaking is required to increase the penalty amount annually based on the CPI.

As always, California employers need to pay close attention to all of their Cal/OSHA requirements, including requirements relating to posting, recordkeeping and reporting.

*The Labor Law Helpline is a service to California Chamber of Commerce preferred and executive members. For expert explanations of labor laws and Cal/OSHA regulations, not legal counsel for specific situations, call (800) 348-2262 or submit your question at [www.hrcalifornia.com](http://www.hrcalifornia.com).*

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**Next Alert: September 15**

**Quick Answers  
to Tough  
HR Questions**

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## White House Halts Requirement to Collect Pay Data by Race, Gender



On August 29, the White House Office of Management and Budget (OMB) issued an immediate stay of a rule that would have required private employers with more than 100 employees to

report how much they pay employees by race, ethnicity and gender on their EEO-1 reports.

“It’s enormously burdensome,” Neomi Rao, administrator of the Office of Information and Regulatory Affairs, told *The Wall Street Journal* (subscription required). “We don’t believe it would actually help us gather information about wage and employment discrimination.”

The administration also was concerned about the practical utility of the pay data reporting requirement as well as privacy and confidentiality issues, said Rao.

Ivanka Trump, the president’s daughter and an assistant to the president, also released a statement on the stay of the pay data rule:

“Ultimately, while I believe the intention was good and agree that pay transparency is important, the proposed policy would not yield the intended results. We look forward to continuing to work with [the] EEOC, OMB, Congress and all relevant stakeholders on robust policies aimed at eliminating the gender wage gap.”

### EEO-1 Pay Data Rule

Last year, the **Equal Employment Opportunity Commission (EEOC)** announced that it would begin collecting pay data from large employers, including aggregate information from employee W-2s. Employers were given approximately 18 months to prepare for this change with a deadline of March 31, 2018, to first provide pay data.

The stated purpose of the pay data collection was to assist the EEOC in identifying pay disparities that warrant investigation into potential discriminatory pay practices.

Under the now-stayed rule, private employers with 100 or more employees would have been required to provide summary pay data by job category and sex, ethnicity and race using 12 different “pay bands” or salary ranges identified on the EEO-1. To choose the correct pay band, the employer would refer to the employee W-2 earnings.

### What Happens Now

Many in the business community raised concerns about this new reporting requirement. During the rulemaking period, the California Chamber of Commerce submitted comments voicing several concerns about the proposed pay data reporting requirement.

The announcement that the rule is halted is an enormous break for employers.

According to a **statement issued by Victoria Lipnic**, acting chair of the EEOC, employers should continue

complying with the earlier version of the EEO-1 form that collects data on race, ethnicity and gender by occupational category. These sections of the EEO-1 report have been around for decades. However, employers will not be required to provide pay data.

The 2017 EEO-1 report is still due on March 31, 2018. The 2017 EEO-1 reporting instructions found on the **EEOC’s website** are currently being updated.

The stay of the pay data requirement will remain in effect while the OMB and the EEOC conduct a review. In addition, Lipnic wrote that the EEOC will continue to remain “committed to strong enforcement of our equal pay laws.”

The issue of fair pay continues to be a focus at both the state and federal levels.

**Staff Contact: Gail Cecchetti Whaley**

## CalChamber-Sponsored Seminars/Trade Shows

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

### Labor Law

Meal and Rest Break Rules. CalChamber. September 21, Webinar. (800) 331-8877.

HR Symposium. CalChamber. October 26, Los Angeles. (800) 331-8877.

### Business Resources

Mobile World Congress Americas. GSMA and CTIA. September 12–14, San Francisco. (202) 736-3200.

### International Trade

SEMICON Japan Connect Webinar. U.S. Department of Commerce. September 7. (408) 316-7315.

Innovation and Culture at the Border.

Institute of the Americas. September 12, La Jolla. (858) 453-5560.

Global Trade Services Workshop.

Sacramento Regional Center for International Trade Development (CITD). September 13, Grass Valley. (916) 563-3204.

Perumin-Extemin: Peru Mining Show.

Duquesne University Small Business Development Center. September 18–22, Lima, Peru. (412) 396-5670.

Expanding Horizons: A Workshop for Small Businesses Entering Emerging  
*See CalChamber-Sponsored: Page 6*

 **CalChamber.**

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Reception: 4 p.m.–6 p.m.

Register at  
**[calchamber.com/hrsym](http://calchamber.com/hrsym)**



# State Supreme Court Ruling May Threaten Longstanding Local Taxpayer Protections



A California Supreme Court decision makes it easier to raise some local taxes. But how much easier remains to be seen.

For two decades, local tax increases have

usually been governed by **Proposition 218**, whether proposed by a local government agency or by citizen initiative.

Passed by voters in 1996, Proposition 218 requires voter approval of all local tax increases. The measure also mandates that tax proposals appear on general election ballots (as opposed to primary or special elections). More controversially, most local tax proposals require approval of two-thirds of the voters.

## Supreme Court Ruling

In the case of *California Cannabis Coalition v. City of Upland*, the court by a 5-2 majority held that statutes proposed by voter initiative need not be held to the same procedural standards as statutes proposed by local government agencies.

While the court's decision interpreted a longstanding taxpayer protection measure, and fomented a predictable spate of comments from both supporters and skeptics of Proposition 218, the decision itself was quite narrow. Whether this ruling will lead to the erosion of actual taxpayer protections, such as supermajority vote thresholds, must await future litigation not yet on the horizon.

The opinion by Justice Mariano-Florentino Cuéllar held that Proposition 218 "does not limit voters' 'power to raise taxes by statutory initiative.' A contrary conclusion would require an unreasonably broad construction of the term 'local government' at the expense of the people's constitutional right to

direct democracy, undermining our longstanding and consistent view that courts should protect and liberally construe it."

## Distinctions

The court distinguished between the procedures that a local agency must comply with in approving a tax increase, which justices agreed is governed by Proposition 218, and the procedures a citizens' initiative must comply with, which are not necessarily governed by Proposition 218. The court elaborated by analogy:

"As Ulysses once tied himself to the mast so he could resist the Sirens' tempting song, voters too can conceivably make the clear and important choice to bind themselves by making it more difficult to enact initiatives in the future. The electorate made no such clear choice to tie itself to the mast here. Without a direct reference in the text of a provision—or a similarly clear, unambiguous indication that it was within the ambit of a provision's purpose to constrain the people's initiative power—we will not construe a provision as imposing such a limitation."

## Limited Remedy

The issue in *Upland* was whether the tax measure should be set for a vote in the general election, or at an earlier special election. Plaintiffs preferred the special election since it would more promptly enact the ordinance. Sponsors of Proposition 218 included the general election mandate to ensure the broadest possible electorate to consider tax matters.

Having established a procedural distinction between tax measures based on their provenance, the court left open the reach of this distinction. While the rhetoric was broad, the remedy was limited. The court ruled that the tax proposal should have been considered at a special election.

## Special Taxes Approval

Timing of elections is one thing, but the procedural hurdle that really matters is the vote threshold. Proposition 218 requires special taxes be approved by a two-thirds supermajority. The court opened this question, but did not answer it.

Justice Leondra R. Kruger wrote, in a dissent joined by another justice:

"A tax passed by voter initiative, no less than a tax passed by vote of the city council, is a tax of the local government, to be collected by the local government, to raise revenue for the local government," she wrote. "None of this could have been lost on the electorate that, also by initiative, amended the California Constitution to set ground rules for voter approval of local taxes."

The sponsor of Proposition 218, Howard Jarvis Taxpayers Association **President Jon Coupal**, said, "If local initiatives are exempt from critical taxpayer protections, then public agencies could easily deny taxpayers their rights by colluding with outside interests to propose taxes in the form of an initiative, then submitting a tax under a lower vote threshold than that currently mandated by the constitution."

## For a Future Case

Others believe any change in voter approval thresholds are down the road. Michael Coleman, an adviser to the League of California Cities, **wrote on Twitter** that the "case did NOT concern voter thresholds. Vote requirements remain pending a future case."

The attorney who successfully prevailed in the Supreme Court agreed. Roger Jon Diamond said: "I believe that this does not affect one way or the other whether you need a two-thirds vote or simple majority."

**Contact: Loren Kaye**

# CalChamber-Backed Student Team Shows Levitating Model of High-Speed Transit Pod



A transit pod prototype designed and built by a team of student engineers from the University of California, Santa Barbara (UCSB) demonstrated the potential for active magnetic levitation during the second round Hyperloop competition last weekend.

The California Chamber of Commerce is among the supporters of the UCSB Hyperloop II team, which was among 25 chosen from 150 contenders for a spot at Hyperloop Competition II. The competition was sponsored by SpaceX, which built the test track, about 1 mile long and 6 feet in diameter, outside its headquarters in Hawthorne, California.

UCSB Hyperloop II team member Brian Canty, an electrical engineer pursuing his master's at UCSB, explains: "The idea behind Hyperloop is that by removing friction and drag, you can get a vehicle to move very efficiently at high speeds. By placing the vehicle in a vacuum tube, drag from contact with air is severely reduced. To mitigate friction, the vehicle levitates above the ground."

The several approaches to get a pod to levitate, Canty says, include "passive/active magnets and air bearings (think a puck sliding over the top of an air hockey table)."

The UCSB team chose to experiment with active magnetic levitation. The second version of the team pod uses four magnetic levitation engines that rotate at high speeds to lift the pod slightly off the ground.

During competition weekend, the UCSB team showed SpaceX an in-place levitation, says team leader Benjamin

Flores, a junior engineering major. The team pod was one of a very few that were able to levitate in place, Flores notes.

## Efficiency vs. Weight

"Our major design goals were to create the fastest vehicle we could while also testing out the efficiency of the magnetic engines," writes Canty. While levitation could make the pod more efficient, it

cabling that reduced magnetic interference and had to iterate all our circuits until they were protected from the magnetic radiation. In the end, we got them to work even in the noisy environment, which was incredibly rewarding."

## Heat in a Vacuum

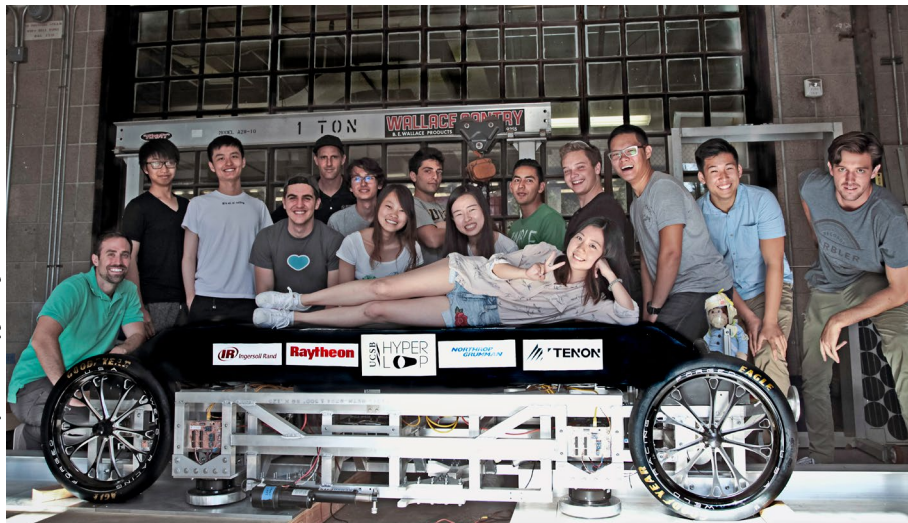
Another big challenge for the UCSB Hyperloop team was what the **engineering overview**

described as "the staggering thermal implications of working in a near-vacuum environment."

As the overview pointed out, "Without air to dissipate heat, components will begin to heat up much faster."

The subgroup of the team focusing on this challenge worked to ensure the extra heat was within acceptable parameters, and if it wasn't, "designed efficient methods for sinking the heat to ensure everything would function."

Photo courtesy UCSB Hyperloop Team



Members of the UC Santa Barbara Hyperloop II team pose with the prototype of their pod, which relies on active magnetic levitation to remove friction that would impede speed (the levitation engines are located above the metal cylinders just inside the 22" drag racing wheels). The team leader is Benjamin Flores (standing, fifth from right), an engineering student in his junior year. Kneeling at left is faculty adviser Tyler Susko, Ph.D., lecturer in the UCSB Mechanical Engineering Department.

"comes at the cost of requiring heavy batteries to power the engines," says Canty. "We are close to determining if it makes sense to keep the engines, or if it is more efficient to switch to nonrotating 'passive' magnets."

Because using active magnetic levitation remains a theory still being tested, the project has been "exciting," Canty writes. "We are truly pioneering in this field of transportation."

An electrical engineer, Canty designed the circuitry that controls the pod's brakes. He designed the circuits digitally then used a device similar to a 3D printer to mill the circuits onto copper plates.

"The biggest challenge we faced on the pod was making sure everything would work around those crazy powerful magnets," says Canty. "We used special

## Team Dynamics

The broad scope of developing the pod required an interdisciplinary team with electrical, computer and mechanical engineers collaborating. The more than 20 members on the team divided further into six task forces that focused on different aspects of the pod, such as design of the structure, magnetic levitation, power distribution, sensors and controls, braking and thermal.

"To efficiently interface, we ran our team like a small company where each team had a team leader that kept the rest of the team updated," Canty says. "This structure was very efficient at allowing people to get their work done without having to worry too much about logistics."

Continuity is a continuing challenge

*See CalChamber-Backed: Page 6*

## CalChamber-Backed Team Shows Levitating Transit Pod Model

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for the UCSB team. Many members sign on as part of the UCSB Engineering Capstone Program, a project-based course offered to fourth-year engineering students—who then graduate and move on to other opportunities.

Documenting design decisions can help with transitions, but as Canty points out, “When you’re on such a short deadline, it’s difficult to get the work done at all, let alone document it. In the future, I can see UCSB Hyperloop becoming a campus club with members of all ages, not just seniors.”

Interesting subjects for future Hyperloop team members, Canty suggests, include testing batteries in a vacuum and collecting data about magnetic levitation.

### Hyperloop Finalists

Just three teams were chosen to run their prototypes through the SpaceX tube

on August 27 based on criteria that included tests to ensure the vehicles could run the test track with some guarantee of safe performance. Time constraints also limited the number of pods that could be run through the tube, which reportedly took 30 to 45 minutes to depressurize and repressurize.

Says Flores, “Sadly we were unable to see what speed we can reach because we didn’t get on the tube, but if we did we might have reached over 150 mph.”

First place in the competition went to WARR Hyperloop, a team from the Technical University of Munich. The WARR pod reached a speed of more than 200 mph. The pod had wheels and has been described as a fancy version of an electric car. Website [Tech Crunch](#) reported the WARR pod was built of a carbon fiber and attributed the win to the pod’s electric motor and lightweight 176-pound frame.

Second place Paradigm, a team with members from Northeastern University and Memorial University in Newfoundland, Canada, used air bearings, the method described in the original Hyperloop white paper released by SpaceX CEO and Tesla founder Elon Musk in 2013. The Paradigm pod reached a speed of nearly 63 mph.

### Competition III

Musk said SpaceX would host the Hyperloop competition again next year.

“It was a great learning experience at SpaceX,” says Flores, citing lessons from other pods. “We are excited for Competition III.”

For more information about the UCSB Hyperloop program, visit [www.ucsbhyperloop.com](http://www.ucsbhyperloop.com).

## CalChamber-Sponsored Seminars/Trade Shows

*From Page 3*

Markets. Overseas Private Investment Corporation (OPIC). September 19, Oakland. (800) 814-6548.

10th World Chambers Congress. Sydney Business Chamber, The International Chamber of Commerce, and The International Chamber of Commerce World Chambers Federation. September 19–21, Sydney, Australia.

Trade Mission to the Four Countries of the Pacific Alliance (Chile, Colombia, Mexico and Peru). U.S.-Mexico Chamber of Commerce California

Regional Chapter. September 27–October 10, Santiago, Chile; Lima, Peru; Bogota, Colombia; Mexico City. (310) 922-0206.

Panama Energy Roundtable. Institute of the Americas. September 28, Panama. (858) 453-5560 ext. 103.

Export Compliance Training Program. Orange County CITD. September 29, Santa Ana. (714) 564-5415.

Import Compliance Training Program. Orange County CITD. October 13, Santa Ana. (714) 564-5415.

Sustainable Building and Construction

Trade Mission to Mexico. U.S. Department of Commerce International Trade Administration. October 16–20, Mexico City and Guadalajara, Mexico. (210) 472-4020.

U.S. Trade Mission to Azerbaijan. U.S.-Azerbaijan Chamber. October 16–20, Azerbaijan and Georgia. (202) 333-8702.

California-Germany Bilateral Energy Conference 2017. California Energy Commission. October 19–20, Sacramento.



CalChamber

## 2017 CalChamber Public Affairs Conference

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## CalChamber Calendar

*Fundraising Committee:*

September 7, Beverly Hills

*Board of Directors:*

September 7–8, Beverly Hills

*International Trade Breakfast:*

September 8, Beverly Hills

*Public Affairs Conference:*

October 17–18, Santa Monica



# CalChamber Seeks to Prevent Increases in Employer Health Care Premiums



The California Chamber of Commerce has asked congressional leaders to repeal a tax on health insurers that drives up costs for responsible employers.

In a letter to House Majority Leader Kevin McCarthy (R-Bakersfield) and Minority Leader Nancy Pelosi (D-San Francisco), the CalChamber points out that the health insurance tax on health insurance providers is essentially an indirect tax on responsible employers because the tax is calculated on insurance premiums paid for by employers.

The tax on health insurers was included in the Affordable Care Act (ACA) and was set at \$8 billion in 2014,

increasing to \$14.3 billion in 2018.

In California, almost 18 million individuals—more than 45% of the state's population—receive employer-sponsored health insurance coverage. For the United States as a whole, approximately half of all health insurance is through employer-sponsored coverage.

For health insurance providers, the health insurance tax is calculated on the entity's net premiums and is not deductible. Providers who increase premiums to recoup the tax must raise premiums by an amount greater than the tax itself because the additional premium increase is considered taxable income. The increased cost is passed along to businesses, small and large.

With the continuing increase in health care premiums paid by employers and the announcement in August that premiums for health care plans purchased through the state's insurance marketplace, Cov-

ered California, will rise by an average of 12.5%, a delay or repeal of the health insurance tax is more critical than ever.

## Potential Increases

Collection of the health insurance tax was suspended for 2017 on a bipartisan vote of Congress. If the tax is not repealed or again delayed, large California employers and their employees will see health insurance premiums for family coverage increase by \$560 in 2018, while small California businesses and their employees will see premiums for family coverage increase by \$467.

The CalChamber urges Congress to repeal the health insurance tax, and if more time is needed for a repeal, to at least delay the tax to ensure that responsible employers and their employees are not penalized by further increases in health insurance premiums.

**Staff Contact:** Karen Sarkissian

## CalChamber Legal Affairs Welcomes New Employment Law Counsel

*From Page 1*

training programs to human resources professionals via live presentations and webinars, along with written materials and articles.

Before working at SNR Denton, Young held various positions for the U.S. Naval Reserve Judge Advocate General's

Corps. She served as an assistant staff judge advocate for the U.S. Naval Hospital in San Diego, handling employee-related matters, including administrative discharge and privileging issues. She also worked as a claims officer evaluating and settling federal tort claims; and served as a defense counsel in court martial and

administrative discharge proceedings.

Young holds a B.A. in economics from the University of Pennsylvania at Philadelphia. She earned her J.D. with distinction from the University of California Hastings College of the Law in San Francisco.

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## Sexual Harassment in the News

With sexual harassment in the news and shaking up Silicon Valley, it's a cautionary tale for staying in compliance. If you wait until conduct is unlawful, even toward job applicants, independent contractors and other nonemployees, you've waited too long. Education is the important first step.

Remember, California companies with 50 or more employees are required to provide two hours of sexual harassment prevention training to all supervisors **within six months of hire or promotion**, and every two years thereafter.

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