

ALERT

Class Action Settlement Doesn't Prevent 2nd Lawsuit

Court Allows Claim Based on Different Facts



An employee who was a member of a wage-and-hour class action settlement with her employer, is able to pursue a subsequent lawsuit against her employer for a claim that was not

alleged in the first case, said the Ninth Circuit Court of Appeals in a recent opinion.

The employer settled in federal court a wage-and-hour class action lawsuit that claimed the employer failed to pay wages and overtime, provide meal and rest breaks, provide accurate wage statements

and reimburse business expenses.

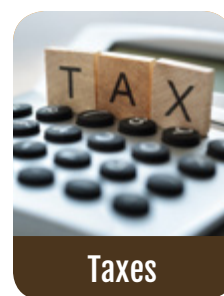
Second Lawsuit

After the first case was settled, one of the class members filed a Private Attorneys General Act (PAGA) case in California state court, alleging that the employer failed to provide suitable seating to employees, as required by California's Wage Orders. The federal case did not allege a suitable seating claim.

The employer asked the federal court to dismiss the state court PAGA case because the settlement of the federal class action barred the PAGA case. Although the district court agreed and dismissed the PAGA case, the Ninth Circuit, in an unpublished opinion, reversed that ruling.

See Class Action: Page 4

A Different Kind of Carbon Tax



My primary policy areas at the California Chamber of Commerce are privacy and tax. Yet, when I heard there was going to be a proposal for a "carbon tax" this session, I didn't

pay a lot of attention at first. I assumed that the "carbon tax" would be a tax on fossil fuel emissions, and that my brilliant, climate change-specializing, CalChamber colleague, [Leah Silverthorn](#), would be participating in some sort of renewed "carbon tax" versus cap-and-trade debate this year.

Well, you know what they say about making assumptions....

I was wrong. The "carbon tax" being contemplated this session would replace California's sales-and-use tax with a "carbon tax" based on the "carbon intensity" of specific products.

Yes, you read that right—it's basically the creation of a "carbon sales tax": retail products sold or used in this state with greater "carbon intensity" will be taxed at a higher rate. The goal is to use higher prices to influence Californians to purchase products in a way that is supposed to help reduce climate change.

Fortunately, the "carbon sales tax" bill, [SB 43 \(Allen; D-Santa Monica\)](#), is a study bill—because there is a lot to study!

See A Different Kind: Page 6

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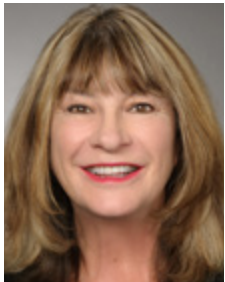
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Inside

[Commentary: Air Board Plan to Raise Fees: Page 3](#)

Labor Law Corner

Warnings to Employee with Bad Attitude Should Focus on Specifics



Dana Leisinger
HR Adviser

We would like to terminate an employee who has a bad attitude that rubs off on other employees. However, we haven't given him any warning. Is it safe to let him go?

Although California is at "at-will" state, meaning employment may be terminated by either the employer or employee on notice to the other, that doesn't make an employer bulletproof when relying on its at-will status.

At-Will Limits

First, at-will can be negated in a number of ways, including, but not limited to, contracts to terminate only for cause, promises of progressive discipline, and promises that "you will always have a job if you do good work."

But even absent the circumstances noted above, an employer can't terminate an employee based on his/her status in a protected category, such as age, physical disability, race, etc.

Therefore, when considering termination for someone who has a "bad attitude," be sure to keep in mind all these protected categories.

For example, if the employee with the bad attitude is in one or more protected categories and no warnings have been issued, that employee may easily claim discrimination upon termination. Therefore, an employer should follow progressive discipline, but never promise it.

Most employees expect there to be some kind of reason for getting fired, and if they haven't received any warnings at all and the employer simply states that the employee isn't working out, the vague language doesn't bode well for the employer.

Focus on Specifics

Therefore, even when it's difficult, the employer should give warnings with specifics to the employee.

The bad attitude can affect the workplace in a number of ways, and that impact should be the focus of the warnings.

Issues such as stress/unhappiness of co-workers, disruption of work flow—the employer should address these so that if a termination for a "bad attitude" is challenged, the employer has ample defenses.

Column based on questions asked by callers on the Labor Law Helpline, 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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Labor Law

HR Boot Camp. CalChamber. February 22, Modesto; March 29, San Diego; April 12, Oakland; April 26, Costa Mesa; May 9, Sacramento; June 14, Walnut Creek; August 22, Pasadena; September 12, Sacramento. (800) 331-8877.

Leaves of Absence: Making Sense of It All. CalChamber. March 8, Sacramento; June 21, San Diego; August 16, Oakland. (800) 331-8877.

International Trade

Annual Customs and Border Protection Update and State of the Port Luncheon. Women in International Trade, Los Angeles. February 7, Carson. (213) 545-6479.

A Chinese New Year Celebration. Women in Trade, Northern California. Febru-

ary 13, San Jose. info@wit-nc.com. Annual State of International Trade and Customs Outlook Luncheon. Women in International Trade, Orange County. February 20, Costa Mesa. (949) 445-0618.

Canada Advocacy Day: NAFTA 2.0: A Trade Agreement for the 21st Century. California Chamber. February 20, Sacramento. (916) 930-1233.

93rd Annual World Trade Week: SoCal—The Engine of Global Trade and Economic Growth. Los Angeles Area Chamber. May 2, Los Angeles. (213) 580-7500.

Annual Export Conference. National Association of District Export Councils. May 21–22.

SelectUSA Investment Summit. SelectUSA. June 10–12, Washington, D.C. (800) 424-5249



Air Board's Plan to Raise Fees Threatens Our Economy and Climate Goals

**Allan Zaremborg**

California produces just 1% of atmospheric carbon emissions, yet global leaders and activists care about California regulations. Why is this?

It's the same reason that California politicians insist on our unique climate regulations. Governors and legislators—here and globally—count on California's leadership to translate into solutions applicable around the world. If it can work in California, then maybe it can transform global climate policy.

Governors Jerry Brown and Arnold Schwarzenegger staked their climate policies on the belief that a cost-effective and gradual approach will not upset consumers, destabilize markets or shock voters, but will reduce greenhouse gases released to the atmosphere consistent with projected recommendations for global carbon emission reductions.

This has been the guiding principle of California's go-it-alone approach. Otherwise, we are simply volunteering our economy and lifestyles for underperformance and discomfort.

The Legislature memorialized this approach in 2017 when it adopted the cap-and-trade system as the state's central approach to greenhouse gas regulation, rejecting specific command-and-control mandates.

The Legislature directed the California Air Resources Board to "avoid adverse impacts on households, businesses and the state's economy" and consider the "potential for environmental and economic leakage."

Right policy, but the Legislature will spend the taxes generated by cap-and-trade on programs that may or may not affect taxpayers' daily lives.

Rather than allowing regulators to hide the true costs from the public by rolling cap-and-trade taxes into fuel and utility bills, the Legislature should review the goals and impacts of cap-and-trade, and how the increased revenue from motorists and ratepayers will be spent.

Commentary By Allan Zaremborg

For example, the Legislature insisted that cap-and-trade include a price ceiling to prevent shocks to consumers and the loss of economic activity from California to other states.

Setting the price ceiling is tricky because it requires balancing the state's interests in containing costs for businesses and households with the certainty of reaching targeted greenhouse gas emission levels.

Nonetheless, the Air Resources Board has adopted an aggressive regulation, baking in higher consumer and industry costs in the hope of squeezing out more emission reductions. This approach not only flouts the express will of the Legislature, but undermines the moral authority for engaging in state-level greenhouse gas regulation.

Instead of benchmarking a price ceiling and letting it rise with inflation, the California Air Resources Board has proposed compounding each annual increase by another 5%. The effect would be that by 2030, the price ceiling would increase by an additional 60%.

The difference in 2018 dollars is a 2030 price ceiling of about \$100 per ton of greenhouse emissions, compared to \$60 without this adder.

A \$40 difference is the equivalent of a 36-cent increase in a gallon of gasoline and double-digit increases in natural gas and electricity rates.

These increases are on top of the costs already assumed under an unadorned cap-and-trade regime, which already anticipates, by 2030, adding more than 50 cents a gallon to gasoline, and hiking utility bills by more than 25%.

These will create unavoidable costs to all Californians, especially residents who must commute long distances for work or school, and Californians who live in the interior of the state where temperatures are more extreme. As usual, low-income Californians will pay a larger portion of their income for higher energy prices.

Economic researchers have found that higher compliance costs for industry are directly proportional to higher emission allowance prices. This means that the incentive to move economic activity (and emissions) outside of California will increase along with allowance prices. Limiting allowance prices will limit the flight of jobs and excess emissions.

Cap-and-trade is clearly the superior policy choice to control carbon emissions, costing a third to a half as much as command-and-control policies. But how state officials implement this new pricing regime matters.

It isn't leadership if nobody follows.

Air regulators and their masters in the legislative and executive branches cannot inspire international replication of these ideas unless they design regulations to contain costs, enhance competition, and minimize pain to ordinary Californians.

Allan Zaremborg is president and chief executive officer of the California Chamber of Commerce. This commentary appeared first on CALmatters.org.

Remember to Post Form 300A: February 1–April 30



The California Chamber of Commerce is reminding employers that they need to post at their place of business the Form 300A summary of 2018 job-related injuries and

illnesses from February 1 through April 30.

Employers are required to post only the summary (Form 300A)—not the log (Form 300). The summary must list the total number of job-related injuries and illnesses that occurred in the previous year and were logged on the Form 300.

Companies with no recordable injuries or illnesses in the previous year still must post the summary with zeros on the

“total” line. A company executive must certify all establishment summaries.

The summary must be displayed in a common area where notices to employees usually are posted. Employers must make a copy of the summary available to employees who move from worksite to worksite, such as construction workers, and employees who do not report to any fixed establishment on a regular basis.

Electronic Reporting

As [previously reported](#), the Division of Occupational Safety and Health (Cal/OSHA) in the California Department of Industrial Relations adopted emergency regulations that require specific California employers to [electronically submit Form 300A information](#) to the federal Occupational Safety and Health Administration (OSHA).

March 2, 2019 is the deadline for

electronically reporting the 2018 Form 300A. Collection began on **January 2, 2019**. This deadline affects:

- Employers with 250 or more employees per establishment, [unless exempted](#) by Title 8 California Code of Regulations Section 14300.2.
- Employers with 20 to 249 employees in specific industries listed in [Appendix H](#) of the regulations.

Electronic reporting does not change the requirement to keep and maintain Form 300, [Form 300A](#) and [Form 301](#).

Readers can download a free Form 300A from [HRCalifornia](#).

CalChamber members can get more information on filing and posting requirements from [Recording Work-Related Injuries and Illnesses](#) in the HR Library on [HRCalifornia](#).

Staff Contact: Katie Culliton

Class Action Settlement Doesn't Prevent 2nd Lawsuit

From Page 1

According to the Ninth Circuit opinion, the prior class action settlement does not prevent the suitable seating claim in the state court case. Although the class action settlement was written broadly, the settlement bars only claims based on the same facts, and the claim in the PAGA case was based on different facts than those in the federal case.

Because the two cases don't involve the same claims, the court held that the

federal settlement doesn't bar the ensuing state PAGA case.

Suitable Seating

California employers should be aware that the majority of the Wage Orders require employers to provide “suitable seats when the nature of the work reasonably permits the use of seats.”

Compliance often requires employers to conduct a case-by-case analysis of tasks performed in various locations to

determine if a seat is required at a particular location. Employers with questions about their obligations to provide seating should consult legal counsel.

California Chamber of Commerce members can read more about California's suitable seating requirements in Tools, Uniforms and Equipment Explained in the HR Library on [HRCalifornia](#).

Staff Contact: Erika Pickles

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A Chance for California to Lead Us Back from the Brink on Frivolous Climate Suits



Theresa Harvey

A little over a year ago, the city and county of Santa Cruz filed suit against several energy companies seeking money for property damage

allegedly linked to climate change. They jumped on the bandwagon with San Francisco and other California cities alleging these companies should be financially responsible for coastal property damage caused by rising sea levels along with destruction from major storms, wildfires and drought.

New York City, Rhode Island and other municipalities have filed similar suits since then. But federal judges sharply disagree with the claim that energy companies should be hauled into court over this global problem.

U.S. District Judges William Alsup (California) and John Keenan (New York) pointed out that a small sample of energy industry players cannot reasonably be forced to shoulder climate change-related costs local and state governments could incur down the road.

They noted that the daily needs of the world's nearly 8 billion people depends on the products these energy companies provide. Effective strategies to confront this global challenge need to come from state and federal legislatures and executive branch agencies, not court-sanctioned shakedowns of a small group of companies.

That is common sense and consistent with precedent in the new field of climate litigation, but Oakland and San Francisco have changed law firms and are pressing ahead with appeals. The cities replaced their lawyers, the firm of Hagens Berman based in Seattle and partner Matt Pawa, with Sher Edling, another high-profile litigation shop. The two firms have a history of working in concert in suits against industry.

Guest Commentary By Theresa Harvey

The financial stakes in this spate of suits is enormous, which explains why these lawyers have been shopping around for clients and courts, hoping to strike gold. Most recently, a group of Pacific Coast fishermen have taken energy companies to court. The lawyers in these suits are working on a contingency basis so they don't get paid until one of the cities or counties wins or reaches a settlement. But should that happen, tens of millions of dollars await them so they will keep pressing ahead with their already-repudiated legal theory.

Let's hope they fall short. The fact that some 200 countries recently participated in a climate summit in Poland underscores that shifts in climate patterns have many causes and many solutions, all of them complicated. Misdirected lawsuits are surely not an effective way of addressing problems towns and cities could face as a result of climate change.

Fortunately, some California public officials, such as Huntington Beach Mayor Mike Posey, recognize that hitting

manufacturers with nuisance suits is the wrong way to spur economic development and job creation.

The state is home to some 30,000 manufacturers. With abundant supplies of crude, sunshine, geothermal resources, and hydropower electricity generation, California is literally an energy production powerhouse. Unfortunately, as many as 10,000 employers have left the state in recent years, most of them manufacturers. Frivolous climate lawsuits could exacerbate this trend.

Targeted attacks on companies that are central to our state's economic success will certainly not address the state's many challenges, such as unfunded pension obligations, affordable housing, water resources, and the age-old vulnerability to drought and natural disasters.

Californians take pride that the state has long been a world-class innovator and a magnet for talent, but there is no pride in being at the vanguard of a litigation war that is hostile to business. Pitting California cities against manufacturers who produce and consume energy will not do nothing to address climate change. But it is good business development for trial lawyers.

California has the regrettable distinction of kicking off this legal assault against energy manufacturing. It would be a far better profile to be the first state to sound the retreat.

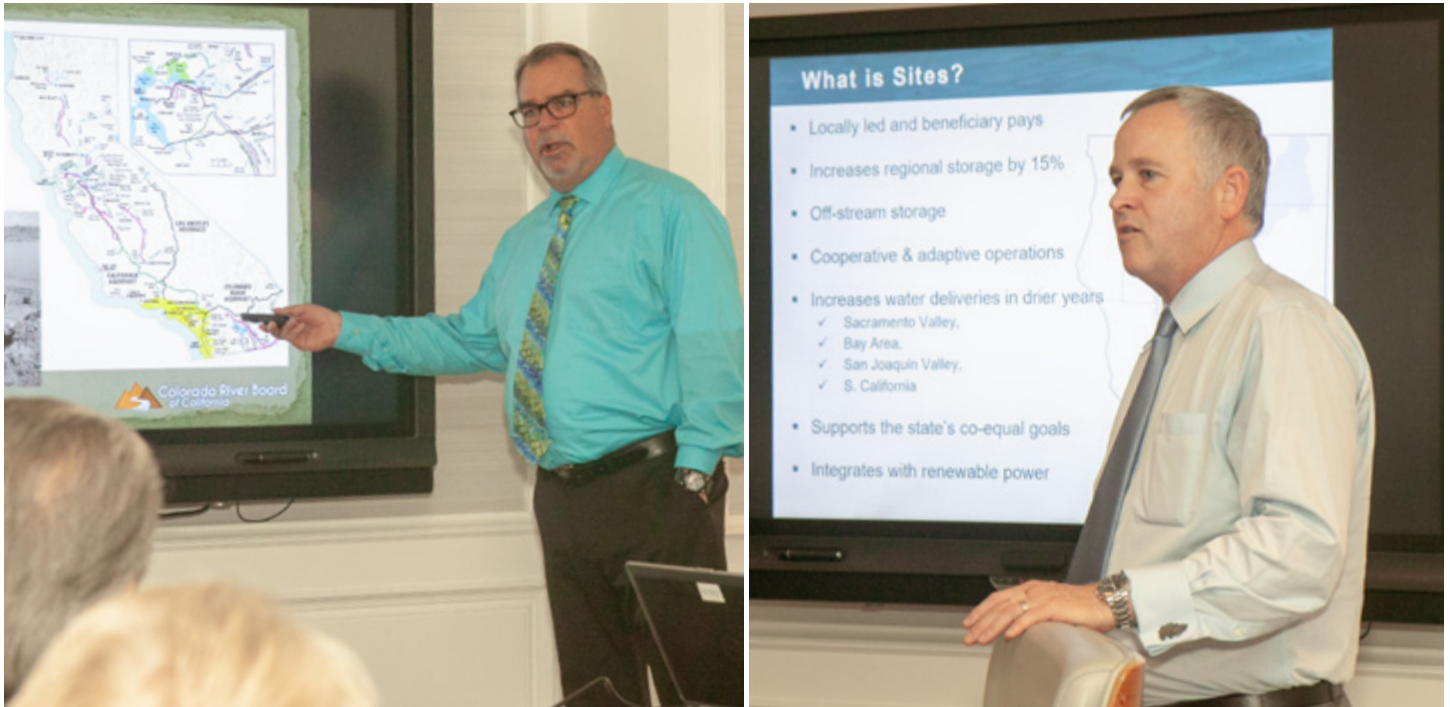
Theresa Harvey is president and CEO of the North Orange County Chamber of Commerce. This opinion piece first appeared on [Fox and Hounds Daily](#).



Helping Business In A Global Economy

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CalChamber Committee Gets Updates on Projects Affecting Water Supply



Christopher Harris (left), executive director of the Colorado River Board of California, outlines for the CalChamber Water Resources Committee the Drought Contingency Plan to **boost storage levels** at the Lake Mead and Lake Powell reservoirs on the Colorado River. James Watson, general manager of the **Sites Project** Authority, reviews for committee members the progress on the project, which will capture water in wet times for use in dry ones.

A Different Kind of Carbon Tax

From Page 1

Questions

Here are just some of the initial questions I have:

- Who within the California Air Resources Board (CARB) or the California Department of Tax and Fee Administration (CDTFA) will determine the “carbon intensity” of every single product sold or used in California? Would it be a team of scientists? Would companies around the country and the world have to send the CDTFA some sort of form assessing the “carbon intensity” of every single one of their products sold in California? How will the CDTFA verify the accuracy of such information? How will they enforce this new requirement here in California when so many products come from out of state or from another country?

- Assuming they can do this, how will they convey the specific carbon sales tax for every single product to retailers in this state? Could they assign the different rates of carbon sales taxes to categories of products? Or would this be unfair

because two companies could produce the same type of product with significantly different carbon intensities?

- What will be included in the determination of “carbon intensity”? Some of the factors contributing to “carbon intensity” can include the amount of fuel combusted, the number of animals used, certain industrial processes, and distances traveled. What else?

- What will be the impact of assessing a carbon sales tax based—in part—on how far a product must travel to get to our state? If the same company produces a product in two different states, one closer to California than the other, will that same product from the same company have two different prices? Will the distance to each local jurisdiction in our large state be part of the “carbon intensity” measurement? For example, if a product is manufactured in Oregon and sold in San Diego, will it have a different “carbon intensity” measurement than the same product sold in Sacramento?

- How will the carbon sales tax impact lower-income Californians? Will there be

some Californians who don’t have many options when trying to buy products with a lower “carbon intensity”? Will it impact their ability to buy meat and dairy products, including milk and formula? Will it increase the cost of their utilities and driving? Will their cost of living go up?

- Per SB 43, the carbon sales tax has a goal of revenue neutrality. Yet, if the carbon sales tax is successful at getting consumers to stop purchasing products with higher carbon emissions, via their higher tax rates, wouldn’t revenue ultimately be diminished?

- California’s sales-and-use tax is one of the state’s most stable forms of revenue. How would a carbon sales tax impact budget volatility?

Considering the seismic shift of our tax system contemplated by SB 43 and the correspondingly massive administrative burden, I hope any study would pursue these questions and many more. But I—for one—will not be making any more assumptions!

Staff Contact: Sarah Boot

Rate of Fatal Work Injuries in California Remains Same Year Over Year



The Department of Industrial Relations (DIR) [reports](#) that 376 Californians died on the job in 2017, the same as in 2016.

California's workplace fatality rate remains stable with slight fluctuations over the last eight years. On the national level, the rate of fatalities decreased from 3.6 to 3.5 per 100,000 workers.

There were 376 fatal injuries on the job in California in 2017 and 2016, compared to 388 in 2015, 344 in 2014, and 396 in 2013.

The data comes from the [Census of Fatal Occupational Injuries](#) (CFOI), which is conducted annually in conjunction with the U.S. Bureau of Labor Statistics (BLS). Figures for 2017 are the latest numbers available.

Key Findings

Key findings from the latest census in California include:

- More than one in five (22%) of all California workplace deaths identified in 2017 were attributed to trips, slips and falls, with 88% of those deaths involving falls to a lower level.

- Assaults and violent acts in the workplace accounted for one of every five (20%) of all workplace deaths in the state in 2017.

- Nearly two of every five (37%) California workplace deaths identified in 2017 occurred in transportation-related incidents.

[Tables reflecting final data for 2017](#) (and prior years' final data) for California are posted online, as well as a [report reflecting five years of fatal occupational injuries in California](#).

For further detail on CFOI methods

and calculations see [Part III: Census of Fatal Occupational Injuries on the BLS website](#).

DIR conducts the California Census annually in conjunction with the U.S. Bureau of Labor Statistics. CFOI produces comprehensive, accurate and timely counts of fatal work injuries. This federal-state cooperative program was implemented in all 50 states and the District of Columbia in 1992.

Injury/Illness Prevention

For more information on Injury and Illness Prevention Programs in California, California Chamber of Commerce members can visit the HR Library's [Injury and Illness Prevention Program](#) page on [HRCalifornia](#). Not a member? Learn more about how CalChamber can help you at www.calchamber.com/membership.

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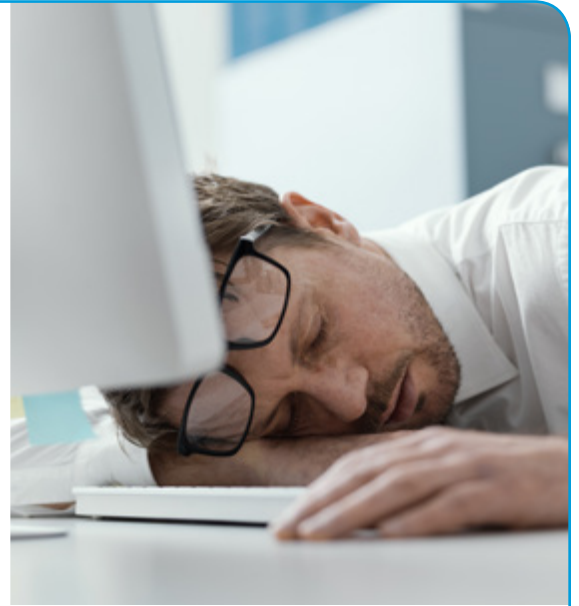
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