

ALERT

Coalition Continues Push for Workplace Flexibility

Seeks Support for Ability to Work Independently



As the 2019 legislative session gets underway, a California

Chamber of Commerce-led coalition is continuing its efforts to develop a proposal supporting the ability of workers to work independently.

The coalition explains through its website at imindependent.co why state lawmakers need to take action regarding the California Supreme Court ruling that created a one-size-fits-all test for deciding who is an independent contractor (*Dynamex Operations West v. Superior Court* (2018) 4 Cal.5th 903).

With the variety of industries and independent contractors affected, the test used by the court in *Dynamex* simply does not work.

Impact of *Dynamex*

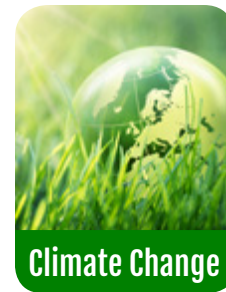
California is estimated to have nearly 2 million residents who choose to work as independent contractors. That figure is a conservative one as the 2018 U.S. Bureau of Labor Statistics Economic Release did not include the number of individuals who supplement their income with online platforms.

Independent contractors work in many industries, including health care, education, financial planning, agriculture, beauty, creative fields (filmmaking, editors, writers), technology development, insurance, construction, on-demand marketplace and transportation.

As many employers know, in April 2018, the California Supreme Court issued a significant decision in *Dynamex* that completely changed the way in

See Coalition Continues: Page 4

More Questions on Carbon Tax Proposal



Last week, CalChamber's tax and privacy guru **Sarah Boot** wrote about her surprise that a California legislator would introduce a "carbon tax" bill that proposes replacing the

California sales and use tax with a tax on the sale of retail goods based on their respective "carbon intensity."

She's right to be surprised. When most people talk about a carbon tax, they do so in the context of regulating emissions from stationary facilities, where the debate is over two types of emission reduction techniques: a tax on emissions of carbon (commonly referred to as a carbon tax) or cap-and-trade, a system of market-based controls that can be extended beyond California's borders.

Cap-and-Trade System

Consistent with its goals to make a global impact on greenhouse gas reduction, California has repeatedly chosen cap-and-trade as the preferred mechanism, implementing a cap-and-trade system through the Global Warming Solutions Act of 2006 (AB 32; Núñez (D-Los Angeles)/Pavley (D-Agoura Hills) and extending that program through 2030 via AB 398 (E. Garcia; D-Coachella; 2017), which was backed by a mix of Democrats, Republicans, environmentalists and businesses.

See More Questions: Page 4

2019 Issues Guide Available on Website



The California Chamber of Commerce **2019 Business Issues and Legislative Guide** is available now on the CalChamber website at www.calchamber.com/businessissues.

This easy-to-reference publication presents ways to make progress on longstanding issues facing the state.

To fulfill the **California Promise: Opportunity for All**, the state should pursue: fiscal stability for government

programs and spending; putting California on a path to increase available housing; workplace flexibility—including mutually agreed upon options for workers and independent contractors; fostering a skilled, well-prepared workforce; and keeping energy affordable by minimizing costs due to California's climate change policy.

Chevron is the premier sponsor of this year's **Guide**.

Hard copies of the **Guide** are being mailed to CalChamber preferred and executive members who receive printed copies of **Alert** or who previously signed up for the hard copy **Guide**. Preferred and

See 2019 Issues Guide: Page 6

Inside

Privacy Law Has Broad Impact: Page 5

Cal/OSHA Corner

Federal OSHA, Cal/OSHA Add Another Layer of Paperwork



Mel Davis
Cal/OSHA Adviser

Now that I have to file Form 300A electronically, what do I do with the hard copy?

The recent requirement to submit Form 300A data electronically doesn't relieve employers of the responsibility to post the hard copy Form 300A each year.

Each establishment (place of business) must post the Form 300A from February 1 to April 30 in a conspicuous place or places where notices to employees normally are posted.

This requirement, in addition to all others listed in Section 14300.32 of the California Code of Regulations, remains in effect.

Unfortunately, this fact was not included as a note in the electronic filing regulation to ensure that the electronic filing requirement was not perceived to be the new norm, bypassing the requirement for the hard copy.

Providing Form 300A Copy

Employees who do not report to the establishment (for example, construction workers or salespeople who never report to the office except for special meetings) or who work from their homes are to be provided a copy of the Form 300A.

The Form 300A can be mailed or emailed to the employee.

Electronic Reporting Recap

On April 30, 2018, the federal Occupational Safety and Health Administration (OSHA) announced that employers

in state plan states would be required to submit electronically their Form 300A data to federal OSHA where state plan states had not adopted a plan of their own for electronic submittal.

California then started the process to adopt on an emergency basis the requirements of the federal regulations. The initial Form 300A electronic filing was for the year 2017 to be submitted by December 31, 2018.

All future submittals are to be made on March 2 of the year following the date of the Form 300A—that is, the 2018 Form 300A must be submitted by March 2, 2019.

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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CalChamber-Sponsored Seminars/Trade Shows

More at www.calchamber.com/events.

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

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

International Trade Lunch with Consul General of Canada Rana Sarkar. Hayward (CA) Chamber. February 27,

Hayward. (510) 537-2424, ext. 3.
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, Arlington, Virginia. (407) 255-9824

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

CalChamber Calendar

Water Committee:

March 14, Santa Monica

Board of Directors:

March 14–15, Santa Monica

International Breakfast:

March 15, Santa Monica

Capitol Summit:

May 22, Sacramento

Host Breakfast:

May 22–23, Sacramento



SB 1300 Expands FEHA Litigation

Employers and Lawyers Should Be Wary of Bill's 'Guidance' to Courts



Last fall, Governor Edmund G. Brown Jr. signed **SB 1300 (Jackson; D-Santa Barbara)**, a comprehensive bill that makes several changes in the law for litigating sexual harassment claims.

SB 1300 prohibits employers from requiring employees to sign a release of claims under the Fair Employment and Housing Act (FEHA) in exchange for a raise or as a condition of employment.

The bill also amends FEHA to specify that an employer may be responsible for the acts of nonemployees for all forms of harassment, rather than the responsibility being limited to sexual harassment, as it was before SB 1300 took effect.

Further, the bill prohibits a prevailing defendant from being awarded fees and costs unless specific conditions are met.

SB 1300's provisions took effect on January 1, but employers and defense counsel need to be aware of the bill's "intent language."

Broad Intent Language

In addition to the statutory changes noted, SB 1300 sets forth several statements of "legislative intent" about applying FEHA to harassment claims.

Businesses and their attorneys need to be aware that including this broad "intent" language is likely inconsistent with canons of statutory construction and prior court precedent. As such, SB 1300's intent language will surely increase employer costs as lawyers attempt to erroneously utilize the "findings and declarations" in SB 1300 to expand FEHA litigation.

Employers and lawyers should recall the general rule of statutory construction is to effectuate the intent of the Legislature, which basically requires the courts to give the statutory language its usual

and ordinary meaning. A statute is changed by a material amendment to the statutory language itself, but not by "legislative intent" language.

In this instance, however, SB 1300 did *not* make any statutory changes related to its statements of "intent." Below are several troublesome examples.

Single Incident

• One intent declaration concerns the Legislature's view about whether a single harassment incident still could be considered a violation of FEHA. To quote SB 1300: "the Legislature hereby declares its rejection of the United States Court of Appeals for the 9th Circuit's [decision] and states that the opinion shall not be used in determining what kind of conduct is sufficiently severe or pervasive to constitute a violation of [FEHA]."

Yet, the author removed from her bill the statutory provisions that would have lowered the severe or pervasive standard.

Summary Judgment

• Another declaration concerns the Legislature's view that "harassment cases are rarely appropriate for disposition on summary judgment."

However, SB 1300 does not amend Code of Civil Procedure Section 437(c), which sets forth the requirements regarding motions for summary judgment.

Summary judgment is already an extremely high legal threshold whereby the "party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact, and that he is entitled to judgment as a matter of law[.]"

The intent language in SB 1300 seeks to restrain the discretion of the courts in evaluating the facts before them, which is inappropriate because the decision of whether a case should be summarily adjudicated needs to be left, without legislative influence, to a judge who knows the specific facts of the case.

Hostile Work Environment

• Additionally, the intent language of SB 1300 seeks to lower the legal standard for hostile work environment claims by referring to a single quote by a single justice's concurring opinion in a U.S. Supreme Court 9-0 decision: "the Legislature affirms its approval of the standard set forth by Justice Ruth Bader Ginsburg in her concurrence that, in a workplace harassment suit, 'the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment.'"

However, the author removed from SB 1300 all the statutory amendments that actually would have changed the legal standard for actionable harassment cases.

Lack of Guidance

Given that SB 1300 did not change the statutory standards for summary judgment and hostile work environment, the superfluous intent language in SB 1300 does not serve to provide guidance regarding either of these standards. As the U.S. Supreme Court has stated, "We are governed by laws, not by the intentions of legislators."

Even the Legislature recognized the limitation of this intent language when it considered the bill. For example, the Assembly Judiciary Committee's analysis that was prepared when SB 1300 was considered by that committee notes: "It is not at all clear what impact the guidance offered in these non-binding findings and declarations will have on how the courts decide cases...."

While the actual statutory changes adopted by SB 1300 will make FEHA litigation costlier and more time-consuming for employers in this state, so too will its "intent" language.

This analysis of SB 1300 was written by CalChamber Policy Advocate [Laura Curtiss](#) and [Chris Micheli](#), a principal at the Sacramento lobbying firm of [Aprea & Micheli, Inc.](#)

Coalition Continues Push for Workplace Flexibility

From Page 1

which an individual is classified as an independent contractor versus an employee in this state.

The court abandoned a long-established test previously adopted by the court in a 1989 decision. This previous approach weighed multiple factors in their totality to account for the variety of California industries and professions, as well as diversity of California's workers.

Under *Dynamex*, the court presumes that a worker is an employee unless the hiring entity establishes all three of this one-size-fits-all test. This test is referred to as the "ABC Test."

Under the ABC Test, an individual is presumed to be an employee, unless the company can prove *all* of the following:

- A. That the worker is free from control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; and
- B. That the worker performs work that

is outside the usual course of the hiring entity's business; and

C. That the worker is customarily engaged in an independently established trade, occupation or business of the same nature as the work performed.

The "ABC Test" has never before existed in California. It is the most restrictive form of the ABC Test, and the *Dynamex* decision marks the first time in U.S. history that any form of the ABC Test has been imposed by a court without any legislative approval.

For more background information, see the article at www.calchamber.com/businessissues.

Coalition Activities

Due to the enormous impact of the *Dynamex* decision, the coalition is rapidly and continuing to grow. The I'm Independent Coalition currently consists of more than 3,000 members, including businesses, independent contractors and industry associations.

The coalition has convened:

- Four separate roundtables across the state during the fall that were attended by nearly 150 independent contractors and small business owners.
- Thirty town hall and coffee meetings with legislators and/or legislative staff members.
- Six in-district meetings with new legislators.
- Sent more than 6,000 emails to legislators urging action.

Get Involved

The coalition and CalChamber will continue to work diligently as the session progresses, seeking legislation that modernizes California's labor laws in ways that preserve the flexibility independent contractors value while improving the quality and security of independent work.

To get involved, please visit imindependent.co or contact CalChamber directly at (916) 444-6670.

Staff Contact: Laura Curtis

More Questions on Carbon Tax Proposal

From Page 1

California's cap-and-trade program continues to obtain emissions reductions to help the state reach its ambitious 2030 climate goals, with **\$6.1 billion** appropriated to state agencies since 2014 and predicted emissions reductions of over **23 million metric tons** of carbon dioxide equivalent (CO₂e). These costs are added to the cost of goods produced at cap-and-trade facilities in the Golden State.

This new type of "carbon tax" would result in BOTH a cap on emissions from facilities AND a carbon-based sales tax on the products manufactured in those facilities, potentially driving up the already-high cost of living for Californians.

Although **SB 43 (Allen; D-Santa Monica)** is being regarded by some as a "study" bill, we think it's important to ask these questions up front. This is especially true because at the end of the study, without coming back to the Legislature, SB 43 requires the California Air Resources Board (CARB) to amend its 2017 Scoping Plan, the document that guides the state's strategy for meeting its 2030 goals, to include this new carbon-in-lieu-of-sales tax concept.

While repeal of the sales and use tax

would require legislative approval, concepts included in CARB's Scoping Plan tend to become a runaway train.

Many More Questions

As for SB 43's version of a carbon tax, like Sarah, I too have many, many questions:

- Would this tax be applicable to products made in a facility that already has its emissions capped under cap-and-trade, resulting in a stacking of carbon taxes?
- Will this apply to the carbon content of fossil fuels before combustion, or the CO₂ in combustion gas?
- Will proceeds of this new tax be distributed differently than traditional sales tax, for example, to areas that already have intense local emissions controls?
- Sales tax is calculated at the register, after a shopper has made their decisions. How is an at-the-register variable carbon tax supposed to influence purchasing decisions, a stated goal of the bill?
- The low carbon fuel standard and cap-and-trade program have already increased costs at the pump by more than 50 cents a gallon. Will the sales tax apply to the transportation sector, increasing gas prices ever higher?

- Will it be applied to water, an idea floated in previous CARB Scoping Plans?
- Will there be different taxes for manufacturers who have multiple facilities inside California, resulting in two prices for the same exact item?
- Will livestock production, land tilling, and timber harvesting be taxed?
- How will such a tax affect interstate trucking competitiveness amongst the states?
- How will carbon-intense plane travel be taxed?
- How would we track the carbon intensity of goods imported from outside the United States?
- How will small businesses with already-slim margins compete?

Scholars are apt to remind us that both climate change-related programs and sales taxes disproportionately impact the pocketbooks of lower-income residents because these Californians spend a larger percentage of their income on basic necessities subject to the tax.

This bill proposes that the tax bring in at least as much as the sales and use tax, but does not require CARB to address the inevitable increase in costs to Californians' daily lives.

See More Questions: Page 6

CalChamber-Led Coalition Outlines Flaws Affecting Workability of State Privacy Law



The state privacy law passed by the Legislature last year contains multiple flaws that undermine consumer privacy and employee protections, a coalition led by the California Cham-

ber of Commerce explained this week.

CalChamber Policy Advocate Sarah Boot spoke on behalf of the coalition at the February 5 workshop hosted by the state Attorney General’s Office in Sacramento for parties interested in the California Consumer Privacy Act (CCPA).

“CalChamber’s goal for the Attorney General rulemaking process is to make sure that CCPA compliance is actually realistic for *all* the businesses it covers and to fix the unintended consequences of this hastily passed law, many of which will be harmful to consumers,” Boot said.

Small Businesses Affected

She pointed out that the CCPA covers “a massive scope of businesses—far more than most people realize.”

In addition to data brokers and larger companies, Boot said, “the CCPA applies to a third, incredibly broad category of businesses in almost every industry: **any business that annually receives the personal information of 50,000 or more**

consumers, households, or devices.”

If a business has an average of 137 unique online visitors per day, it will reach the threshold, Boot said. Numerous small businesses, she said, easily conduct an average of 12 transactions per hour in a 12-hour day, including convenience stores, coffee shops and restaurants.

Parts of the CCPA, such as its references to households and devices in the definition of personal information, run counter to the law’s privacy goals. Boot commented.

Other problems with the CCPA are summarized in the *2019 CalChamber Business Issues and Legislative Guide* article.

California Consumer Privacy Act

Lawmakers passed the CCPA, a sweeping privacy law that applies to businesses of all sizes across almost every industry, at the end of the 2017–18 legislative session.

The CCPA was rushed through the legislative process in the summer of 2018 without the benefit of input from numerous crucial stakeholders. As a result, the law is deeply flawed. Many of the CCPA’s provisions are unworkable in practice or will result in numerous unintended consequences.

At the end of the 2018 session, the Governor signed SB 1121, a bill fixing a handful of the CCPA’s problems. However, many more fixes are needed before this law goes into effect on January 1, 2020.

Tuesday’s workshop was the fifth of seven statewide forums being held in advance of the formal rulemaking process

to enable stakeholders to provide feedback early in the process.

CalChamber Position

CalChamber will continue to push for crucial legislative changes to fix the CCPA in 2019, and also will be involved in the Attorney General’s rulemaking process to ensure that business efforts to implement and comply with the CCPA can be as efficient and safe as possible.

California has the opportunity to lead the country on this issue and produce model legislation on consumer privacy that works for both consumers and businesses.

Next Steps

CalChamber will submit written comments before the end of the informal period, which is early March. CalChamber will submit more written comments during the formal period as well.

The Attorney General’s Office has indicated the formal rulemaking period will likely take place in the fall.

CalChamber Coalition

The coalition consists of hundreds of stakeholders, including businesses, companies, local chambers, and trade associations that appreciate and understand the need and desire for consumer privacy.

Businesses interested in joining the CalChamber-led coalition should contact Sarah Boot: sarah.boot@calchamber.com.
Staff Contact: Sarah Boot

MAY 22-23, 2019

CAPITOL SUMMIT & SACRAMENTO HOST BREAKFAST

Federal Agency Releases New Approach for Dealing with California Water Operations



This week, the federal Bureau of Reclamation released a lengthy document outlining a new approach applying scientific principles to state operations affecting water

supply and fishery protections.

The Biological Assessment document will guide two other federal agencies—the U.S. Fish and Wildlife Service and the National Marine Fisheries Service—in updating biological opinions put together a decade ago for the Delta smelt and salmon.

The handling of both fish species affects operations of two major water supply and flood protection systems in California—the federal Central Valley Project and the State Water Project.

Outdated Assessments

Critics, including the California Farm Water Coalition, a statewide organization representing a cross-section of agriculture, have pointed out that the biological opinions currently used by the federal agencies have led to operational problems. Moreover, experts have concluded the biological opinions were ineffective at helping the endangered fish the opinions aimed to protect.

The outdated biological opinions often conflicted, requiring more water to be stored upstream to keep temperatures lower for salmon, while also requiring more water to be released into the Sacramento/San Joaquin Delta to benefit the smelt.

Cooler temperatures allow salmon to reach spawning beds and juvenile salmon to migrate downstream to the ocean. Water flows into the Delta help control salinity, which harms the ecosystem, agriculture and the Delta smelt.

New Biological Assessment

The reclamation bureau's new biological assessment creates a new process to

modernize the operation and efficiency of the federal and state water projects, providing much-needed operational flexibility.

The changes to the federal Central Valley Project are based on experience with the older biological opinions, the drought and previous policy decisions.

The science-based operational changes will respond to actual conditions rather than following a calendar-based approach to protecting species. The changes will allow water regulators to provide better temperature control for salmon while reducing impacts on the Delta.

Flow requirements will be based on a variety of factors rather than using flow as the only criteria for water project management.

A key change: the new biological assessment moves away from the inaccurate presumption that water projects are the only cause of the decline in fish species.

The more integrated and holistic approach will enable federal and state agencies to use science and effective

operational measures to address all the factors that are affecting fish populations.

In a news release, the reclamation bureau says its proposed actions aim to give water operators more flexibility, maximize water supply delivery and optimize power generation.

The U.S. Fish and Wildlife Service and National Marine Fisheries Service are expected to release new biological opinions by mid-June.

CalChamber Position

The reclamation bureau's biological assessment will help support past and current calls by the California Chamber of Commerce and other groups in support of voluntary agreements among state and local water agencies, water districts, farmers, cities and other groups affecting water flows in the lower San Joaquin River.

The voluntary agreements are preferable to arbitrary flow requirements based on assumptions discredited by the new biological assessment.

Staff Contact: Valerie Nera

More Questions on Carbon Tax Proposal

From Page 4

Even fellow coastal Washington state, which considered but ultimately rejected an initiative to create a traditional facility emissions-based carbon tax, proposed to use the resulting funds to REDUCE the sales tax burden by 1%, fund a tax rebate for low-income households, and reduce other taxes on manufacturers.

This bill would stack taxes, far from the "carbon tax" and "revenue-neutral" concept espoused by academics proposing these types of emission-based controls.

I hope that the Legislature will ask these hard questions and review the real-world impacts of such a proposal before the freight train comes barreling through.

Staff Contact: Leah Silverthorn

2019 Issues Guide Available on Website

From Page 1

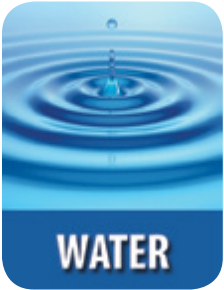
executive members receiving the email **Alert** can request a hard copy of the **Guide** by emailing alert@calchamber.com.

Additional hard copies are available for purchase (\$20 each). Mail checks to California Chamber of Commerce, P.O. Box 1736, Sacramento, CA 95812-1736, Attn: Business Issues.

An e-book edition of the Guide, compatible with smartphones, tablets and desktop computers with an e-book reader installed, can be downloaded free at www.calchamber.com/businessissues. A PDF file also is available.

In addition, issue articles can be viewed as web pages and downloaded as individual PDF files.

More Water in Sierra Snowpack This Year



More water is available in the Sierra snowpack this year than last due to the January storms, according to the state Department of Water Resources (DWR).

At the second Phillips Station

snow survey of 2019 on January 31, DWR staff found that the snowpack was 98% of average for the location. State-wide, the Sierra snowpack is 100% of average, according to DWR.

The manual survey recorded 50 inches of snow depth and a snow water equivalent (SWE) of 18 inches, which is 71% of average for this location.

Snow water equivalent is the depth of water that theoretically would result if the entire snowpack melted instantaneously. That measurement allows for a more accurate forecast of spring runoff.

Higher than 2018

By comparison, on February 1, 2018, measurements at Phillips Station revealed an SWE of 2.6 inches, only 14% of the early-February average. Last year at this time, measurements at this location were at 30% of average.

Results from snow surveys like the one conducted on January 31 at Phillips Station are critical to the management of California's water. More than 50 local, state, and federal agencies work together as part of the [Cooperative Snow Surveys Program](#) to collect data from more than

Photo by Florence Low/California Department of Water Resources



John King, water resource engineer from the California Department of Water Resources, Snow Survey Section, conducts the second DWR snow survey of the 2019 season on January 31 at Phillips Station in the Sierra Nevada.

300 snow courses throughout California.

On average, the Sierra snowpack supplies about 30% of California's water needs as it melts in the spring and early summer to meet water demands in the summer and fall.

Historical Data

DWR has conducted manual snow surveys at Phillips Station since 1964, recording both depth and snow water equivalent.

DWR conducts five snow surveys each winter—near the first of January,

February, March, April and May—at Phillips Station in the Sierra Nevada, about 90 miles east of Sacramento, just off Highway 50 in El Dorado County near Sierra-at-Tahoe.

The Phillips snow course is one of hundreds that will be surveyed manually throughout the winter. Manual measurements augment the electronic readings from about 100 snow pillows in the Sierra Nevada that provide a current snapshot of the water content in the snowpack.

Staff Contact: Valerie Nera

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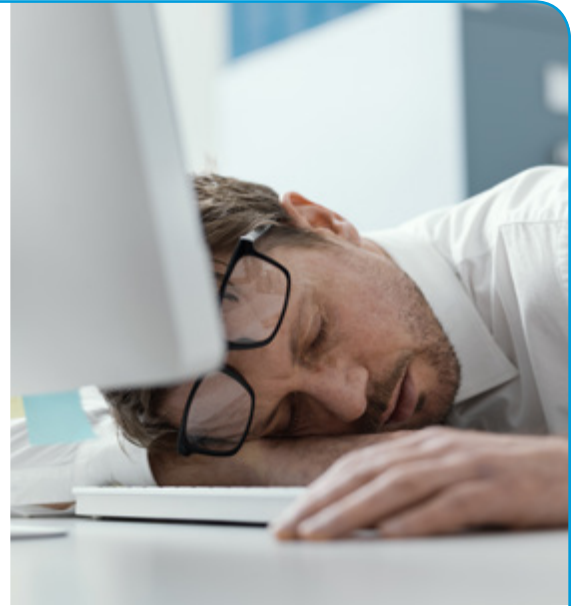
THURSDAY, FEBRUARY 21, 2019 | 10:00 - 11:30 AM PT

Give Meal and Rest Break Violations a Rest Webinar

Think it's OK in California if a nonexempt employee occasionally misses a meal break or takes a late lunch? What about letting that employee combine the two required 10-minute rest breaks?

Misunderstandings about California's meal and rest break rules—including requiring employees to stay onsite—expose employers to expensive litigation. Learn what you can do to avoid violations, down to the smallest detail.

Cost: \$199.00 | Preferred/Executive Members: \$159.20



This webinar is mobile-optimized for viewing on tablets and smartphones.

LEARN MORE at calchamber.com/feb2019 or call (800) 331-8877.

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