

ALERT

Amendments Put Balance in Former Job Killer Bill



SUPPORT

Commerce and its allies to strike a balance between meeting the state's ambitious climate change goals and ensuring continued economic vitality.

In response to the May 1 amendments to **SB 44 (Skinner; D-Berkeley)**, the CalChamber has removed the job killer tag and now **supports** the bill.

Before the amendments, SB 44 would

Legislation that began as a targeted mandate increasing transportation costs has been amended at the urging of the California Chamber of

have had a severe impact on transportation costs by directing the California Air Resources Board (CARB) to develop a strategy to reduce all motor vehicle emissions by 40% by 2030 and 80% by 2050 by disproportionately targeting diesel medium- and heavy-duty trucks.

SB 44 also threatened jobs by requiring an immediate strategy for reducing the number of diesel vehicles without sufficient alternate technology.

Amended Bill

Now, SB 44 requires CARB to identify policies and practices that will help trucking companies meet standards for reducing greenhouse gas and other emissions.

CARB must first consult with the
See Amendments: Page 4

Independent Contractor Test Applies Retroactively



Last week, a federal appeals court ruled that the test for determining whether a

worker is an independent contractor, established by last year's California Supreme Court ruling, applies retroactively.

The May 2 decision of the Ninth Circuit Court of Appeals means the independent contractor test established in *Dynamex Operations West v. Superior Court* (April 30, 2018) will be applied retroactively to federal cases predating the Supreme Court ruling, as well as cases going forward.

Coalition Seeking Change

Removing the retroactive application of the *Dynamex* decision is among the amendments the California Chamber of Commerce and a broad-based coalition have been seeking to pending legislation that makes a start toward restoring flexibility for numerous individuals since the *Dynamex* decision upended the test for determining who is an independent contractor.

The CalChamber and coalition **support if amended AB 5 (Gonzalez; D-San Diego)**, which exempts certain industries/professions (doctors, insurance agents, securities brokers, and direct sellers) from the application of the *Dynamex* decision.
See Independent Contractor Test: Page 4

Forum Highlights Mexico-California Ties



Photo by Sara Proffitt

(From left) CalChamber President Allan Zarembeg moderates questions on May 7 from Mexico Advocacy Day luncheon attendees for speakers Pamela Starr, University of Southern California; Andrew Selee, Migration Policy Institute; and Rafael Fernández de Castro, UC San Diego. See story on [Page 7](#).

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Labor Law Corner

When Dealing with Older Worker, Focus on Job Performance Concerns



Dana Leisinger
HR Adviser

Our employee is over 65 years old and he seems shaky physically; it is taking him longer and longer to get his job duties done. Can we address his physical symptoms and/or ask him if he's likely to retire soon?

Recent studies have shown that employees are retiring later in life for

a number of reasons, primarily due to financial considerations.

Other older employees don't want to retire due to other issues—loneliness, enjoying their job, having a sense of purpose, etc.

The question posed above is becoming more and more of an issue. Nevertheless, when an older worker shows physical signs of slowing down, the employer needs to stay focused on job performance concerns.

Job Performance

An employer should address the job performance consistently with all employees, noting the lack of productivity, absenteeism and tardiness.

If the employee brings up a physical condition that is causing the performance issues, another subject arises. Getting older is not a disability, but medical conditions caused by getting older may require the employer to accommodate the condition. This is when the employer and employee enter into the interactive process to discuss options from both sides.

It is very important to be specific about the job performance versus complaining that Employee A is "really slowing down"—older employees can be very sensitive to use of the word "slow."

Beware of Ageism

Remember, both federal and state laws protect workers over age 40 from discrimination. Point out the specifics and suggest ways to improve the performance.

Any disciplinary action must be consistent with company policy and how you handle all employees. Follow-up is vital. If an employer has been specific in directions to employees, those employees, including older workers, can have much better success in improvement.

Communication is critical, and motivation is very helpful. By the time employees are in their 60s, advancement may not be important, but praise for a job well done can be very important.

Lastly, keep in mind that older employees can be great mentors for younger employees. Experience is a tremendous asset, and it is wise to remember the positive aspect of senior employees.

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. June 14, Walnut Creek; August 22, Pasadena; September 12, Sacramento. (800) 331-8877.

Employer To-Due List for Pregnancy Disability Leave. CalChamber. May 16, Webinar. (800) 331-8877.

Classifying Exempt Employees. CalChamber. June 20, Webinar. (800) 331-8877.

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

International Trade

Doing Business in Czech Republic and Slovakia Webinar. U.S. Commercial Service. May 15, Webinar. (800) 872-8723.

Argentina ICT Modernization Reverse

Trade Mission. U.S. Trade and Development Agency. May 21, San Jose. (703) 875-4357.

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.

Doing Business in Baltics Webinar. U.S. Commercial Service. June 12, Webinar. (800) 872-8723.

Trade Mission to Israel for National Cyber Week. U.S. Chamber of Commerce. June 23–26, Tel Aviv. (202) 463-5553.

Think Asia, Think Hong Kong. Hong Kong Trade Development Council. September 20, Los Angeles. (213) 622-3194.



The Workplace

Recreational Marijuana: Impact on Employee Retention, Recruitment



In the newest podcast episode of The Workplace, California Chamber of Commerce General Counsel and Executive Vice President Erika Frank is joined by employment law attorney Jennifer Shaw to discuss how legalization of marijuana is affecting both workers and business owners in California.

The two employment law experts dive

into details about the profound impact that legalization of recreational pot is having on both recruitment and retention of employees.

They further discuss the parameters of both pre-employment and reasonable suspicion drug testing and provide perspective on an employer's ability to maintain a drug-free workplace.

According to Frank, California is in an interesting place because the booming economy is creating a situation where qualified workers are becoming harder to find. This is compounded by the fact that a significantly higher number of job applicants are unable to pass drug screening tests due to more prevalence of both recreational and medicinal marijuana use.

Shaw cautions employers against creating unexpected liability by relaxing their drug testing practices and discusses examples of how troublesome situations can easily be created.

Both Frank and Shaw discuss the problems created when employees or

potential employees assume they are engaging in legal activity and do not understand the issues created because employers have the right to drug test and/or maintain a drug-free workplace.

Shaw underscores the fact that the California Supreme Court has made it clear that employees can't come to work under the influence or test positive for marijuana use simply because recreational and medicinal use is legal in the state.

Frank also points out that employers should be clear in establishing policies and giving guidance to applicants and current employees about the company's drug testing requirements.

Subscribe to The Workplace

Subscribe to The Workplace on [iTunes](#), [Google Play](#), [Stitcher](#), [PodBean](#) and [Tune In](#). New episodes will be released each Wednesday.

To listen or subscribe, visit www.calchamber.com/theworkplace.

IRS Highlights Resources Available for Small Businesses



In recognition of National Small Business Week,

May 5–11, the Internal Revenue Service (IRS) is highlighting its resources to help small business owners and self-employed individuals understand and meet their tax obligations.

Links to a wide array of topics are gathered at www.irs.gov/smallbiz.

Subjects covered include withholding taxes; tips and resources to protect the business community from the rising threat of identity theft; estimated taxes, credits and deductions; depreciation and expensing; recordkeeping; connecting with the IRS through social media; small

business resources; e-filing payroll taxes; and tips for taking full advantage of tax law changes that could affect a business' bottom line.

The IRS also has a [YouTube playlist](#) on small business tax tips.



CalChamber Calendar

Capitol Summit:
May 22, Sacramento

International Forum:
May 22, Sacramento

Water Committee:
May 22, Sacramento

Host Breakfast:
May 22–23, Sacramento

Board of Directors:
May 22–23, Sacramento

Amendments Put Balance in Former Job Killer Bill

From Page 1

Department of Transportation, the State Energy Resources Conservation and Development Commission, and the Governor's Office of Business and Economic Development (GO-Biz) to develop recommended goals and be consistent with the state's Sustainable Freight Action Plan.

The bill also requires CARB to identify advantages to fleets for early adoption.

The Sustainable Freight Action Plan outlines a path to modernizing and reducing emissions in California's freight transport system. State transportation and environmental agencies issued the plan in July 2016.

The plan has been promoted by the

state as being the start of a process that is to give industry stakeholders an opportunity to help define California's goals.

SB 44 is set to be considered on May 13 by the Senate Appropriations Committee.

Related Bill

The amended SB 44 aligns with CalChamber-supported legislation that encourages the development of new technology, **AB 1262 (O'Donnell; D-Long Beach)**, sent to the Assembly Appropriations Suspense File on May 8.

California's freight sector is at a competitive disadvantage when compared to other states, with some of the highest costs in the nation.

AB 1262 seeks to take a comprehensive, long-term examination of the barriers that have, to date, caused a delay in adoption of new freight technology.

As part of the update, state agencies are required to consider a plan for freight efficiency, transitions to zero-emissions technology, and increased competitiveness. These considerations will be included in an update to the California Sustainable Freight Action Plan in 2021.

The bill also seeks to evaluate policies that might drive faster reductions to reduce air quality impacts in low-income and disadvantaged communities.

Staff Contact: Leah Silverthorn

Independent Contractor Test Applies Retroactively

From Page 1

The CalChamber and coalition appreciate the recognition in AB 5 that the *Dynamex* decision is not one size fits all, and agree the professions identified in the May 1 version of AB 5 should be exempted.

However, the Legislature should not stop with selecting just a few professions and not others similarly situated. The CalChamber and coalition are seeking additional amendments that provide a more progressive and holistic approach to the application of *Dynamex* that reflects today's modern workforce.

In an April 29 letter to the Assembly Appropriations Committee, the CalChamber and coalition request:

- a broader exemption for professionals;
- a broader exemption for individuals who, like direct sellers, prefer to control their own schedules;
- a business-to-business exemption; and
- the ability to subcontract for short-term projects.

Dynamex Test

Under *Dynamex*, the court presumes that a worker is an employee unless an individual satisfies all three factors of the ABC Test:

- A. That the worker is free from the 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;
- 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 "B" prong of the test is the most problematic because many independent contractors work in the same line of business as the hiring entity.

Ninth Circuit Decision

A three-judge panel of the federal appellate court ruled that *Dynamex* applies

retroactively in the case of *Vazquez v. Jan-Pro Franchising International, Inc.*

In *Vazquez*, workers at Jan-Pro, a janitorial cleaning business, filed minimum wage and overtime claims, saying they had been misclassified as independent contractors.

The federal district court dismissed the claims, but the workers appealed. The appellate court returned the case to the district court to be considered in light of the *Dynamex* decision and the ABC Test, even though the *Vazquez* case had been decided by the trial court before the *Dynamex* ruling.

Action Needed

The CalChamber is urging members to ask their Assembly and Senate representatives to encourage the author of AB 5 to work with the business community to further amend her bill to protect the opportunity for millions of Californians to maintain their careers.

AB 5 is awaiting action by Assembly Appropriations.

Staff Contact: Laura Curtis



 CalChamber

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Strong California Economy, Jobs Depend on Worldwide Free Trade, Investment



Susanne T. Stirling

With trade being a top tier national issue, the California Chamber of Commerce continues to communicate its international trade priorities to secure a

national free trade agenda. Such an agenda is in keeping with the CalChamber's long-standing support for eliminating disincentives that impede the international competitiveness of California business.

The economic advances that international commerce makes possible are clear, despite the regular attacks, and World Trade Month activities each May appropriately provide many opportunities to acknowledge the importance of global trade to the economies of California and the United States.

The U.S. Department of Commerce reports that more than 97% of the nearly 285,000 U.S. companies exporting goods in 2017 were small or medium-sized businesses with fewer than 500 employees.

About a third of CalChamber members are engaged in international commerce, and more than two-thirds are small or medium-sized enterprises.

Prosperity through Trade

California's diverse economy relies heavily on exports and imports of both goods and services by California-based companies. It is a complex, inter-connected network that involves exports and imports through California's transportation gateways, as well as inflows and outflows of human and capital resources.

The statistics underscore the importance of our international connections. In 2018, California exported \$178.4 billion to 230 foreign economies, up from \$172 billion in 2017, according to the U.S. Department of Commerce. California's top export markets are Mexico, Canada, China, Japan and South Korea. California maintained its perennial position as a top exporting state, accounting for 10.7% of total U.S. exports.

2019 Trade Priorities

Trade agreements (the United States has 20) ensure that the nation and its businesses may continue to gain access to world markets, resulting in an improved economy and additional jobs for Americans. CalChamber trade priorities for 2019 include the following:

- **U.S.-Mexico-Canada Agreement:** The United States-Mexico-Canada

Commentary

By Susanne T. Stirling

Agreement (USMCA) was signed in Buenos Aires at the G-20 Summit on November 30, 2018. The treaty must now be approved by all three nations.

The CalChamber is urging Congress to approve the new USMCA agreement, a successor to the CalChamber-supported North America Free Trade Agreement, following the objectives and procedures of the Trade Promotion Authority.

- **Indo-Pacific Initiative:** The Indo-Pacific Initiative launched by President Donald Trump in July 2018 aims to accelerate U.S. private sector involvement in the region and support more U.S. export opportunities. The CalChamber is hopeful that the Trump administration will continue to develop the Indo-Pacific Initiative in 2019 and strengthen partnerships within the region.

- **U.S.-Japan Free Trade Agreement:** The United States and Japan began negotiations in 2019 with the goal of expanding bilateral trade in a mutually beneficial way.

It is hoped that the U.S. and Japan will expand areas of cooperation and deepen their understanding of each other's respective views and positions.

California continues to be the top exporting state to Japan, and Japan has remained California's fourth largest export market since 2010.

- **U.S.-China Relations:** At the beginning of 2018, President Trump instructed the U.S. Trade Representative, Ambassador Robert Lighthizer, to apply \$US billions of tariffs onto Chinese goods, explaining the tariffs were the consequence for years of Chinese theft of

U.S. intellectual property. China retaliated with tariffs on U.S. products.

As of this month, the United States and China have made progress on talks, with a possible deal in the coming weeks. The CalChamber expects that the Trump administration and its Chinese counterparts will be able to arrive at a conclusion and not continue to escalate the trade dispute between the two countries.

- **U.S.-United Kingdom Trade Agreement:** The United States maintains a deep trade and investment relationship with the United Kingdom. Once the U.K. leaves the European Union, which it now is expected to do by October 2019, the two countries will be able to negotiate a formal free trade agreement. The United Kingdom is California's 11th largest export destination.

The CalChamber is hopeful that the U.S. and U.K. will begin free trade agreement negotiations as soon as the U.K. formally exits the European Union. The CalChamber supports the goal of strengthening the trading and investment relationship between the two countries, with a focus on securing open market access.

- **U.S.-European Union Trade Agreement:** The European Union is one of the three new markets for which President Trump announced in October 2018 his intent to enter into trade negotiations. California is a top exporting state to the EU, and the single market presents a stable one with huge opportunity for California companies.

The CalChamber of Commerce is optimistic that the U.S. and EU will continue free trade negotiations in 2019 to deepen the world's largest trading and investment relationship, with a focus on trade and investment initiatives.

The CalChamber urges support of trade agreements that will continue to keep U.S. and California businesses competitive. Although the recent trend has been to regional trade agreements, the CalChamber also will be supportive of bilateral trade agreements.

Susanne T. Stirling is vice president of international affairs for the California Chamber of Commerce, www.calchamber.com/international.

Making State Privacy Law Work: Aim of CalChamber-Led Coalition



Ever since the adoption of California's far-reaching privacy law last June, a coalition led by the California Chamber of Commerce has been working diligently to fix problems with the act

before it takes effect on January 1, 2020.

The coalition is supporting legislation to prevent negative, unintended consequences for consumers and businesses, especially small businesses, from the California Consumer Privacy Act (CCPA).

The coalition also is opposing bills that thwart the intent of the law.

Explanations about the pending legislative proposals and an easy way to contact lawmakers are available at the coalition website, www.makeprivacy.work.

Supporting

Among fixes being supported by the CalChamber and coalition are bills that will:

- **Clarify that employees and job applicants are not classified as “consumers” under the law - AB 25 (Chau; D-Monterey Park).**

Under the CCPA, “consumers” have the right to know what personal information has been collected about them, as well as the rights to access, delete and opt out of the sale of their personal information. The CCPA defines “consumer” as any California resident.

Without clarifying legislation, a “consumer” under the CCPA could be interpreted to include employees and job applicants, with serious unintended consequences. For example, an employee accused of sexual harassment could ask a business to delete complaints about that employee.

AB 25 will fix this concern and create safeguards to ensure that businesses are not required to give sensitive personal information to someone who could be a fraudster posing as a consumer.

- **Clarify access to customer loyalty and rewards programs – AB 846 (Burke; D-Inglewood).**

Under the CCPA, frequent flier miles,

rewards levels, hotel points, and other retailer programs could be erased or changed, affecting millions of people who have spent years and dollars acquiring these popular benefits.

AB 846 simplifies the non-discrimination section of the CCPA and will ensure that loyalty and rewards programs can continue to operate once the CCPA takes effect.

- **Fix the definition of “personal information” to clarify operational uncertainties and eliminate unintended consequences – AB 873 (Irwin; D-Thousand Oaks).**

Most people think of personal information as data that could identify someone, like birthdates or Social Security numbers. The CCPA defines personal information far more broadly—as any information that is “capable of being associated” with a consumer or household.

For example, if an online customer browses a store’s website without logging in and then asks the store to delete all of the customer’s personal information, the store could be on the hook to search for and delete IP addresses that could be associated with the customer—even if the store never linked that data to a person and kept it only to perform web analytics.

This means that in order to respond to these CCPA requests, businesses would need to collect more of a customer’s personal information and keep that information all in one place, making it more vulnerable to hackers.

AB 873 fixes this problem by making the definition of personal information more reasonable, without eroding privacy rights.

- **Fix language in the CCPA that is unworkable and likely unconstitutional – AB 874 (Irwin; D-Thousand Oaks).**

The CCPA limits businesses’ distribution of “information lawfully made available from federal, state or local government records.”

This limitation is unconstitutional and creates practical problems for businesses that rely on the free flow of public records information, including those involved with real estate, journalism, credit reporting and background checks. The restriction also could impede consumer access to housing prices on

popular real estate websites.

AB 874 fixes the problematic language in the CCPA.

- **Ensure businesses can continue to prevent identity theft and other crimes – AB 1416 (Cooley; D-Rancho Cordova).**

The CCPA unintentionally undermines businesses’ efforts to protect consumers from identity theft and to prevent other crimes, such as money laundering or human trafficking.

The CCPA also unintentionally restricts the sale of data to governmental entities in a way that will have a profoundly negative impact on many government services, including reuniting foster youth with relatives and preventing fraud in governmental benefits programs.

AB 1416 fixes both these problems.

Opposing

The CalChamber and coalition strongly oppose SB 561 (Jackson; D-Santa Barbara), which creates new ways for trial attorneys to sue businesses without cause and has been tagged a job killer.

SB 561 would allow trial attorneys to test businesses’ ability to comply perfectly with the complexities of the CCPA. This will be strict liability—with no proof of injury—even for reasonable differences in interpretations of a law that can be vague and ambiguous.

Privacy experts disagree over certain provisions of the law, and allowing a flood of class action litigation on technical violations is not the way to get clarity. It is a significant and unfair burden on businesses, especially small businesses.

SB 561 also rolls back both businesses’ right to seek guidance from a regulator and their right to cure in case their good faith efforts to comply with the many nuances of the CCPA fall short.

Take Action

The CalChamber encourages members to contact their legislators to support the legislative fixes to the CCPA. To send an email to your representatives and sign up for updates on the coalition’s activities, including the legislative solutions being negotiated, visit the coalition website at www.makeprivacy.work.

Staff Contact: Sarah Boot

Luncheon Forum Highlights Opportunities, Challenges of Mexico-California Relations



Dr. Pamela Starr

An international luncheon forum at the California Chamber of Commerce provided historical context and insights into the U.S. and California relationship with Mexico.

The Consulate General of México, Sacramento, represented by Ambassador Liliana Ferrer, joined CalChamber in presenting the May 7 forum, attended by 100 guests. The Automobile Club of Southern California, a CalChamber member, was the luncheon sponsor.

Dr. Pamela Starr

Dr. Pamela Starr, director of the U.S.-Mexico Network, University of Southern California, commented that the last quarter-century has been notable for the close bilateral collaboration between the U.S. and Mexican governments.

Mexico President Andrés Manuel López Obrador is highly conscious of the power differential between Mexico and the United States, and his actions are governed by the philosophy that Mexico shouldn't give the United States any excuse to interfere in Mexico internal affairs, she said.

She commented that Mexico and California “produce things together through cross-border supply chains,” and the opportunity for engagement between California and Mexico is “enormous.”

Unlike his two predecessors as President, López Obrador is less interested in climate change and more focused on energy sovereignty for Mexico. Individual states, however, are interested



Dr. Andrew Selee

in reducing their carbon footprint, she said, providing an opening for California to reach out on wind, solar power and a potential energy water corridor—especially to the leaders of Baja California following the June election.

Dr. Andrew Selee

Dr. Andrew Selee, president of the Migration Policy Institute, illustrated the economic contribution of immigrants from Mexico by citing the example of Hazleton, Pennsylvania. Where storefronts on the main street in the city once were shuttered, there now is a vibrant business district. Immigrants have rejuvenated the city, and large Mexican companies have a strong presence, having purchased the factory that produces 1 in every 4 pieces of fresh bread eaten in the nation—Bimbo Bakeries; Gruma owns the Mission brand tortilla plant outside the city—Americans now eat five times more tortillas than in the 1990s; and Mexican company Arca Continental owns the plant that makes Wise potato chips, the official potato chip of the New York Mets.

Selee expressed concern that disagreements about migration from south of the border will interfere with the ability of Mexico and the United States to “segment things” so that trouble in one area will “contaminate” the U.S.-Mexico trade relationship.

He commented that the number of Mexicans living in the United States dropped between 2010 and 2017, and that the latest huge influx of illegal immi-



Dr. Rafael Fernández de Castro

grants is coming from Central America.

Selee called himself an “optimist” for the future of the U.S.-Mexico relationship. But, just as the pilot advises when an airplane hits turbulence, he said, “This is the moment to be fastening your seatbelts.”

Dr. Rafael Fernández de Castro

Dr. Rafael Fernández de Castro, director of the Center for U.S.-Mexican Studies, University of California, San Diego, said California “has an enormous potential to become a wonderful Mexican ally.”

He cited examples of close personal relations between leaders from the United States and Mexico as keys to the relationship between the two nations.

The signing of the U.S.-Mexico-Canada Agreement (USMCA) came about due to the excellence of Mexico's negotiating team and commitment from both outgoing President Enrique Peña Nieto and incoming President López Obrador, Fernández de Castro said.

Fernández de Castro emphasized that for the future relationship between the United States and Mexico, it will be important for the two nations to do “something meaningful together” to address the migration of people from Central America.

A more detailed story on the luncheon forum is available on the [CalChamber website](#).

Staff Contact: Susanne T. Stirling

LIVE WEBINAR | THURSDAY, MAY 16, 2019 | 10:00 - 11:30 AM PT

Employer To-Due List for PDL and Baby Bonding

California law provides some of the country's strongest workplace protections for employees who are pregnant and/or new parents.

That said, employers have due dates too. There are certain "to-due" steps to follow when an employee requests Pregnancy Disability Leave (PDL) or when you become aware of the need for leave.

Given the number of laws involved, learn specifics for managing your compliance from CalChamber's employment law experts on May 16.

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



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

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