

ALERT

Robust Budget, Key Programs Rely on Private Sector Success



Taxes continue to pour into the state treasury, like spring snowmelt into Lake Oroville. Thanks to the engine of California’s private economy—the creativity of business leaders and productivity

of employees—and the wealth it creates, Governor Gavin Newsom last week announced that revenues exceeded earlier budget estimates by more than \$3 billion, enabling him to propose bolstering reserves, paying down debt, and boosting education spending.

Californians have enjoyed nearly 10 years of economic growth, and one of the biggest beneficiaries has been the state budget. Since the depths of the recession, the state budget has increased by 82%—that’s more than \$95 billion.

Compare that to the recession years when the Governor and Legislature were forced to cut tens of billions of dollars in spending.

Today, with a healthy budget and continuing prospects for growth, Governor Newsom has set aside \$16.5 billion in a rainy-day reserve to hedge against the next economic downturn and continued to boost education spending.

In addition, he proposes spending
See Robust Budget: Page 4

Job Creator Fostering Technological Innovation Wins OK from Assembly Fiscal Committee



A California Chamber of Commerce-supported job creator bill that encourages

technological innovation passed the Assembly Appropriations Committee this week with bipartisan support.

AB 1195 (O’Donnell; D-Long Beach) supports the development of new technology by requiring the California Air Resources Board (CARB) to provide a credit for innovative production or transportation of crude oil as part of the Low Carbon Fuel Standard program in California.

Encouraging the development of new technology to meet California’s ambitious

climate change goals will create jobs.

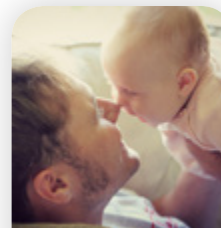
Ambitious Goal

California has the most ambitious and aggressive greenhouse gas (GHG) emission reduction goals in the world. In 2016, California adopted SB 32, which mandated a 40% reduction in GHGs below 1990 levels by 2030. In 2017, a well-designed cap-and-trade program was adopted as the most efficient and cost-effective way to accomplish that goal.

California adopted these goals and programs not because they alone will have a major impact on overall emissions reductions—after all, California accounts for only 1% of global GHG emissions. Rather, the main reason for advancing

See Job Creator: Page 7

Budget Plan Spells Out Steps to Expanding Paid Family Leave



Following up on his January commitment to expanding California’s Paid Family Leave (PFL) program, Governor Gavin Newsom outlined steps toward that goal in the budget

plan he released last week.

PFL, a component of the State Disability Insurance (SDI) program, currently allows workers to take up to six weeks of paid leave annually to care for a seriously ill family member or to bond with a newborn or newly adopted child, with wage replacement of up to 70% of salary based on income level.

The PFL program is funded through state-required employee payroll deductions. The contribution rate is adjusted each year based on a statutory formula designed to collect revenues sufficient to fund benefits and program administration, as well as to maintain a reserve to accommodate fluctuations in fund revenue or disbursements.

Goal: 6 Months

The Governor’s budget proposal commits to expanding California’s PFL program “with the goal that all newborns and newly adopted babies could be cared

See Budget Plan Spells Out: Page 4

Inside

Texting in the Workplace:
Page 3

Labor Law Corner

Retiree Who Returns for Specific Projects: Independent Contractor or Not?



Michelle Galbraith
HR Adviser

One of my long-term employees recently retired, and would like to do some occasional work for us in her spare time. Can we hire her as an independent contractor?

Probably not. There are a number of different worker classifications in California, such as directly hired employees, leased workers, interns, volunteers, and independent contractors.

These classifications are fact-specific: employers and workers cannot simply agree to a certain status. Employers must instead be prepared to demonstrate that a worker meets the legal tests for any given classification.

‘Right to Control’ Test

When it comes to independent contractors, those legal tests have gotten more stringent in recent years. Before 2018, courts generally applied a “right to control” test to determine whether a worker was an independent contractor or an employee.

That standard primarily focused on the level of control an employer exerted over a worker, along with factors such as the right to discharge at will and the type of occupation.

Under that standard, a retired employee returning to assist an employer with discrete projects, using her own expertise and without supervision, could potentially have been classified as an independent contractor.

ABC Test

However, in 2018, the California Supreme Court disregarded the right to control test and established a more stringent “ABC” test for independent contractors.

This test presumes that workers are

employees, and places the burden of proving independent contractor status on the employer. To do so, the employer must demonstrate that:

- Part A: the worker is free from the employer’s control;
- Part B: the work performed is outside the scope of the employer’s normal course of business; and
- Part C: the worker is engaged in an independent business of the same nature as the work performed.

Although a recently retired employee helping out on an occasional basis could potentially satisfy Part A of the ABC test, he or she will likely not satisfy Parts B or C.

To pass those tests, the worker would have to perform very different job duties from those performed during employment, likely with an intention of providing those same services for other companies.

Depends on Work

For example, a retired former accountant who offered after-hours cleaning services to an accounting firm that was a prior employer would likely qualify as an independent contractor, particularly if he or she incorporated the cleaning business and advertised it to other firms.

But if that same individual offered

See Retiree: Page 6

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Labor Law

HR Boot Camp. CalChamber. June 14, Walnut Creek; August 22, Pasadena; September 12, Sacramento. (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

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.

China-California Business Forum. Consultate General of the People’s Republic of China in Los Angeles, Los Angeles Regional Export Council, China Chamber of Commerce for Import and Export of Machinery and Electronic Products, and California Governor’s Office of Business and Economic Development. June 5, Los Angeles.

2019 China (Guangdong)-U.S. Investment Cooperation Conference. Service
See CalChamber-Sponsored: Page 3

Next Alert: May 31



The Workplace

Texting in the Workplace and Other Cautionary Employment Tales



Finding novel ways to increase efficiency or prevent workplace harassment can create serious problems for employers if not properly executed or thought out.

In this week's episode of The Workplace, CalChamber Executive Vice President and General Counsel Erika Frank and employment law attorney Jennifer Shaw discuss the implications of events highlighted in three recent news stories: The first recounts a company's job announcement seeking "preferably Caucasian" candidates; the second involves an employer's attempt to establish a no-touching workplace; and the third describes problems that can be created in the workplace due to texting mishaps.

Review Your Work

A Virginia information technology staffing agency made headlines recently for posting a job ad seeking "preferably Caucasian" candidates. In the podcast, Shaw mentions that in an effort to increase efficiency, many companies

choose to use resume scanning software, and it is possible that this staffing agency simply made an error by checking a wrong box and not reviewing the final job announcement before it was published.

Why would race even be an option? Ninety-nine percent of the time, Shaw says, race is not relevant. However, there are isolated cases that allow for *bona fide* occupational qualifications (BFOQ), where race or ethnicity can be considered, such as when a worker is interacting with a refugee population and needs to have cultural or language rapport.

Although the Virginia staffing agency said it was upset by the job posting, both Frank and Shaw agree the response was not helpful.

"Employers need to fall on their sword when they make a mistake," Shaw says.

No-Touch Workplace

Another recent article tackled how some employers are attempting to prevent workplace sexual harassment by banning all physical contact, including handshakes.

Frank and Shaw comment that cultural norms vary a great deal in American workplaces—especially in California. Nevertheless, there still is a sense of proper etiquette and "good manners," they say. Although no one is expected to be a mind reader, common sense should prevail, Frank says.

"We have to be realistic as far as how far we're going to go to try and prevent any unintended consequence from a potential handshake or inadvertent touch in the workplace," Frank says.

Texting vs. Email

The last news item discussed in the podcast is a clash between technology and common sense: companies incorporating text messages into workplace communications. Quickly becoming the norm, texting in the workplace brings a host of problems and raises many legal questions. On the one hand, text messages often produce quicker responses, but this increases the number of mistakes that can be made. Texting may be convenient, but group texts and responses can inundate users. Furthermore, while auto correct is supposed to make spelling easier, it can create, and has created, many embarrassing situations, which are amplified in the workplace.

There also is a range of wage-and-hour requirements that employers need to be aware of—including reimbursing employees for the work-related text messages, which can be costly, Frank says. On top of all this, Shaw points out, texts between coworkers are still work-related communications and therefore phones can be subpoenaed.

"Texting is good for 'Can you bring, you know, some milk home for dinner, honey,' but it's probably not good for much else in the business world," Shaw says.

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CalChamber-Sponsored Seminars/Trade Shows

From Page 2

Alliance for Chinese Companies on Investment and Trade. June 7, San Francisco. (415) 745-5577.

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.

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

Robust Budget, Key Programs Rely on Private Sector Success

From Page 1

more than \$9 billion to pay down unfunded pension liabilities and pay off longstanding debts and deferrals.

Protecting Against Shortfalls

But what goes up inevitably will come down, and a key responsibility for a chief executive is to look to the future—not only to spread the blessings of prosperity but to protect against shortfalls.

When he released his revised budget proposal last week, Governor Newsom recognized this, insisting that “We need to have a structurally balanced budget because we are entering the end of the beginning of a new phase of economic reality. The headwinds are real.”

The precarious condition of state finances is well known. The top 1% of earners pays nearly half of all income taxes and these taxes provide 70% of all General Fund revenues. The Administration forecasts that a moderate recession would reduce state revenues by \$70 billion over three years.

Savings Strategy

The Governor and the Legislature should continue to insist on a savings strategy pioneered by Governor Brown. Top up the budget reserve, reject new taxes, and resist demands to build into the budget new, ongoing spending that will be painful to unwind when the economy slows.

The easiest money to save for a rainy day is money you haven’t committed to ongoing programs.

The good news is that the extra revenues the state receives once the reserve fund is filled are directed to infrastructure, which can be used to help create high-paying jobs for skilled workers to improve and upgrade our highways, mass transit, public buildings and flood control facilities.

This has the three-fold benefit of providing mobility, safety and public services for residents, creating well-paying jobs for Californians, and budgeting responsibly for the fiscal health of the state.

No Need for Tax Hikes

The budget windfalls should also allay the calls for new or higher taxes, which have proliferated in the early days of the legislative session. The existing state corporate tax rate, combined with the effects from federal tax reform, resulted in a surge of more than a billion dollars of new revenues this year.

Only a few members of the current Legislature were in Sacramento during the last recession, so it may be understandable that many members call for increases in ongoing programs. But nobody wants to return to the bad-old-days of deep cuts to education and safety net programs.

We can help those in need if the private sector continues to thrive and generate tax revenue. Success of the private sector economy creates the foundation for a state budget that provides services to the people of California.

Contact: Loren Kaye

Budget Plan Spells Out Steps to Expanding Paid Family Leave

From Page 1

for by a parent or close family member for the first six months.”

The budget plan cites research showing “a strong connection between providing this duration of care with positive health and educational outcomes for children and enhanced economic security for parents.”

Moreover, “given the high cost of infant child care, making it possible for children to be with their parents during this period is cost-effective for both families and taxpayers,” the budget plan asserts.

As a “down payment” on its commitment to broaden PFL, the administration proposes to expand the maximum duration of a PFL benefit claim from six weeks to eight weeks for all bonding and

care-giving claims, effective July 1, 2020.

The proposal also will allow claimants to take a full eight weeks to help a family member for military deployment, in keeping with legislation adopted last year (SB 1123; Jackson; D-Santa Barbara; Chapter 849, Statutes of 2018), when that bill takes effect on January 1, 2021.

To deliver this expanded benefit, the Governor’s budget proposes reducing the minimum reserve in the SDI fund by 15%. According to the budget proposal, that reduction still maintains an adequate reserve that “will be sufficient to absorb fluctuations in revenues due to future economic downturns as well as increased use of benefits.”

The reserve rate change will take effect starting July 1, 2019.

Task Force

The administration also plans to convene a task force soon to consider different options to phase in and expand PFL to meet the administration’s goal that all babies be cared for by a parent or a close relative for up to six months.

According to the budget plan, the task force also “will evaluate important policy considerations such as aligning existing worker protections and non-retaliation protections for employees’ use of the program, as well as adjustments to the wage replacement rate.”

The task force is to issue recommendations by November for consideration in the 2020–21 Governor’s budget.

The Legislature has until June 15 to act on the budget. The new fiscal year begins July 1.

CalChamber Reiterates Support for U.S.-Mexico-Canada Agreement



The California Chamber of Commerce reminded the state's representatives in Congress

this week of the importance of the pending U.S.-Mexico-Canada Agreement (USMCA) to the U.S. and California economies.

The CalChamber continues to urge all members to ask their California congressional representatives to support the USMCA.

For an easy-to-edit sample letter, see the [federal](#) link under the Bill Positions dropdown menu at www.calchamber.com/advocacy.

Background

The CalChamber actively supported the creation of the North American Free Trade Agreement (NAFTA) among the United States, Canada and Mexico, comprising almost 495 million people and combined annual trade with the United States of around \$1.228 trillion in 2018. In 2018, goods exported topped \$563.729 billion while goods imported totaled nearly \$665.008 billion.

President Donald J. Trump announced his intent to renegotiate NAFTA in May 2017. The negotiations started shortly thereafter, going through many rounds.

In August 2018, the U.S. and Mexico reached a preliminary agreement, while the U.S. continued separate negotiations with Canada.

In October 2018, Canada and the U.S. came to an agreement right before a self-imposed deadline, reassuring the deal would remain trilateral. The pact was rebranded the United States-Mexico-Canada Agreement.

Benefits and Goals

CalChamber support for the USMCA, like its longstanding support for NAFTA, is based on an assessment that the agreement serves the employment, trading and environmental interests of California, the United States, Mexico and Canada, and is beneficial to the business community and society as a whole.

The objectives of the USMCA are to eliminate barriers to trade, promote conditions of fair competition, increase investment opportunities, provide adequate protection of intellectual property rights, establish effective procedures for implementing and applying the agreements and resolving disputes, and to further trilateral, regional and multilateral cooperation.

CalChamber Position

The CalChamber understands that the original NAFTA was negotiated more than 25 years ago, and, while our economy and businesses have changed considerably over that period, NAFTA has not. We agree with the premise that the United States should seek to support higher-paying jobs in the United States and to grow the U.S. economy by improving U.S. opportunities under the new USMCA.

The provisions of NAFTA with

Mexico and Canada have been beneficial for U.S. industries, agricultural enterprises, farmers, ranchers, energy companies and automakers.

Since 1993, trade among the three NAFTA countries has nearly quadrupled.

Mexico and Canada are California's largest and second largest export markets. A final approval of the new USMCA will benefit the California economy and jobs.

USMCA Coalition

Earlier this year, the CalChamber joined more than 200 companies and associations in launching the USMCA Coalition, which advocates congressional approval of the United States-Mexico-Canada Agreement.

The coalition includes a diverse group of businesses, farmers and ranchers, manufacturers, service providers, and technology companies in support of the USMCA.

The USMCA Coalition continues to make the case for expeditious passage of the agreement to members of Congress, and will work to educate employers and members of Congress about the benefits of the new deal. The effort will harness the advocacy strength of a broad membership of companies, trade associations, and chambers of commerce, including many that operate outside of Washington, D.C.

More information about the agreement and the coalition is available at www.usmccalition.org.

Staff Contact: [Susanne T. Stirling](#)



U.S. Senators Vote to Unleash Full Potential of Export-Import Bank



In a bipartisan vote last week, the U.S. Senate confirmed three members for the Export-Import

Bank Board of Directors to restore the export credit agency to full financing capacity.

The three members, confirmed by the U.S. Senate on May 8 to serve staggered terms, are:

- Kimberly Reed as President and Chairman of the Board of Directors, with a term expiring in January 2021.

- Spencer T. Bachus III as a board member, with a term expiring in January 2023.

- Judith Delzoppo Pryor as a board member, with a term expiring in January 2021.

Remaining board member nominees, including one for Ex-Im Bank vice president, are lined up to be voted on in the coming weeks.

CalChamber Letter

The California Chamber of Commerce sent a letter on May 3 to California's two U.S. senators to support restoring a quorum to the Ex-Im Bank. The U.S. Senate vote to restore the Ex-Im Bank's quorum once again allows the bank to authorize transactions greater than \$10 million.

Until now, the Ex-Im Bank has not had a quorum since July 2015 and so was limited to approving transactions of \$10 million or less, meaning numerous lost opportunities for U.S. businesses and their workers.

"This is a great day for U.S. exporters, their workers, and their suppliers across the country," said Ambassador Jeffrey D. Gerrish, Ex-Im chairman and president (acting), in a May 8 statement. "Ex-Im has nearly \$40 billion worth of export deals in the pipeline that can move forward in support of hundreds of thousands of American jobs. The Senate's bipartisan votes today renew opportunities for U.S. exporters to compete on a level playing field in markets and industries where China and other nations are aggressively supporting their exporters. With Ex-Im restored to full functionality, our exporters again have a fighting chance to win export sales on the fair basis of quality and price instead of on the availability of government-backed financing."

Broad Impact

The hundreds of workers at large businesses are not the only ones affected by lost U.S. export transactions. As explained in the CalChamber's May 3 letter, there are strong ripple effects on the many small and medium-sized enterprises throughout the larger companies' supply chains.

The United States is home to some of the largest supply chains in the world. Sales and employees in these supply chains depend on exports of larger clients, financed by Ex-Im. Uncertainty for large clients means diminished purchasing, which means fewer sales and a direct impact on jobs in cities and towns across the country.

Effects on U.S. businesses and workers from a lack of domestic political

support for Ex-Im are exacerbated by the extraordinary steps other countries are taking to support their own exporters and national interests. Export credit agencies abroad are expanding product offerings allowing exporters to compete more aggressively, and more countries are opening new export credit agencies of their own.

With economic growth and job creation the top priorities for the United States, Ex-Im has an important role to play.

Trade offers the opportunity to expand the role of California's exports. As one of the top economies in the world with a gross state product of more than \$2.7 trillion, California exported \$171.9 billion to approximately 229 foreign markets in 2017.

Record of Success

Ex-Im has a proven record of success, and turns a profit for the U.S. taxpayer. Since 2009, Ex-Im has refunded \$4.8 billion to the U.S. Treasury above all costs and loss reserves.

In 2017 alone, Ex-Im Bank assisted nearly 200 California exporters, helping to support almost \$900 million in exports. Over the last five years, the bank authorized \$6 billion in financing to support \$1.3 billion of California exports. Over this period, Ex-Im supported nearly 670 California exporters, 500 of which were small businesses, including approximately 200 minority-owned and women-owned enterprises.

Staff Contact: Susanne T. Stirling

Retiree Who Returns for Specific Projects: Independent Contractor or Not?

From Page 2

to perform accounting services to the prior employer and to no one else, he or she should likely be classified as an employee. The accounting services are within the scope of the employer's normal course of business, and not part of any independent business of the worker. Consequently, the employer would not be able to demonstrate parts B and C of the independent contractor test.

The ABC test applies only to cases brought for wage order violations (such as unpaid overtime and missed meal and rest breaks), and it is unclear whether courts will extend it to other types of employment law violations.

Given this more stringent standard, however, as well as the significant financial risks to misclassification, employers generally should classify as employees former workers rehired to perform

tasks similar to those performed during employment.

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.

U.S. Labor Agency Gives More Time to Comment on Proposed Rules



The U.S. Department of Labor (DOL) has **extended the comment period** for two proposed rules—one that revises and clarifies joint-employer arrangements and another that clarifies how to calculate an employee's regular rate of pay when determining workers' overtime rates.

The DOL extended the deadline to provide interested parties additional time to submit comments in response to requests for extension from law firms, unions and advocacy organizations, among others.

Joint-Employer Rule

The **proposed joint-employer** rule revises and clarifies the responsibilities of employers and joint employers to employees in joint-employer arrangements.

The deadline for submitting comments has been extended to **June 25** (the previous deadline was June 10).

You can submit comments, identified by Regulatory Information Number (RIN) 1235-AA26, either:

- Electronically through the Federal eRulemaking Portal at www.regulations.gov/docket?D=WHD-2019-0002; or
- By mail to:

Division of Regulations, Legislation, and Interpretation, Wage and Hour Division
U.S. Department of Labor
Room S-3502
200 Constitution Ave. NW
Washington, D.C. 20210

Regular Rate Rule

As a reminder, the DOL's proposal seeks to clarify how employers calculate an employee's regular rate of pay for the purposes of calculating overtime and what employers can properly exclude from the regular rate of pay.

The comment period, which was set to close on May 28, has been extended to **June 12**.

You can submit comments, identified by RIN 1235-AA24, either:

- Electronically through the Federal eRulemaking Portal at www.regulations.gov/docket?D=WHD-2019-0002; or
- By mail to:

Division of Regulations, Legislation, and Interpretation, Wage and Hour Division
U.S. Department of Labor
Room S-3502
200 Constitution Ave. NW
Washington, D.C. 20210

Comment on Overtime Rule

The DOL has one other proposed rule open for comment right now.

The **proposed overtime rule** increases

the white collar exemption salary test from \$455 per week (\$23,660 annually) to \$679 per week (\$35,308 annually).

The deadline for submitting comments is **May 21**.

You can submit comments, identified by RIN 1235-AA20, either:

- Electronically through the Federal eRulemaking Portal at www.regulations.gov/docket?D=WHD-2019-0002; or
- By mail to:

Melissa Smith
Director of Division of Regulations, Legislation and Interpretation, Wage and Hour Division
U.S. Department of Labor
Room S-3502
200 Constitution Ave. NW
Washington, D.C. 20210

So far, the regular rate and joint-employer rules have received relatively little public attention, with 40 and 22 public comments, respectively. In comparison, the overtime rule has received more than 57,000 comments at time of publication.

California Chamber of Commerce members can learn more about several noteworthy actions the federal government is taking this year in the Cases & News article "[Feds Propose Overtime, Clarify FMLA Requirements](#)" at HRCalifornia.com.

Staff Contact: Katie Culliton

Job Creator Fostering Technological Innovation Passes Committee

From Page 1

these goals is to demonstrate how a major, complex economy can address a difficult and expensive public policy challenge.

By taking the leadership and showing how to accomplish these goals at the least economic expense and societal disruption, California can show the way for the rest of the world.

Encouraging Innovation

As a means to accomplish the state's

emission reduction goals, AB 1195 seeks to encourage the development of technology that will help reduce emissions associated with crude oil production and transportation.

The bill allows oil producers to claim credit under the Low Carbon Fuel Standard for renewable natural and biogas, which can contribute to a decrease of GHG emissions.

The bill also allows credit for innovative technologies such as carbon capture and sequestration, which is consistent

with the state's goals of pursuing carbon neutrality and allowing for a flexible approach to reducing GHG emissions that protects jobs and the economy.

Spurring technological advancement in the private sector will not only create jobs and protect existing ones, it will encourage early adoption of GHG-reducing technology, helping California achieve GHG reductions faster.

AB 1195 will be considered next by the full Assembly.

Staff Contact: Leah Silverthorn



Helping Business In A Global Economy

www.calchamber.com/international

LIVE WEBINAR | THURSDAY, JUNE 20, 2019 | 10:00 - 11:30 AM PT

Classifying Exempt Employees in California

A high salary doesn't automatically make an employee exempt in California. In fact, the state's exemption requirements create more restrictions than federal law—regardless of job title or description.

Classification mistakes are highly litigated and extremely costly for employers. Misclassify an employee as exempt and you could face a back-pay nightmare and severe penalties for denying overtime as well as meal and rest breaks.

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



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