

ALERT

Anti-Arbitration Proposal Keeps Moving in Senate



An anti-arbitration bill identified by the California Chamber of Commerce as a job killer passed through the first Senate committee to consider it

this week.

The Senate Labor, Public Employment and Retirement Committee approved **AB 51 (Gonzalez; D-San Diego)**, which prohibits arbitration of labor and employment claims as a condition of employment.

AB 51 is a job killer due to the significant increased costs employers will face as a result of more litigation and the expense of delayed dispute resolutions.

AB 51 also proposes to add a new private right of action under the Fair

Employment and Housing Act (FEHA) and exposes employers to criminal liability for any violation

Preempted by Federal Law

In testifying **against AB 51**, CalChamber Executive Vice President Jennifer Barrera emphasized to Senate committee members that the bill will be challenged in court and struck down.

Last year, Governor Edmund G. Brown Jr. vetoed a virtually identical bill, AB 3080 (Gonzalez; D-San Diego), citing his recognition that the bill “**plainly violates federal law.**”

Both the California Court of Appeal and the U.S. Supreme Court have specifically held that state legislation trying to ban arbitration agreements is preempted

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For Uber and Lyft Drivers, Reclassification Means Less Flexibility



Last week, an op-ed appeared in the *San Francisco Chronicle* discussing

the fact that executives from Uber and Lyft have come together to address the ongoing issue of worker classification for rideshare drivers.

This issue of reclassifying workers who drive for rideshare companies is at the forefront of the current debate over worker flexibility at the State Capitol. Importantly, as the discussion continues, the primary focus should be on the quality of work for drivers and preserving the flexibility that attracted so many of them to drive for rideshare companies in the first place.

As such, it is time for California lawmakers to end the notion of attempting to make these drivers “employees” because doing so would require major changes on the drivers’ part.

Driver Freedom

As the op-ed authored by Lyft and Uber states, “reclassification [of drivers] misses two important points: First, most drivers prefer freedom and flexibility to the forced schedules and rigid hourly shifts of traditional employment; and

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Labor Law Corner**July 1 Local Minimum Wage Hikes Don't Change Exempt Salary Test**

Erika Pickles
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Counsel and HR
Adviser

A local minimum wage applies to our nonexempt employees. When the minimum wage increases on July 1, does that mean the salary test for our exempt employees also increases?

There are 11 cities and one county that have minimum wages which increase on July 1. These increases to the minimum wage rates apply only to an

employer's nonexempt employees. The increases don't alter the salary test for the employer's exempt employees.

Increases Don't Affect Exempt Employees

Employees classified under the executive, administrative or professional exemptions must earn a minimum monthly salary of no less than two times the state minimum wage for full-time employment.

For employers with 26 or more employees, the required monthly salary is \$4,160 per month, and for employers with 25 or fewer employees, the required monthly salary is \$3,813.33 per month.

The exempt salary test is based on the California minimum wage, which means that it increases every year on January 1 as the state minimum wage increases. The salary test is not affected, however, by any applicable local minimum wage.

The exempt salary test is calculated using the current California minimum wage, even if an employer's nonexempt employees may be entitled to receive a higher minimum wage under a local ordinance.

Raise for Nonexempt Employees

If you have nonexempt employees working in any of the following localities, the required local hourly minimum wage will increase on July 1, 2019 as follows:

Northern California

- Alameda: \$13.50.
- Berkeley: \$15.59.

- Emeryville: \$15 for "small independent restaurants" (as defined by the ordinance); \$16.30 for all other employers.

- Fremont: \$13.50 for employers with 26 or more employees (employers with 25 or fewer employees are subject to the California minimum wage).

- Milpitas: \$15.

- San Francisco: \$15.59.

- San Leandro: \$14.

Southern California

- City of Los Angeles, County of Los Angeles (unincorporated areas only), Malibu, Pasadena, and Santa Monica: \$14.25 for employers with 26 or more employees; and \$13.25 for employers with 25 or fewer employees

Local Posters

Don't forget your posters! Increases in the local minimum wage also mean updates to required workplace posters. Check at the CalChamber Store, calchamberstore.com, to make sure you have the current version of the applicable local poster in your workplace.

California Chamber of Commerce members can find more information about local ordinances in the [HR Library on HRCalifornia](#).

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. August 22, Pasadena - Sold Out; September 12, Sacramento. (800) 331-8877.

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

Business Resources

Business H2O Water Innovation Summit. U.S. Chamber of Commerce and Salt Lake Chamber of Commerce. September 12, Snowbird, Utah. (801) 364-3631.

14th Annual Prop. 65 Conference. Prop

65 Clearinghouse. September 23, San Francisco. (415) 391-9808.

International Trade

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.

Annual Pan African Global Trade and Investment Conference. Africa-USA Chamber of Commerce. October

See CalChamber-Sponsored: Page 3



*The Workplace***Rules May Require Employers to Monitor Air Quality/Provide Respirators**

New regulations for safety in the workplace are in motion as Cal/OSHA looks to protect employees from detrimental effects of working near or around California wildfires.

In this week's episode of *The Workplace*, CalChamber Executive Vice President and General Counsel Erika Frank and CalChamber Policy Advocate Robert Moutrie discuss proposed regulations that will require employers to provide respirators to employees in certain circumstances.

Based on Air Quality Index

For many California employers, Cal/OSHA handles most regulations in workplace safety.

Last year, a petition was filed by worker groups in California to protect people working outside from unsafe air quality caused by wildfires. As a result of the petition, Cal/OSHA began work on new regulations that will be triggered when the Air Quality Index, known as the AQI, reaches unhealthy levels.

Because of the recent fires in California, Moutrie explains, employers want to make sure their employees work-

ing outdoors are protected from effects of smoke. "The background issue that existed in the prior wildfires was that as the air quality worsened, the employers were in a difficult situation because you want to provide basic protections: respirators that will do filtration of the smoke hazards."

However, Moutrie describes, there is a current regulation in place, Section 5144, which states that if employers are going to distribute respirators to their employees, there are other steps they must take, which include fit testing and medical evaluations done by professionals.

"The problem is, I can't just hand out respirators because I need these testings, but clearly something was needed because smoke was out there," says Moutrie. "These regulations were initially brought up to fix that. The concept is that these [regulations] allow workplaces to continue operating while providing some protection to workers without going through the fit testing and other regulations that are hard to do in an emergency situation."

The new regulations by Cal/OSHA are pending, with the Cal/OSHA Standards Board expected to vote on them in July. According to Moutrie, the regulations are expected to be approved. Though the CalChamber has some ongoing concerns with the regulations' present form, Moutrie expressed that employers believe the regulations are a step in the right direction.

What Triggers Requirements

"When the AQI hits a certain point, the new regulations will go into effect," explains Moutrie in the podcast. "As proposed now, that level will be when an AQI of 150 for PM 2.5 is reached. Employers will then have to provide a handout to employees, provide some discussion, keep them apprised of what

the air quality is and give them an option of using a respirator."

If the impending regulations pass in July as expected, employers should prepare their businesses and employees with safety protections by August.

There are many inexpensive ways for employers to track and monitor the AQI. They can receive daily emails about the AQI forecast, check levels online or purchase an AQI detector.

Additionally, Moutrie recommends, employers should consider preparing ahead of time for unsafe air quality levels by stockpiling N95 masks for all their workers for a two-week period.

All California employers with "a worker who is outdoors for more than an hour cumulative over the course of their shift" must comply with these regulations.

"Having workers outside for a cumulative of an hour brings in a broad base of employers for those employees who might be going in and outside, working in a warehouse, car washes, different places where there is a lot of traffic from inside to outside," adds Frank.

As these regulations come closer to a vote, employers can find more information, including the [dates and times of the Standard Board meetings](#), on the California Department of Industrial Relations website, as well as any updated draft language.

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CalChamber-Sponsored Seminars/Trade Shows

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16–17, Sacramento. (626) 243-3614.
Trade Expo Indonesia. Indonesian Ministry of Trade. October 16–20, Banten, Indonesia.

Hong Kong International Wine and Spirits Fair 2019. Hong Kong Trade Development Council. November 7–9, Hong Kong.

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For Uber and Lyft Drivers, Reclassification Means Less Flexibility

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second, many drivers are supplementing income from other work.”

Indeed, the hallmark of driving for a rideshare company like Uber or Lyft is the independent nature of the job. Drivers have the unique flexibility of being their own boss and can make their own choices about if, when and where to work. This independence would simply cease to exist if drivers were reclassified as employees.

In addition, as independent workers, rideshare drivers can supplement their income by driving with Uber or Lyft to earn extra money alongside their day job whenever they want.

If the Legislature were to consider rideshare drivers as employees under California law, many of the individuals who currently drive for these companies would not be able to continue working even as part-time employees, leaving an immense gap in the transportation millions of California consumers rely on every day.

Food Delivery

This issue affects more than just Uber and Lyft. Postmates is another platform that offers drivers independent work through its app. The food delivery business says it has enabled members of its fleet to supplement their incomes by more than half a billion dollars to date. [Moreover, as it told *Vanity Fair* in 2017](#), the company has “stimulated growth for local economies by linking our network of customers and couriers to the brick-and-mortar merchants in their own communities.”

With millions of dollars on the line, it is crucial for lawmakers to consider what rideshare and delivery drivers want. According to May 2017 data released in 2018 by the Bureau of Labor Statistics [Economic News Release](#), 79% of independent contractors prefer their work arrangement over traditional employment.

To reclassify drivers as employees would not only be against the wishes of the majority; it also would force companies like Uber, Lyft and Postmates to impose more control over employees to stay in compliance with California labor laws. This would undercut the innovation of a business model that has powered economic growth for the state.

A Model that Works

Uber and Lyft’s fight to protect their drivers’ status as independent contractors is about maintaining a model that works for both the drivers and consumers. Rideshare companies would be very different services with employee drivers. Wait times would certainly be longer and service would likely be limited.

The op-ed discusses multiple solutions that would go a long way toward providing drivers with additional protections without having to reclassify them as employees. Uber and Lyft executives argued for a new legal framework that would maintain flexibility while offering new benefits. In addition, Postmates executives have also expressed alignment with this historic proposal for delivery-based app workers.

“The status quo can and should be

improved,” the executives said in the op-ed. “Current employment laws, however, do not allow companies like ours to offer certain benefits without blurring the boundaries of employment and triggering a wave of litigation in which nobody wins.”

Change Needed

Change is certainly needed to protect new types of employment in California.

One of the first steps Uber and Lyft executives identify in the legal dispute over driver protection is fixing the law in California. “Amending existing law to allow for a system of worker-determined benefits—from paid time off to retirement planning to lifelong learning—could deliver a measure of security that independent workers currently lack,” the executives said.

Maximizing the ridesharing experience for both drivers and customers should be top of mind for California’s policymakers. Employment laws should not limit how people make a living; instead, the laws should reflect the types of jobs that are fueling California’s booming economy while providing appropriate protections against fraud and abuse.

The final days of the legislative session offer an opportunity for lawmakers to do something that is both innovative and pro-worker. It is time to protect a model that is benefiting hundreds of thousands of California rideshare workers every day.

Staff Contact: Jennifer Barrera

Anti-Arbitration Proposal Keeps Moving in Senate

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by federal law, the Federal Arbitration Act.

Numerous opinions by the U.S. Supreme Court and the California Supreme Court over the last decade have consistently held that any state law that interferes with, discriminates against, or limits the use of arbitration is preempted by federal law.

Delays

Neither employers nor employees will benefit from the delays and uncertainty AB 51 will cause, Barrera commented.

If the use of arbitration is limited, she pointed out, the remaining options for employees are a hearing before the Labor Commissioner (an office that lacks funding or resources for timely responses) and the overworked court system.

Countering the notion that employees can fare better in court, a state Department of Industrial Relations review of 1,500 settlement agreements found that the plaintiffs’ attorneys had failed to protect employees or were of only marginal assistance in a majority of cases.

Key Vote

AB 51 passed Senate Labor, Public Employment and Retirement on June 19, 4-1:

Ayes: Hill (D-San Mateo), Jackson (D-Santa Barbara), Mitchell (D-Los Angeles), Pan (D-Sacramento).

Noes: Morrell (R-Rancho Cucamonga).

AB 51 will be considered next by the Senate Judiciary Committee.

Staff Contact: Jennifer Barrera

CalSavers Retirement Savings Program Registration to Begin July 1



In 2016, the California Legislature passed a bill that laid the foundation for a state-run retirement plan, and in 2018, the final governing regulations were adopted. Eligible employers can begin to register for the [CalSavers Retirement Savings Program \(CalSavers\)](#) on July 1.

CalSavers is a retirement savings program for private sector workers whose employers don't offer a retirement program. Once the program goes into effect, employees who haven't opted out are automatically enrolled in CalSavers, and CalSavers will remove a percentage of their pay to save for their retirement.

Although eligible employees will be automatically enrolled, participation in the CalSavers program is voluntary, and employees can opt out at any time.

Eligible Employers

Private sector employers who meet these two requirements are considered eligible employers:

- Have five or more employees; and
- Don't maintain or contribute to a "tax-qualified retirement plan," which is a plan that qualifies for favorable income

tax treatment under Internal Revenue Code Sections 401(a), 401(k), 403(a), 403(b), 408(k) or 408(p) (payroll deduction IRA programs that don't provide for automatic enrollment don't qualify).

Registration Deadlines

Although CalSavers is scheduled to open for employers to register on July 1, 2019, employers aren't compelled to register until June 30, 2020, at the earliest. Specifically, employers with:

- More than 100 employees must register by June 30, 2020;
- More than 50 employees must register by June 30, 2021; and
- Five or more employees must register by June 30, 2022.

Employer Responsibilities

Under the CalSavers program, employers must:

- Register for the CalSavers program in compliance with the above schedule.
- Within 30 days of registering, provide the CalSavers program administrator with a collection of personal information about each individual employee. This information includes: the name, Social Security number, date of birth, and contact information for each eligible employee.
- Ensure that each employee receives a packet of information from the program administrator.

• Calculate the appropriate rate of deduction for each employee, based on a schedule contained in the regulation.

• Deduct each employee's contributions to the CalSavers program from their salary.

• Remit the employee's contributions to the program administrator within seven days of deduction.

In addition, if a new employee is hired after registration, that individual's information must be submitted within 30 days of the date of hire.

Employers don't pay any fees for their employees' participation in the CalSavers program and are not required to contribute to the CalSavers program aside from remitting the prescribed portion of their employees' salaries.

Employers are expressly prohibited from encouraging or discouraging employees from participating in the CalSavers program, or from providing any advice about any decisions related to investment and contribution relating to the program.

Employers can register via the [CalSavers](#) website, by phone, by overnight mail or by regular mail.

California Chamber of Commerce members can log onto [HRCalifornia.com](#) to view the full [HRCalifornia Extra](#) article, [CalSavers 101: What Employers Need to Know](#).

Staff Contact: Erika Pickles

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Proposition 65: Take Your Coffee and Hold the Cancer (Warning)

Following is a recent *Capitol Insider* blog post from CalChamber Policy Advocate Adam Regele.



In the bizarre world of Proposition 65, some sanity has been restored.

On June 3, the California Office of Administrative Law (OAL) announced approval of a regulation proposed by the Office of Environmental Health Hazard Assessment (OEHHA) that exempts businesses from having to provide Proposition 65 (Prop. 65) warnings for exposures to acrylamide and other listed chemicals that are created when coffee is roasted or brewed.

I wrote about it almost one year ago here.

The finalization of the new regulation brings much relief to the business community involved with the roasting,

packaging, distribution and selling of coffee in California. The new regulations were in response to a determination last year by a superior court judge that coffee retailers must warn customers under Prop. 65 because acrylamide—a byproduct that comes from roasting coffee beans—is listed as a carcinogen in California.

The approved regulation will be effective on October 1, 2019, when it will be published as Section 25704 of Title 27 of the Code of Regulations. The final language of the regulation is as follows:

§ 25704. Exposures to Listed Chemicals in Coffee Posing No Significant Risk

Exposures to chemicals in coffee, listed on or before March 15, 2019 as known to the state to cause cancer, that are created by and inherent in the processes of roasting coffee beans or brewing coffee do not pose a significant risk of cancer.

NOTE: Authority cited: Section 25249.12, Health and Safety Code.

Reference: Sections 25249.6 and 25249.10, Health and Safety Code.

Pending Lawsuit

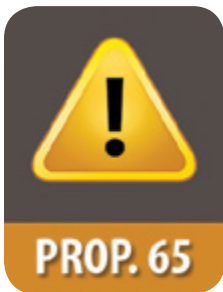
Unfortunately, the Prop. 65 coffee saga continues for the more than 80 businesses already named in the *Council for Education and Research on Toxics v. Starbucks, et al.* lawsuit currently pending in Los Angeles Superior Court. For these businesses, the fight is not over.

The plaintiff, Council for Education and Research on Toxics (CERT), led by Raphael Metzger of Metzger Law Group, insists that the regulations are not legally valid and even if they were, the exemption does not apply retroactively.

In other words, the plaintiff argues that “old” coffee is still cancerous and requires Prop. 65 warnings. Apparently “new” coffee, post-regulations, is somehow different? CERT is seeking \$1 billion in fees (\$2,500 for each cup sold!).

Staff Contact: Adam Regele

Conference to Help Businesses Comply with New Prop. 65 Regulations



Regulators and legal experts will discuss how to help companies understand how to comply with the newest Proposition 65 warning regulations at the 14th Annual Prop. 65 Conference on

September 23 in San Francisco.

Conference panelists will also discuss:

- how to calculate exposure levels in consumer products;
- responsibilities from manufacturers to retailers and third party internet markets; and
- ways to cure abuses in Prop. 65.

The conference will be chaired by Arthur Lawyer, principal at Exponent. Lawyer has 35 years of experience in

environmental public policy and scientific initiatives, including advising clients about Prop. 65.

More Information

For more information, visit www.prop65clearinghouse.com. A full conference schedule is expected to be posted to the website in July.

Capitol Insider

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The *Capitol Insider* blog presented by the California Chamber of Commerce offers readers a different perspective on issues under consideration in Sacramento. Sign up to receive notifications every time a new blog item is posted at capitolinsider.calchamber.com.



Bill Threatening Water Supply Reliability Passes First Assembly Policy Committee



Legislation that threatens water supply reliability for millions of Californians passed the Assembly Environmental Safety and Toxic Materials Committee this week.

The California Chamber of Commerce has labeled **SB 1 (Atkins; D-San Diego)** as a job killer due to the significant and entirely avoidable negative consequences resulting from language in the bill.

The author's stated intent is to protect California's air, water, biodiversity and citizens from any federal changes that undermine the state's existing environmental standards.

Instead, the bill:

- substantially threatens water supply reliability for millions of Californians;
- forces state agencies to review irrelevant federal laws, regulations and guidelines;
- instigates costly litigation through the creation of brand new private rights of action;
- removes basic due process by waiving Administrative Procedure Act safeguards; and
- automatically integrates federal baseline standards into California law without agency review under certain circumstances.

The CalChamber and a coalition of industry groups, state water contractors and local chambers of commerce have proposed reasonable amendments that preserve all goals in the bill, avoid all identified negative impacts, and thereby remove all opposition. Unfortunately, the amendments have not been taken.

Unresolved Issues

Although the author has accepted some of the amendments to address the CalChamber and coalition concerns, the majority and most significant problems of the bill remain unresolved. Those flaws include the following:

• **SB 1 undermines the State Water Project, Central Valley Project and voluntary water flow agreements** by removing the ability of the state Department of Fish and Wildlife to apply new science and adaptive management practices, thereby dismantling years of negotiations.

The bill's rigid approach to water management runs counter to the collaborative, science-based approach developed during the current and previous state administrations to enhance fish and wildlife habitat throughout California and provide reliable water supplies to communities.

• **SB 1's overly broad mandate will have significant fiscal impacts** for California agencies, estimated to be in the tens of millions of dollars annually.

• **SB 1 subjects state and local agencies to lawsuits**, including when reasonable persons can differ as to whether a standard/requirement is "less protective" than existing federal law. The bill also encourages such lawsuits through a one-sided attorneys' fees provision and vague/ambiguous language.

• **SB 1 creates a new private right of action** by any member of the public to enforce labor and employment law claims. As currently drafted, the bill would allow any "person in the public interest" (proposed Government Code

Section 120072) to file a lawsuit to enforce provisions of the federal Fair Labor Standards Act of 1938, the federal Occupational Safety and Health Act of 1970, and the federal Coal Mine Health and Safety Act of 1969. This extension of private rights of action to labor and employment claims brought by the general public is unwarranted and would give rise to a flood of litigation against California businesses.

• **Rulemaking pursuant to SB 1 will be permanent and without public notice** and comment to nongovernmental organizations, businesses, the public and even state and local agencies. The bill circumvents the California Administrative Procedure Act.

As currently drafted, SB 1 provides no remedy other than litigation.

• **New amendments allow federal baseline standards to automatically be integrated into California law without any state agency oversight or rulemaking if there is no analogous state standard.**

Key Vote

SB 1 passed Assembly Environmental Safety and Toxic Materials on June 18, 6-1.

Ayes: Arambula (D-Fresno), Bauerkahan (D-Orinda), C. Garcia (D-Bell Gardens), Holden (D-Pasadena), Muratsuchi (D-Torrance), Quirk (D-Hayward).

No: Mathis (R-Visalia).

Not voting: Melendez (R-Lake Elsinore).

SB 1 will be considered next by the Assembly Natural Resources Committee.
Staff Contact: Adam Regele

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California employers with 5 or more employees are required to provide sexual harassment prevention training to all employees. Your minimum count of "5" includes seasonal and temporary hires, independent contractors and any employees located out of state.

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