

# ALERT

## ‘Right to Recall’ Mandate Circumvents Policy Process



Now in effect is a new law establishing a “right to recall” requirement for certain hotels, private

clubs, event centers, airport hospitality operations, and building services. The law applies to all employees laid off due to COVID-19.

Adopted through the budget process rather than legislative policy committee hearings, **SB 93 (Committee on Budget and Fiscal Review)** went into effect immediately upon being signed by Governor Gavin Newsom on April 16.

If the subject sounds like déjà vu, it is because Governor Newsom vetoed a nearly identical bill just last fall — **AB 3216 (Kalra; D-San Jose)**.

In reaction to AB 3216’s veto, Assemblymembers Ash Kalra and Lorena Gonzalez (D-San Diego) introduced AB 1074, which was set to be heard in the Assembly Labor and Employment Committee. Rather than moving the bill through the standard policy committee procedures, the substance of AB 1074 was repackaged instead as SB 93 and passed through the budget process.

### Rushed Process

SB 93 was heard in both the Assembly and Senate Budget committees just four days after the language was in print and was signed by the Governor just eight days after it was in print.

The measure was adopted according to rules governing the state budget, not because it affects the state treasury, but because this enabled it to take immediate effect without a supermajority vote.

Although proponents of SB 93 are correct that it is different from AB 3216 in some respects, what is not different is the devastation COVID-19 has had on the hospitality industry.

### Hit Hard by Pandemic

As noted in the Governor’s AB 3216 veto message, the hospitality industry has been “hit hard by the economic impacts of the pandemic” and these mandates place “too onerous a burden on employers navigating these tough challenges.”

This is still true today. In the short time stakeholders had to consider SB 93, many expressed the same concerns as with AB 3216. Most notable were the mandate to wait five business days before

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## Workers’ Compensation Job Killer Bill Now Just Calls for Study



Costly job killer legislation that would have reduced injured workers’ access to quality care was amended this week to remove the problematic provisions.

With the April 26 amendments, the California Chamber of Commerce has **no position on AB 1465 (Reyes; D-San Bernardino)**.

Before the latest changes, AB 1465 would have mandated the creation of a state-run Medical Provider Network for workers’ compensation claims. Besides imposing millions of dollars of costs on the system and the state, the proposal would have reduced injured workers’ access to quality care.

### Coalition Opposition

The CalChamber and a coalition of employer groups pointed out that AB 1465 would have reduced the quality of care in the workers’ compensation system while increasing costs by eliminating the ability of medical provider networks (MPN) to exclude inexperienced and low-quality providers.

A state-run MPN would have disrupted the balance achieved by the negotiated reforms that established the networks.

By requiring the state to establish its own MPN, AB 1465 would have further undermined the existing MPN system and

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May 12-13, 2021

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## Labor Law Corner

# What to Do When an Employee Complains About ‘Discrimination’



**Matthew J. Roberts**  
Employment Law  
Counsel/Subject  
Matter Expert

*An employee complained to me that a co-worker frequently yells at the employee for parking in the wrong spot and says that the co-worker is “discriminating” against him by yelling at him. What, if anything, do I need to do to address this complaint?*

Employee workplace complaints are not a new phenomenon and very frequently employees use terms like “discrimination,” “retaliation,” “harass-

ment,” or “hostile work environment” when making the complaint.

But at what point is an employer obligated to take action based upon the complaint and the language used?

To understand employer obligations, it is important to know the legal significance of these words and their proper legal context. We can start with defining what is unlawful in the workplace.

### Unlawful Actions

Both federal and California laws prohibit discrimination, harassment and retaliation in the workplace based upon an employee’s protected class, such as their age, race, sex, gender identity, disability or religion.

- **Discrimination** occurs when an employer takes a negative employment action against an employee based, at least in part, upon an employee’s protected class.

- **Harassment** occurs when an employee is subjected to unwelcome and unwanted conduct that is severe and pervasive based upon the employee’s protected class.

- Lastly, **retaliation** occurs when an employer takes a negative employment action against an employee based, at least in part, on an employee engaging in a protected activity, such as complaining about unlawful harassment and discrimination.

Using the example above, we now know how we can frame our questions when speaking with the employee after they raise their complaint, such as asking why the employee thinks the co-worker is “discriminating” against him.

Whether the employee says the “discrimination” was based upon a protected class will determine whether an employer has a further obligation to investigate the complaint.

### Investigations

Under California law, an employer has an obligation to promptly, impartially and thoroughly investigate any complaint of unlawful discrimination, harassment or retaliation.

All parties to the complaint are entitled to appropriate due process, which generally means giving notice of the allegations, providing each party the opportunity to respond, interviewing relevant witnesses and reviewing relevant documents identified by the parties.

Once the investigation is complete, the employer must determine whether the alleged conduct occurred based upon a preponderance of evidence standard — meaning is it more likely than not that the conduct occurred?

Employers also must include investigation procedures in their discrimination, harassment and retaliation policy. The policy should state where complaints can be made, that the employer will investigate the complaint in compliance with the law, and that the complaint will be kept as confidential as possible.

### Employer Policies

Using our example above, even if the employee is not complaining about any unlawful discrimination, harassment or retaliation, the complaint still may implicate an employer’s internal policy, such

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### International Trade

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Commercial Service and U.S.-Mexico Chamber of Commerce. May 3–6, Online. (279) 666-9104.

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Mexico Natural Care Products “Coffee”  
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*The Workplace*

# Considerations for Workplace Reopenings



In Episode 118 of The Workplace podcast, CalChamber Executive Vice President and General Counsel Erika Frank and

law expert Jennifer Shaw discuss workplace reopenings and what employers should consider when deciding whether to end their remote work programs.

*Note: This podcast was recorded on April 16, 2021. Listeners should be aware that given the unpredictability of the COVID-19 pandemic, information shared on this podcast episode may change at any time.*

With Governor Gavin Newsom announcing that companies can anticipate fully reopening their businesses on June 15, employers and employees might soon be able to be in the same room together, Frank says.

As companies prepare for that big day, employers should keep in mind that June 15 is an arbitrary date and much will depend on COVID-19 transmission rates and outbreaks, Shaw says.

She advises listeners to remember there are three different types of workplaces: the workplaces that never closed; the workplaces that had to shut down completely; and the hybrid workplaces. Each type of workplace will have a different route to reopening and will require a different plan.

“It’s not a one size fits all,” she says.

## Strategic Choices

Employers will need to make strategic choices on many components, such as which staff members to bring back; whether getting the COVID-19 vaccine will be required; or what type of personal protective equipment (PPE) will be provided, Shaw tells podcast listeners.

Shaw also suggests that every employer think about their individual workplace and look over their employee

roster to see who is working remotely and whether every worker needs to be brought back into the worksite or if it is only a select group of people that need to be brought back.

Now is also a good time for employers to look at their internal operations and think about what their ideal workplaces would look like, Frank says. Employers should think about what their employees have been through this past year and think about what they are going to need as they come back to the office, Shaw says. Importantly, employers should think of ways that managers can communicate the company’s expectations.

## Flexible Work Schedules

Employers have said that collaboration is harder in remote work arrangements, and many companies are looking into adopting flexible work schedules, Frank says.

The arrangement is challenging because while there are people who love working from home, there are others who can’t wait to go back to work, Shaw says. So, the first thing managers need to do is to take stock of what each employee wants to do and ask them if they like working from home. Employers should not ask whether the employee has been vaccinated.

This is also a great opportunity for employers to look at ways to improve company morale, and take stock of their employees and facility. Employers should think about all the regulations that have been put into place, whether it’s the new sick leave law or the California Division of Occupational Safety and Health (Cal/OSHA) emergency temporary standard, Shaw says.

## Vaccines

COVID-19 vaccine eligibility has expanded to include people over 16 years of age in California. While many people have already received their vaccines or have made appointments to get them, there are others who are hesitating.

Frank asks Shaw what she is seeing from employers.

Shaw replies that she has seen different responses — while some employers don’t care about who gets vaccinated, others require the vaccine, seeing it as their obligation to create a safe work environment. Other employers prefer to incentivize vaccines by telling workers that if they want to come back to the office, they must get vaccinated.

## Returning Remote Workers to the Workplace

Whether it is taking naps in the middle of the workday, or inappropriate attire during Zoom meetings, employers have been seeing a number of problematic behaviors from remote workers and have seen productivity levels decline, Frank says. What are employers going to have to deal with when they bring back employees to the workplace, she asks?

Just as it was tough to switch employees to remote work at the start of the COVID-19 pandemic, it’s going to be tough getting people to come back to the workplace, Shaw points out. Employers will have to be flexible and be sympathetic to the situation their employees are in. This doesn’t mean, however, that employers can’t hold employees accountable or have expectations.

Finally, Shaw says that employers should have a rationale for everything they do so that they can explain why they are doing what they’re doing. An employer needs to be able to say, “I’ve really thought things through and examined the pros and cons, and effective May 1, I need everyone back in the office. These are all the protocols, and this is how we are going to do it.”

And if an employer decides to continue having employees telework, the employer should decide how the employees will be managed, how productivity will be evaluated, and how bonuses/promotions will be decided, Shaw says.

# CalChamber Cites Key Policy Elements for Recycling in a Circular Economy



Working to find a comprehensive solution to recycling and packaging concerns is a goal shared

by the California Chamber of Commerce and its members.

That was the message conveyed this week by CalChamber Senior Policy Advocate Adam Regele in testimony to the Senate Environmental Quality Committee.

Regele made his comments at the April 26 committee hearing on **SB 54 (Allen; D-Santa Monica)**, explaining the CalChamber's **oppose unless amended** position.

## Shared Goals

The CalChamber agrees with Senator Ben Allen that it is the responsibility of the Legislature to address deficiencies in the state's management and recycling of packaging materials through a comprehensive solution, Regele said.

Regele noted that the CalChamber also agrees with the Senator on the necessary components for achieving his vision: source reducing materials where feasible, designing for recyclability, attracting new investments and providing a pathway for enhancing California's recycling and composting infrastructure, and creating end markets in order to realize a working circular economy.

## Impact on Multiple Sectors

Disagreement has arisen, however, on

the mechanics, feasibility and implementation of prior versions of the bill, Regele pointed out.

Disputed provisions would have substantial impacts on the state's food and agriculture sectors, retailers and nearly every sector selling goods to consumers or other businesses.

Over the last two years, Regele commented, discussions have illuminated unintended consequences and regrettable substitutions, plus infrastructure needs and significant costs associated with creating a circular economy, highlighting both the scale of the challenges and the need for further refining the policies.

## Deficiencies to Fix

Regele expressed hope that stakeholders on all sides can overcome deficiencies in bill language noted over the last few years, such as:

- Providing in statute critical definitions necessary to send market signals and guide companies as they design for recyclability;
- Creating a pathway to bring and expand California's recycling and composting infrastructure in the time frame contemplated by the bill's mandates;
- Standardizing the requirements across all jurisdictions to educate companies and consumers with consistent recycling rules;
- Ensuring the California Legislature retains authority on the subject and avoids delegating much of its authority to the California Department of Resources

Recycling and Recovery (CalRecycle);

- Maintaining due process by striking the emergency rulemaking authority provided to CalRecycle to develop major regulations, as a five-day notice and comment period is wholly inadequate;
- Applying eco-modulated fees where appropriate to account for externality costs rather than banning products under condition of sale language; and
- Including funding mechanisms to ensure the scope of the program can be realized without major disruptions to supply chains or increased costs to consumers.

## Work in Progress

The CalChamber and its member companies remain at the table and will continue to provide solutions toward advancing the vision of a circular economy that reduces waste, increases real recycling, and prevents pollution so that a better system of managing material emerges, allowing economies and environments to thrive.

## Background Briefing

A CalChamber briefing earlier this year featured presentations by practitioners in food packaging and recycling, advanced recycling methods and waste management.

To watch the video, visit the CalChamber advocacy website and go to "Policy Briefings" under the Policy / Issues menu dropdown.

**Staff Contact: Adam Regele**

## What to Do When an Employee Complains About 'Discrimination'

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as codes of conduct, professionalism, or even anti-bullying or workplace violence prevention policies.

Although an employer does not have an obligation to investigate complaints that do not involve unlawful discrimination, employers should still investigate

any complaint that may involve other policies because employers should seek to uniformly enforce their internal policies.

In this case, the employer has discretion about whether to conduct an investigation as well as any disciplinary action they may need to take for any policy violations arising from the conduct.

*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](http://www.hrcalifornia.com).*

## Governor Calls for Phase Out of Oil Extraction in State



Last week, Governor Gavin Newsom issued a press release announcing he was directing

state agencies to phase out new permits for hydraulic fracturing in California by 2024.

He also asked the California Air Resources Board to analyze ways to phase out oil extraction across the state by no later than 2045.

### CalChamber Statement

In a statement released after the Governor's announcement, CalChamber President and CEO Allan Zarembeg said the press release "reflects the fact that fossil fuels will continue to play a crucial role in our economy for the foreseeable future."

Oil production in California, Zarembeg commented, "reduces our reliance on foreign fuel imports and provides good paying middle-class jobs in the Central Valley."

Moreover, oil production in California is highly regulated and more environmentally friendly than the sources from which the state will have to import energy if in-state production is eliminated.

"Thus, the Central Valley will unnecessarily suffer a loss of good paying middle-class jobs for no additional environmental benefit," Zarembeg said.

The California Geologic Energy Management Division (CalGEM), part of the California Department of Conservation, is the state agency that oversees the oil, natural gas and geothermal industries. As noted in the Governor's press release, the CalGEM process for reviewing hydraulic fracturing (fracking) permits is the most stringent in the country and includes input from experts at the Lawrence Livermore National Laboratory.

Also worth noting is that a ban on in-state oil and gas production, the CalChamber job killer **SB 467 (Wiener; D-San Francisco)**, was rejected in its first committee hearing earlier this month.

### California Economy

In-state oil and gas production is a significant component of the California economy. The oil and gas industry supports 50,000 jobs, providing 31,000 jobs in the San Joaquin Valley.

Those energy worker jobs include drillers, welders, geologists, engineers, pipeline technicians, electricians, truck

drivers, environmental advisers and laborers.

The oil and gas sector provides well-paid jobs for skilled workers in both unionized and nonunion positions. The average annual pay of \$121,000 is well above most other industry employment in the region, and oil and gas companies provide one of the best career pipelines in the region for an ethnically diverse workforce.

### Foreign Oil Sources

Foreign sources have been making up an increasing portion of oil supplied to California refineries, the California Energy Commission [reports](#), especially as the supply from Alaska, the major domestic source, has flattened.

Although countries in the Middle East make up the biggest portion of [foreign crude oil imports](#) to California, nations in South America also are a significant source.

### More Information

More information on the central role of the oil and gas industry to the California economy is available at [www.energyindependenceca.com](http://www.energyindependenceca.com).

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an employer could hire someone to fill a position or could advertise the position to new applicants and the requirement to hire employees back by seniority with no ability to consider who is most qualified for the job.

### No Private Lawsuits

One silver lining in SB 93 is the language giving the Labor Commissioner exclusive jurisdiction to enforce the bill's requirements. Representatives from the Department of Industrial Relations and Department of Finance stated that the language in SB 93 giving the Labor Commissioner exclusive jurisdiction over the bill's provisions meant that no private lawsuits may be brought, including no lawsuit under the Private Attorneys General Act (PAGA).

Assemblymember Gonzalez confirmed there was no PAGA liability

during debate about the bill in Assembly Floor session.

### Bypassing Policy Process

This is now the second time the California Legislature has passed a labor-related policy bill through the early action budget process in 2021, the first being the new COVID-19 Paid Sick Leave mandate in **SB 95 (Skinner; D-Berkeley)**.

This troubling trend did not go unnoticed, with both Republicans and Democrats voicing concerns about hearing policy bills in the budget process. Not only was there concern about abuse of the budget process by circumventing policy committees, but also about the extremely limited time legislators have to consider these bills when they move through the budget.

The short timeframe provides members, their staff, and stakeholders little time to analyze the bill and provide feedback.

The hearings on SB 93 demonstrated this issue, with members asking questions to which the Department of Finance or Labor Commissioner did not have an answer, causing frustration among members.

Several legislators also expressed concern about whether their constituents were even aware this bill was moving forward given the short timeframe and an inability to answer questions or concerns raised by constituents because legislators essentially had one weekend to look into the bill.

As a budget proposal, SB 93 went into effect immediately, which means employers affected by this legislation had no time to learn of the bill's requirements, adjust operations, or implement new procedures — another reason policy proposals should not be a part of the budget process.

**Staff Contact: Ashley Hoffman**

## International Events Go Virtual in May

### CalChamber to Co-Host California-Mexico Event Online



“Women’s Role in California’s Economic Recovery” will be the subject of a virtual event

co-hosted by the California Chamber of Commerce and the Consulate General of México, Sacramento.

The webinar is set for Thursday, May 6, 11 a.m.–noon (PT) and will examine the U.S.-Mexico-Canada Agreement (USMCA) as a tool for women-owned small and medium-sized enterprises.

Featured speakers will be Luz María de la Mora, undersecretary for foreign trade, Mexico Secretariat of Economy; and Dee Dee Myers, senior advisor and



Luz María de la Mora Dee Dee Myers

director, Governor’s Office of Business and Economic Development (GO-Biz). Ambassador Liliana Ferrer, consul

general of Mexico in Sacramento, will make brief remarks and moderate a discussion. Susanne T. Stirling, CalChamber vice president, international affairs, will welcome viewers and introduce speakers for the webinar, which is being held in conjunction with the annual California-Mexico Advocacy Week.

Preceding the webinar, 10:30 a.m.–11 a.m., there will be a special cultural performance by the Huanpango de Moncayo, regional dances with Amalia Hernández.

To register for the Zoom session, visit [this link](#).

For questions, call (916) 444-6670, ext. 233 or email [intlevents@calchamber.com](mailto:intlevents@calchamber.com).

## State Food/Agriculture Secretary to Speak at CalChamber Virtual Event

Issues for California agriculture will be the focus of a virtual gathering presented by the California Chamber of Commerce on May 10, 2 p.m.–3 p.m. (PT).

Karen Ross, secretary of the California Department of Food and Agriculture (CDFA), will be the guest for the virtual program, “A Conversation on Issues Facing California Agriculture.”

The program host will be Mark Jansen, president and CEO of Blue Diamond Growers and immediate past chair of the CalChamber.

CalChamber President and CEO Allan Zarembeg will welcome attendees to the virtual program.

Ross has served as state secretary of food and agriculture since 2011, when she was first appointed by Governor Edmund G. Brown Jr. Governor Gavin Newsom reappointed her to the post in 2019, citing her leadership experience in agricultural issues nationally, internationally, and here in California, in areas including environmental stewardship,



Karen Ross Mark Jansen

climate change adaptation, and trade.

Before joining CDFA, Secretary Ross was chief of staff for U.S. Agriculture Secretary Tom Vilsack. She served as president of the California Association of Winegrape Growers from 1996–2009, and as vice president of the Agricultural Council of California from 1989–1996.

Since taking the helm at Blue Diamond in 2010, Jansen has trans-

formed the operation into a \$1.6 billion global branded manufacturer. He has led brand growth for Haagen-Dazs, Betty Crocker, Totino’s, Pillsbury, Red Baron, Freschetta, Blue Diamond and Almond Breeze.

Before joining Blue Diamond, he was president of Schwan’s Food Service in Marshall, Minnesota. He currently serves on the Executive Council for the National Council of Farmer Cooperatives, the Board of Trustees for the International Nut and Dried Fruit Council, the Board of Trustees for the Graduate Institute of Cooperative Learning, and the Almond Board of California.

### Registration

To register for the virtual gathering, to be held on Zoom, visit [this link](#).

Attendees are asked to submit questions they would like to hear addressed at the event to [nicole.ellis@calchamber.com](mailto:nicole.ellis@calchamber.com) by Wednesday, May 5.



## Helping Business In A Global Economy

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## Workers' Compensation Job Killer Bill Now Just Calls for Study

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cost California tens of millions of dollars annually given the extraordinary cost of establishing and maintaining an MPN.

For example, based on the current number of providers, the state Division of Workers' Compensation would have been required to investigate, credential and contract with about 51,000 providers at an estimated cost of \$12.8 million, according to the California Workers' Compensation Institute (CWCI).

Developing the infrastructure and

related technology for ongoing management of the state MPN would have cost as much as \$65 million annually, the CWCI estimated.

### No Evidence

The coalition also noted that there is no evidence to justify the cost and burden of overhauling the MPN system. Data from the previous two years demonstrates there is little material difference between the time to initial treatment or proximity to providers between claims treated

by providers within an MPN and those outside of the MPN.

The use of MPNs since the most recent major reforms have kept costs in the workers' compensation system relatively stable, the coalition stated.

As amended this week, AB 1465 requires a study about delays and access to care issues in MPNs, including comparing data on treatment for a worker by a provider within an MPN and a provider that is not part of an MPN.

**Staff Contact: Ashley Hoffman**

## CalChamber-Sponsored Seminars/Trade Shows

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Chat." U.S. Commercial Service. May 3, Online. (800) 872-8723.

Doing Business with Italian Ports – The Ports of Genoa. U.S. Commercial Service. May 4, Online. (800) 872-8723.

Increase Market Share through Website Localization. U.S. Commercial Service. May 4, Online. (800) 872-8723.

9th Annual World Trade Week: Trade Challenges and Opportunities in a Post-COVID World. The Port of Hueneme. May 4, Online. (805) 488-3677.

Insights Outreach Navigation Workshop: Partnering with DHS Using CRADAs

(Technology Transfer and Commercialization Program Tools). Department of Homeland Security. May 4, Online. (202) 282-8010.

Key Export Controls. U.S. Commercial Service. May 4, Online. (800) 872-8723.

Making the Most of Virtual Trade Shows: Practical Tips for U.S. Companies. U.S. Commercial Service. May 4, Online. (617) 565-4302.

Cosmetics and Personal Care Opportunities in Ethiopia. U.S. Commercial Service. May 5, Online. (800) 872-8723.

European Union Natural Care Products "Coffee Chat." U.S. Commercial Service. May 5, Online. (800) 872-8723.

## CalChamber Calendar

*Capitol Summit:*

May 12, Online

*Board of Directors:*

May 12–13, Online

*Host Breakfast:*

May 13, Online



LIVE WEBINAR | MAY 20, 2021 | 10 AM TO 11:30 AM PT

### Like Clockwork: California's Precise Rules for Meal and Rest Breaks

Is your company following California's precise meal and rest break requirements? This includes providing hourly workers with opportunities to take their breaks and doing everything you can to communicate what's required and when.

Rest assured, CalChamber's legal experts will cover this topic in detail, including steps to protect your company from liability.

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



Meal and rest break compliance is a highly litigated area of law.

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