

# ALERT

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## Meal Period Lawsuit Crisis Needs Complete Solution

The California Chamber of Commerce is continuing to urge lawmakers to insist on a comprehensive solution to the meal period litigation crisis.

The CalChamber is receiving frequent calls from members who are involved in a meal period lawsuit or who have a client who is being sued. The calls originate from a variety of industries and locations.

### Comprehensive Solution

Despite claims to the contrary, the CalChamber believes there is a comprehensive solution that would provide a remedy across all industries, all job classifications and all employers — both union and non-union.

The comprehensive solution was contained in the language of CalChamber-sponsored **SB 1539 (R. Calderon; D-Montebello)** as introduced on February 22.

At an April 9 hearing, the Senate Labor and Industrial Relations Committee amended SB 1539 to declare the Legislature's intent to clarify the meal period law, then passed the bill by a unanimous vote to provide an opportunity for ongoing discussions to craft a solution to current issues with the law.

On April 21, SB 1539 was referred to the Senate Rules Committee, where it subsequently died for missing the end-of-May deadline to pass its house of origin.

### Changes Needed

The CalChamber is calling for a solution that will provide both employers and employees with the clarity and flexibility needed to comply with the meal period statute, Labor Code Section 512.

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## Multi-Industry Coalition Advocating Sensible Truck/Bus Replacement Rule



The California Chamber of Commerce, along with truck owners, farmers,

construction contractors and other business and community leaders, has announced the formation of "Driving Toward a Cleaner California" (DTCC).

The coalition is committed to working with the California Air Resources Board (ARB) to craft a sensible truck and bus replacement rule that both cleans the air and keeps California's economy moving forward.

### Affects Diesel Trucks/Buses

The recently proposed on-road diesel truck and bus replacement rule — set to be voted on by the ARB this October — would have an impact on the more than 1.5 million trucks and buses used to transport goods and people on California's roads, highways and farms.

Starting in 2010, this proposal requires every diesel truck and bus operating in California today — this includes "those transiting California

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## CalChamber Opposition Helps Stop Unfair Tax



Strong **opposition** from the California Chamber of Commerce, local chambers and the California business community has helped to stop a CalChamber-opposed "job killer" bill that

would have increased transportation costs by creating a new fuel tax or increased the vehicle registration fee.

**SB 445 (Torlakson; D-Antioch)** would have assessed an unfair tax on businesses and consumers by authorizing specified regional transportation agencies to impose

a tax on either motor vehicles or vehicle fuel.

The bill was scheduled to be heard for the second time in the Assembly Transportation Committee; however, the hearing was cancelled due to the heavy opposition to the bill.

California's energy prices are already among the highest in the nation. SB 445 proposed a tax of up to an additional 10 cents per gallon. This proposed tax plus the rising energy prices due to existing environmental initiatives would have made it more and more difficult for California's

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## Labor Law Corner

# Step-by-Step Guide to Implementing Alternative Workweek Schedule



**Jessica Hawthorne**  
Employment Law  
Counsel

*How do I implement an alternative workweek schedule in keeping with current requirements?*

Follow the steps below to create and implement an alternative workweek policy for your company.

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### Step 1:

#### Locate and display the appropriate wage order.

The wage orders contain the specific steps that employers must take in order to implement a valid alternative workweek schedule.

- Before implementing an alternative workweek policy, identify and read the wage order that covers your company. A free Wage Order Wizard is available at [www.hrcalifornia.com](http://www.hrcalifornia.com).

- Post the wage order applicable to your business in a prominent spot in your workplace, such as a break room or any other place employees frequently visit.

### Step 2:

#### Determine the employees affected by the wage order.

Employees in different work units may work a different schedule, or there may be many different schedules within a work unit.

- Define the work unit, which may include one or more non-exempt employees in a:

- ✓ Division;
- ✓ Department;
- ✓ Job classification;

- ✓ Shift;
- ✓ Separate physical location; or
- ✓ Recognized subdivision of any such work unit.

### Step 3:

#### Develop and propose a written alternative workweek schedule to employees in the affected work unit.

- Designate a regularly scheduled alternative workweek in which the specified number of workdays and work hours are regularly recurring. The actual days worked within the alternative workweek schedule do not need to be specified in the agreement. The schedule must provide no fewer than two consecutive days off within each workweek, except for Wage Orders 4, 5, 9, 10, 15 and 16.

You may propose a single work schedule that would become the standard schedule for all workers in the work unit, or a menu of work schedule options from which each employee in the work unit would be entitled to choose.

If you offer a menu of choices, you may limit the choices of schedules on some non-discriminatory basis, such as seniority or random selection, as long as this limitation is approved as part of the two-thirds vote of the work unit. Another option would be to divide the workforce into separate work units and propose a different alternative workweek schedule for each unit.

- Prepare a written disclosure of the effects of the proposed schedule on the employees' wages, hours and benefits. For example, specify:

- ✓ The specific days those employees will work, if you are proposing only one schedule.
- ✓ The amount of time that will be charged to an employee's vacation or sick time if they miss a day. For example, if the workday is 10 hours, will you charge eight hours or 10 hours?

- ✓ What impact the alternate workweek plan will have on sick, vacation or paid time off (PTO) accruals. Will employees accrue the same amount of sick, vacation or PTO, but at an accelerated rate — e.g., for every day worked? There are 260 days in a work year (52 weeks x 5 days),

*See Step-by-Step: Page 4*

## Seminars/Trade Shows

For more information, visit  
[www.calchamber.com/events](http://www.calchamber.com/events).

### Business Resources

Cities Readiness Initiative. County of Sacramento. June 25, McClellan Business Park. (916) 784-9202.

### International Trade

Brazil Infrastructure Projects Roadshow. Brazilian Embassy. June 25, San Francisco. (202) 238-2770.

Customs and Compliance Seminar. Bay Area World Trade Center. June 26, Oakland. (510) 251-5900.

BIS Export Management Seminar. U.S. Bureau of Industry and Security. July 9-10, San Jose. (408) 998-8806.

### Labor Law

HR 201: Labor Law Update On-Demand Web Seminar. CalChamber. 90 minutes. (800) 331-8877.



## *CalChamber in Court*

# Court Upholds Workers' Comp Reforms



The 1st District Court of Appeal has upheld the 24-visit cap on chiropractic care, occupational and physical therapy enacted as part of the 2003-2004 workers' compensation reforms.

In the case of *Jose Facundo-Guerrero v. Nurserymen's Exchange, Insured by Argonaut Insurance Company*, the issue before the court was whether such a cap was constitutional.

The California Chamber of Commerce filed a "friend of the court" brief arguing that a cap is constitutional as the Legislature has the authority to regulate the manner of treating industrial injuries and contain the costs associated with providing that treatment.

The court agreed, saying that the Constitution does not require "unlimited treatments" and leaves the details of the workers' compensation system to policymakers.

The brief was submitted by Daniel Sovocool, a partner in the San Francisco law firm of Thelen Reid Brown Raysman and Steiner, specializing in complex commercial claims.

### **Legislature's Authority**

The law has long afforded the Legislature broad powers to create and

maintain the workers' compensation system, and with that power comes the discretion to restrict access to or deny workers' compensation benefits when appropriate.

The workers' compensation reforms were designed to reduce the skyrocketing costs of workers' compensation premiums for employers, bring businesses back to California and bolster the state's economy.

In making its revisions, the Legislature weighed the various interests involved, including the need of the injured workers to have adequate and appropriate access to care and the need of employers to have a reasonably priced workers' compensation system.

Therefore, the CalChamber argued that the Legislature's decision to place reasonable limits on chiropractic care served a legitimate governmental purpose and should not be compromised by this case.

In its brief, the CalChamber urged the court to defer to the Legislature's exercise of its plenary power in enacting the workers' compensation reforms and specifically to protect the integrity of the Legislature's reasonable limits on chiropractic visits.

The court concluded: "we will not second-guess the wisdom of the Legislature in meeting the workers' compensation crisis in this state by, among other things, specifying the maximum amount of chiropractic care an injured worker may

receive for a single industrial accident. The Legislature clearly has the constitutional authority to make that determination."

According to Sovocool, who appeared for the CalChamber at the oral argument, the decision is particularly important because it eliminates what could otherwise be a flood of constitutional challenges to the integrity of the reforms.

### **Workers' Comp Reforms**

The reform legislation, CalChamber-supported SB 228 (Alarcón; D-San Fernando Valley) and SB 899 (Poochigian; R-Fresno) made fundamental changes in the way the workers' compensation system determines the level of injury and the amount of disability assigned to an injury, and created a new medical network to provide quality, cost-effective care to workers.

The reform package ensured that medical treatment follows nationally recognized guidelines and set clear parameters for what is acceptable treatment for injured workers in the system, while also reducing excessive litigation.

Included in the reform package were changes in the law designed to bring rationality to the process of determining which conditions contributed to an injury and how much, so employers would be responsible for only the portion of an injured worker's disability resulting from the existing job-related injury.

**Staff Contact: Jason Schmelzer**

## Supreme Court: No Punitive Damages in Breach of Contract Cases

The California Supreme Court recently invalidated a jury's punitive damages award in a breach of contract case.

In the case of *City of Hope National Medical Center (City of Hope) v. Genentech Inc. (Genentech)*, the issue before the court was whether a fiduciary relationship arose between two contracting parties by virtue of the fact that one party was contracted to develop a secret scientific discovery.

The Supreme Court found no fiduciary relationship existed between Genentech and the City of Hope. Because punitive

damages cannot be awarded for a breach of contract, the court held that there was no fiduciary relationship and therefore set aside the jury's award of \$200 million in punitive damages to City of Hope.

The Supreme Court concluded that the trial court erred in instructing the jury that a fiduciary relationship existed between City of Hope and Genentech. Because fiduciary duties do not necessarily arise from this type of relationship, City of Hope's only theory at trial for claiming a fiduciary relationship with Genentech was legally

invalid and therefore the judgment against Genentech is defective insofar as it is based on the jury's finding that Genentech breached fiduciary duties owed to City of Hope.

The only other ground for the jury's imposition of liability against Genentech was the jury's finding that Genentech had breached its contract with City of Hope. Because punitive damages may not be awarded for a breach of contract, the award of punitive damages must be set aside.

**Staff Contact: Erika Frank**



## Step-by-Step Guide to Implementing Alternative Workweek Schedule

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but there would be only 208 days in an alternative workweek of four days a week (52 weeks x 4 days).

✓ What days will employees work when there is a company holiday during the week? Will the holiday be unpaid or paid, and if paid, for how many hours — eight or 10?

✓ If you observe company holidays, do the employees get paid only if the holiday falls on a day that is in their alternative workweek schedule?

**Note:** The written disclosure *must* be in a non-English language, as well as in English, if at least 5 percent of the affected employees primarily speak that non-English language.

- Present a written proposal, including all disclosures, for the alternative workweek schedule to employees in the affected work unit.

### Step 4:

#### **Hold a meeting to inform employees of the upcoming alternative workweek election.**

After you have defined the parameters of a proposed alternative workweek, you must hold a meeting to inform employees of an upcoming election:

- The meeting must be held at least 14 days prior to the election.
- Mail a copy of the written disclosure to employees who did not attend the meeting.
- Attach a list of attendees with dates of attendance to this checklist for your records.

**Note:** All employees affected by the

proposed alternative workweek schedule are entitled to vote.

### Step 5:

#### **Schedule a secret ballot election on an appropriate date.**

- Hold the election during the regular working hours at the worksite of the affected employees.

**Note:** All affected employees in the work unit are entitled a vote to approve or reject the proposed schedule in a secret ballot election. A two-thirds vote is required for the schedule to become effective. Only those employees affected by the alternative workweek schedule may vote. Exempt employees in the unit do not vote.

### Step 6:

#### **If the proposal is passed, set an appropriate alternative workweek start date.**

**Note:** You cannot require employees to work the alternative workweek schedule for at least 30 days after announcing the final election results.

### Step 7:

#### **File the election results and required information with the Department of Industrial Relations, Division of Labor Statistics and Research.**

- File the results of the election, along with the required information, with the Department of Industrial Relations, Division of Labor Statistics and Research (DLSR) within 30 days of the final election. The results become a public

document. A sample letter is available at [www.hrcalifornia.com](http://www.hrcalifornia.com): Department of Industrial Relations Letter - Notice of Alternative Workweek Adoption.

- Do not send the actual ballots.

### Step 8:

#### **Maintain the appropriate records.**

It is important to keep complete records of the alternative workweek election, as well as documentation showing how the schedule is being followed. Your records should include:

- The proposal submitted to employees;
- The written disclosure distributed to employees;
- Minutes from the meeting(s) held to discuss the proposed schedule;
- Records of the election procedure;
- Election results;
- A copy of the Department of Industrial Relations Letter - Notice of Alternative Workweek Adoption submitted to the Division of Labor Statistics and Research (DLSR) regarding the election results;
- Documentation indicating the results were properly filed with DLSR;
- Any documentation regarding employees who cannot or will not work the alternative workweek schedule, and who are being accommodated with a different schedule;
- Actual alternative workweek schedules or calendars;
- Documentation of occasional changes to the schedule and notice given to employees about such changes;
- Overtime records;
- Meal period waivers;
- Requests by employees to substitute their regularly scheduled working days;
- Makeup time requests; and
- Petitions to repeal the alternative workweek schedule.

### More Information

More information is available at [www.hrcalifornia.com](http://www.hrcalifornia.com). CalChamber preferred and executive members also can call the Labor Law Helpline for assistance.

*The Labor Law Helpline is a service to CalChamber 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).*

## CalChamber Opposition Helps Stop Unfair Tax

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small businesses to remain in the state.

The state Air Resources Board (ARB) is already working on the scoping plan for AB 32, the landmark emissions reduction legislation passed in 2006. This plan will be the guidebook for putting AB 32 into motion and developing the regulations.

Because AB 32 gives the ARB the ultimate authority to regulate the state's greenhouse gas emissions, it is important that local and regional entities refrain from setting up duplicative requirements.

SB 445 disregarded the multiple levels of work being done at the ARB to reduce the state's greenhouse gas emissions.

Instead of working on a comprehensive, state approach to combating climate change, this bill would have set up a separate tax to fund transit programs within specified regions.

In addition, SB 445 proposed a special tax for a specific purpose and thus should have been subject to a two-thirds vote for approval.

**Staff Contact: Amisha Patel**

# Public Affairs Council Reviews June Election; Examines Trends Affecting Future Voting

Photos by Aaron Lambert



A panel discussing the impact of independent expenditure campaigns on the legislative primaries agrees that the June primary marked the best coordinated pro-business effort of any recent election cycles with definite lessons learned on how to improve results for the future. Darryl Sragow (at podium), Sonnenschein Nath & Rosenthal LLP, is the panel moderator. Panelists (from left) are: Rick Rivas, Civil Justice Association of California; Joe Shumate, Joe Shumate & Associates; Paul Mitchell, EdVoice; Dave Howard, California Association of Realtors; and Bob Giroux, Lang, Hanson, O'Malley & Miller Governmental Relations.



Morley Winograd (left) and Michael Hais, co-authors of *Millennial Makeover: MySpace, YouTube and the Future of American Politics*, provide insights from their new book on future trends in voting and elections.



Rod Wright (D-Inglewood) comments on the decisive impact of the pro-business effort in his primary election victory in the 25th Senate District. Wright won 43.8 percent of the vote, compared to 34.9 percent for Mervyn Dymally (D-Compton), a current member of the Assembly.

**Next Council Retreat: November 12-14**

## Meal Period Lawsuit Crisis Needs Complete Solution

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Current law is confusing and has led to costly litigation against California businesses. Historically, state enforcement officials have interpreted the statute and related regulations narrowly and unreasonably, wrongly increasing employer liability.

To avoid liability under these interpretations, employers have had to discipline or discharge employees for not taking meal periods as directed, and to police employees to make sure they are taking the meal period according to the rules.

Although several recent federal court decisions have rejected those narrow and unreasonable interpretations, the California Supreme Court has not yet issued a ruling that resolves the issue. Both employers and employees seek flexibility and clarity now.

A comprehensive solution must:

- clarify that an employer's obligation to "provide" a meal period means that employees have a meaningful opportunity to take meal periods, but that employers do not have to police their workforces to ensure employees take the meal periods.
- clarify appropriate situations that allow an employee and employer to enter into on-duty meal period agreements; and
- permit employers and labor to collectively bargain on and set their own meal period rules.

### Labor-Sponsored Bill Set for Hearing

A California Chamber of Commerce-**opposed** bill that will not help stop unjustified and unreasonable class action litigation against employers is scheduled to be considered by the Senate Labor and Industrial Relations Committee on June 25.

**AB 1711 (Levine; D-Van Nuys)**, sponsored by the California Labor Federation, fails to provide *all* employees and employers in California with a clear solution to current meal period challenges.

The current interpretation of the law by the state enforcement agency is so rigid that employers are forced to police their workforce to ensure that their employees are taking their meal periods.

The lack of clarity of what it means to provide a meal period has led to unjustified and unreasonable class

action litigation against employers.

AB 1711 provides only limited relief and that exclusively for union companies, along with limited clarification regarding when an on-duty meal period can be taken.

AB 1711 also adds provisions unrelated to meal periods, such as an increase in wages for employees — both public and private — who work split shifts, and a provision for expert witness fees to be paid to a prevailing party to a minimum wage or overtime lawsuit.

#### Action Needed

Contact your senator and members of Senate Industrial Relations and urge them to **oppose AB 1711**.

For a sample letter visit [www.calchambervotes.com](http://www.calchambervotes.com).

**Staff Contact: Marti Fisher**

#### Action Needed

Contact your legislative representatives and urge them to make it a priority

to resolve the meal periods dilemma this year.

**Staff Contact: Marti Fisher**

## Multi-Industry Coalition Advocating Sensible Truck/Bus Replacement

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roadways from other states and countries," according to the ARB — to be replaced or retrofitted.

Considering the millions of goods and products delivered via truck each day in the state, these regulations could have a profound, negative impact on California's economy and competitiveness.

Given the multibillion-dollar cost of this regulation — and the current volatile economic environment — the DTCC coalition believes the affected industries and other sectors should be given the opportunity to comply in the most reasonable timeframe and flexible manner possible.

### Small Business Impact

Many companies, including many small owner-operators, are being asked to dispose of equipment and assets before their useful life has been completed and purchase new equipment before it would otherwise be acquired.

According to the ARB, 55 percent of truck owners are small firms with five trucks or fewer.

Nearly one-third of truck owners — 32 percent — are owner-operators who own just one vehicle.

The ARB has yet to make a full disclosure to business owners and consumers of the true economic impacts of the proposed mandate.

### Goal

The DTCC coalition's goal is to come to consensus with the ARB on a rule that cleans the air while also: keeping the maximum number of companies in business and workers employed; ensuring the business environment stays at its most competitive; and holding increased costs to other businesses and consumers to a minimum.

### Coalition Members

To date, the DTCC coalition includes 50 organizations and companies. For a full list of members and more information, visit [www.drivecleanca.org](http://www.drivecleanca.org).

**Staff Contact: Jason Schmelzer**



# Japanese Business Leaders Share Issues at CalChamber-Hosted Luncheon Gathering

Japanese investors share many of the concerns of California businesspeople about the state's economy and the costs of doing business here, according to an annual report by the two major associations of Japanese business leaders.

A luncheon hosted by the California Chamber of Commerce on June 11 provided an opportunity for leaders of the Japanese Chamber of Commerce of Northern California (JCCNC) and the Japan Business Association of Southern California (JBA) to share the report and their perspectives on doing business in California.

Japan is the third largest export market for California, which exported more than \$13.4 billion worth of goods to Japan in 2007, according to the U.S. Department of Commerce.

The JCCNC/JBA annual report notes that California has become the top location for Japanese manufacturing plants, distribution centers, retail outlets, finance operations and a wide array of other activities that employ more than 226,000 Californians and generate billions in state and local tax revenue.

In addition, Japanese-affiliated companies contribute more than \$17 million annually to host communities.

California is the most preferred place in the nation for Japanese investors to conduct

business, according to the JCCNC/JBA report. Investment here involves 1,772 Japanese firms investing \$32.7 billion.

The state's natural beauty, comfortable climates, educational and technology excellence, rich and diverse cultures are among the attributes that attract JCCNC and JBA members to do business here, the report notes. Another asset, the groups report, is "California's unwavering attitude toward open investment and support for free trade."

Concerns expressed by JCCNC and JBA members in recent surveys mirror those of California firms: the stability of the state's economy, the higher costs of doing business in California, complex regulations, the state's chronic fiscal imbalances and the lack of governmental inducements to expand and attract a well-educated workforce.

## Web Portal

More information on California-Japan trade and U.S.-Japan trade and investment is available at the trading partner web portal on the CalChamber website at [www.calchamber.com/international](http://www.calchamber.com/international).

## Photo

*Front Row (from left):* Yuichi Kawakami, chairman of the board, NEC Electronics America; Masaaki Tanaka, president and chief executive

officer, Union Bank of California; Isao "Steve" Matsuura, president, Japanese Chamber of Commerce of Northern California (JCCNC); CalChamber President Allan Zaremberg; Yasuyoshi Suzuki, president, Japan Business Association of Southern California; Akira Tasaki, president and chief executive officer, Mitsubishi Electric and Electronics USA, Inc.; Masanori Yasunaga, president and chief executive officer, Calbee America, Inc.

*Middle Row:* JCCNC Treasurer Katsuhiro Sawada, Tokio Marine & Nichido Fire Insurance Co., Ltd.; Raizo Sakoda, vice president, Hitachi Data Systems Corporation; Akio Nekoshima, president and chief executive officer, Mizuho Corporate Bank of California; JCCNC Second Vice President Mitsuaki "Mike" Yamamoto, Marubeni America Corporation; June-ko Nakagawa, executive director, JCCNC; Hiroshi Haruki, president and chief financial officer, Fujitsu America, Inc.; Kunihiro "Kent" Ogura, president and chief executive officer, New United Motor Manufacturing, Inc. (NUMMI); Yoshifumi Nakata, Western states regional officer, Mitsui & Co. (USA) Inc.; Masafumi Yasukagawa, senior vice president and general manager, Toshiba America Inc.; Yoshiaki Hata, vice president and regional manager, Japan Airlines.

*Back Row:* Susanne Stirling, CalChamber vice president, international affairs; Steven G. Teraoka, chair, JCCNC governmental affairs and regulatory compliance committee and managing partner, Teraoka & Partners LLP; Naoki Kawada, Greenberg Traurig LLP; Scott Keene, Keene and Associates; Yuji Muranaga, chief executive director, Japan External Trade Organization (JETRO) San Francisco; Jonathan Stallings, Keene and Associates; Kelley McKenzie, NUMMI; Jeanne Cain, CalChamber executive vice president, policy; Drew Savage, CalChamber vice president, corporate relations.

**Staff Contact: Susanne Stirling**



Representatives of the California Chamber of Commerce meet with counterparts from the Japan Business Association of Southern California and Japanese Chamber of Commerce of Northern California, along with top Japanese businesses executives on June 11 at the CalChamber offices.

## Properly accommodating customers with disabilities is the law!

**The 1990 Americans with Disabilities Act (ADA) mandates that you and your employees accommodate certain requirements of customers.**

An ADA violation can result in a discrimination lawsuit, not to mention fines and bad publicity for your company. To avoid this, provide each member of your team a copy of our new mini-book, ***Accommodating Customers with Disabilities***. With it, each employee will have an easy-to-read reference for avoiding costly mistakes while improving customer service. These informative solutions help keep your business in compliance.

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