

ALERT

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Analysis

Release of State Budget Plan Leaves Many Questions



Governor Arnold Schwarzenegger proposed his final budget on January 8, once again wrestling with spending obligations far in excess of available revenues.

Loren Kaye, president of the California Foundation for Commerce and Education, examines some common questions and provides answers below. The foundation is a non-partisan, non-profit corporation that functions as a “think tank” for the

business community in California and is affiliated with the California Chamber of Commerce.

Budget Questions

Given the tax increases, spending cuts and federal aid over the last year, why is the state budget still mired in deficit?

Even before the recession hit California in late 2007, state spending was on an unsustainable trajectory. Between 1998 and 2007, spending increased by an average of 7 percent a year, while population and inflation increased by less than 4 percent. This

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Draft Greenhouse Gas Rule Omits Key Issues



A state agency’s preliminary draft for a cap-and-trade program to reduce greenhouse gas emissions omits controversial elements that are

critical to determining whether the program can succeed or be cost effective, according to the California Chamber of Commerce.

In a letter to California Air Resources Board (ARB) Chairman Mary Nichols, the CalChamber emphasized the importance of decisions on how greenhouse gas (carbon) allowances will be distributed, whether and how businesses can offset emissions at one site with reduced emissions at another, and linking California’s program with future national and international ones.

Those issues will be critical to the overall success of the cap-and-trade program and whether California can cost-effectively meet the greenhouse gas reduction goals required by the state’s climate change law, AB 32, the CalChamber said.

CalChamber Recommendations

The CalChamber recommended that:

- Auctioning of greenhouse gas allowances be kept to a minimum because of the significant costs a 100 percent auction system would impose on

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Redistricting Commission Seeks Applicants



Photo by Aaron Lambert

California State Auditor Elaine Howle reminds a CalChamber audience that applications are being accepted until February 12 for the new Citizens Redistricting Commission, which will redraw boundaries for the state Senate, Assembly and Board of Equalization districts. To date, more than 6,000 have applied and about 5,000 are tentatively eligible. To apply or for more information, visit www.WeDrawTheLines.ca.gov or call (866) 356-5217.

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Cal/OSHA Corner

Injury/Illness Summary (Form 300A) Must Be Posted Starting February 1



Mel Davis
Cal/OSHA Consultant

Is my company required to post the Form 300 beginning February 1?

A free Log 300 wizard is available at www.calbizcentral.com to help a business determine whether it is subject to recordkeeping requirements.

If your company had 10 or fewer employees at all times during the last calendar year, your company does not

need to keep Cal/OSHA injury and illness records.

This exemption also applies if your company's Standard Industrial Classification (SIC) code is included in Table 1 of Article 2 of the regulations adopted by California's Division of Labor Statistics and Research and enforced by Cal/OSHA.

Employers are responsible for providing a safe and healthful workplace for their employees. The role of the federal Occupational Safety and Health Administration (OSHA) is to assure the safety and health of U.S. workers by setting and enforcing standards; providing training, outreach and education; establishing partnerships; and encouraging continual improvement in workplace safety and health.

OSHA or the U.S. Bureau of Labor Statistics may ask you to participate in a random survey to provide records as detailed in the provisions of Section 14300.41 or Section 14300.42.

Form 300, 300A

The Form 300 is used to record, or log, all injuries and illnesses, except those that have been determined to be first aid only. Typically, the Form 300 is not posted because there may be employee privacy issues involved.

As an employer, you are not to include the employee's name for specific injuries or illnesses listed in Section 14300.29(b) (7), such as needle sticks, HIV infection, hepatitis, sexual assault and others. In addition, an employee suffering from an injury or illness not listed as a privacy issue may request that his/her name not be entered on the log.

Another form, the 300A, must be completed and posted beginning February 1. This form contains a summary of the total number of job-related injuries and illnesses that occurred during the previous year. Employers are required to post only the summary (Form 300A)—not the Form 300 (Log)—from February 1 to April 30.

The summary must list the total number of job-related injuries and illnesses that occurred in the previous year and were logged on the Form 300 (Log). Employment information about the annual average number of employees and total hours worked during the

Copies of OSHA forms available at hrcalifornia.com

calendar year also is required to assist in calculating incidence rates. Companies with no recordable injuries or illnesses in the previous year must post the summary with zeros on the "total" line. A company executive must certify all establishment summaries.

The form is to be displayed in a common area where notices to employees usually are posted. Employers must make a copy of the summary available to employees who move from worksite to worksite, such as construction workers, and employees who do not report to any fixed establishment on a regular basis.

All employers covered by California's safety and health regulations need to comply with safety and health standards and must report verbally within eight hours to the nearest Cal/OSHA district office all fatal accidents or the hospitalization of three or more employees. Those employers exempt from the recordkeeping requirements must continue to file reports of occupational injuries and illnesses with the state Division of Labor Statistics and Research.

More Information/Forms

For more information on Form 300 filing and posting requirements, visit www.hrcalifornia.com.

Copies of the OSHA Forms 300, 300A and 301 are available.

The Labor Law Helpline is 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.

Next Alert:
January 29

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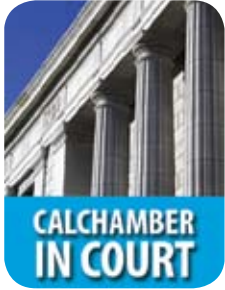
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CalChamber in Court

CalChamber Files Lawsuits to Protect Cost-Saving Workers' Comp Reforms



The California Chamber of Commerce has gone to court to overturn three cases that weaken 2004 workers' compensation reforms enacted to make the calculation of permanent

disability awards more objective.

Medical Guidelines

The required use of the American Medical Association (AMA) guidelines is at risk in what are commonly referred to as the *Almaraz/Guzman* decisions issued by the Workers' Compensation Appeals Board (WCAB) last September.

These cases are on appeal and the CalChamber filed a friend-of-the-court brief because the WCAB has erroneously treated one element of the calculation—the AMA guidelines—as rebuttable even though the law does not permit rebuttal of any of the elements that go into calculating the percentage of permanent disability.

A February 2009 decision issued by the entire WCAB consolidated the cases of *Mario Almaraz v. Environmental Recovery Services and State Compensation Insurance Fund* and *Joyce Guzman v. Milpitas Unified School District and Keenan Associates (2009)*. The decision held that:

- the AMA guidelines portion of the 2005 permanent disability schedule is rebuttable;
- the AMA guidelines portion of the 2005 permanent disability schedule is rebutted by showing that an impairment rating based on the AMA guidelines would result in a permanent disability award that would be inequitable, disproportionate, and not a fair and accurate measure of the employee's permanent disability; and

- when an impairment rating based on the AMA guidelines has been rebutted, the WCAB may make an impairment determination that considers medical opinions not based on or only partially based on the AMA guidelines.

In response to requests for reconsideration, WCAB agreed to rehear the cases. In its orders granting reconsideration, the WCAB requested input from *amici curiae*.

In response, CalChamber filed an amicus brief that focused on the plain language of the statute and the Legislature's intent in passing the workers' compensation reforms of 2004 to support a reversal of the board's findings.

In September 2009, WCAB issued its new decisions in the *Almaraz/Guzman* cases. While the new decision marked a significant departure from the broad ruling issued in February 2009, it nonetheless still leaves room for rebutting the permanent disability rating schedule through the guidelines.

Future Earning Capacity

The method for calculating an injured worker's diminished future earning capacity is at issue in the case of *Ogilvie v. Workers' Compensation Appeals Board*.

In *Ogilvie*, the WCAB held that the diminished future earning capacity adjustment used by the 2005 permanent disability schedule could also be rebutted. The WCAB provided an alternate means to determine this adjustment, and held that the adjustment used by the 2005 permanent disability schedule was rebutted whenever the WCAB's method reached a different result.

As with the *Almaraz/Guzman* cases, WCAB also agreed to reconsider *Ogilvie*, and issued its new ruling along with the *Almaraz/Guzman* cases. Here, the WCAB reaffirmed its original decision concluding that the future earning capacity factor can be rebutted. In keeping with *Almaraz/Guzman*,

the WCAB reiterated its position that the permanent disability schedule is rebuttable. This case is also on appeal.

The CalChamber filed a friend-of-the-court brief in *Ogilvie*, arguing that the WCAB's ruling created an ad hoc approach to the permanent disability calculations and reintroduces the use of subjective, unquantifiable factors that the Legislature had squarely rejected.

Legislative Intent

In both briefs, the CalChamber notes that in enacting the 2004 reform legislation (SB 899), the Legislature considered the cost of the old system to employers, and the economic crisis that threatened the very viability of the system as whole. It concluded that something must be done, and did it. The policy decision must be respected and implemented as intended, the CalChamber argues.

The Legislature sought to eliminate the vagueness and subjectivity of the old system by mandating the method for calculating the percentage of permanent disability. In short, the new system eliminated subjectivity and guesswork from permanent disability calculations, thereby ensuring that similarly situated employees are treated equally, promoting fairness and consistency.

Permitting the use of the AMA guidelines to be rebutted on an individualized basis or allowing a specific element of the permanent disability calculation to be rebutted by creating an individualized factor for determining diminished future earning capacity “would *increase* costs to the employers virtually across the board and is flatly irreconcilable” with the express intention of the Legislature in enacting the workers' compensation reform law, the CalChamber argues in the brief.

The CalChamber is urging the court to overturn both of these erroneous WCAB decisions.

Staff Contact: Erika Frank

Draft Greenhouse Gas Rule Omits Key Issues

From Page 1

California businesses and consumers. The CalChamber noted that ARB's Economic and Allocation Advisory Committee has estimated California businesses would have to pay \$143 billion between 2012 and 2020 just to continue operating in the state if allowance prices reach \$60 per ton by 2020 in a 100 percent auction system. A thorough economic analysis is needed before the ARB considers final adoption of a rule, the CalChamber said.

● The CalChamber also strongly suggested that an auction system or other revenue-raising mechanism would be contrary to the legislative intent of AB 32. A letter by the author of the

legislation states that the intent of AB 32 is for any revenues raised to be used only for direct administrative costs. Accordingly, the CalChamber does not believe ARB has the legal authority to adopt revenues beyond a reasonable charge for administrative activities.

● The state avoid taking a California-only approach to drafting its new program and instead allow for "seamless linkages with other national and international programs from the outset."

● The program allow a broader use of offsets than the 4 percent limit detailed in the preliminary draft rule. Real, verifiable offsets should not be limited geographically. Research has shown that

maximizing the use of offsets would be one of the most effective tools for reducing program costs while achieving AB 32's greenhouse gas reduction goals, the CalChamber noted.

● ARB analyze the potential economic impacts of bringing transportation fuels into the cap-and-trade program before developing regulations to speed the timeline for including fuels. Sticking with the 2015 timeline for including transportation fuels and natural gas in the program allows California time to transition the cap and trade program to include fuels, the CalChamber wrote.

Staff Contact: Brenda Coleman

CalChamber-Sponsored Seminars/Trade Shows

More information at www.calchamber.com/events.

Business Resources

Economic Summit. Beverly Hills Chamber. February 24, Beverly Hills. (310) 248-1000.

International Trade

Annual Economic Lunch Forecast. British American Business Council Northern California. January 19, San Francisco. (415) 683-3175.

China Import/Export Fair Briefing. California-Asia Business Council. January 29, Burlingame. (415) 986-8808, ext. 464.

Tex-Styles India. India Trade Promotion Organisation. February 24–27, Pragati Maidan, New Delhi, India. info@texstylesindia.com.

Cairo International Fair. General Organization for International Exhibitions and Fairs. March 11–22, Cairo, Egypt. info@cairofair.com.

Globe 2010. The GLOBE Foundation. March 24–26, Vancouver, BC. (604) 695-5001.

Stonetech 2010. CCPIT Building Materials Sub-council. April 6–9, Shanghai, China. kontakt@merebo.de.

Asiawater 2010. AMB Exhibitions

Sdn Bhd. April 6–8, Kuala Lumpur, Malaysia. kontakt@merebo.de.

Labor Law

HR 201: California Labor Law Update. CalBizCentral. January 20, San Jose; January 21, Emeryville; January 28, Live Webinar. (800) 331-8877.

CalChamber Calendar

California Business Summit/Host Breakfast: May 17–18, Sacramento

FEATURED SPEAKER

Howard Fineman

NEWSWEEK SENIOR WASHINGTON CORRESPONDENT



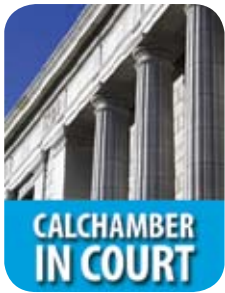
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2010 Business Summit

MAY 17 AND 18 | SACRAMENTO CONVENTION CENTER

CalChamber in Court

CalChamber Goes to Court to Protect Businesses from Class Action Lawsuits



Despite the urging of the California Chamber of Commerce, the U.S. Court of Appeals for the 9th Circuit has declined to rehear a case that rewards litigants who sue in areas most favorable

to their lawsuit (forum shopping) and puts California-based businesses at a disadvantage.

The ruling in the case of *Greg Masters and John Murphy v. DIRECTV* will encourage consumers from all over the country to bring similar lawsuits in California against California-based businesses.

Class Action Lawsuits

The ruling allows the plaintiffs from Montana and Georgia to disregard their agreements to individually arbitrate disputes in their home states—agreements that would be upheld under either Montana or Georgia law—and instead to file nationwide class action lawsuits in California.

The federal court panel refused to

honor the employer’s consumer-friendly contractual choice-of-law agreements providing that the laws in the consumer’s home state govern in a dispute. The panel then applied California law to nullify contractual provisions requiring the parties to individually arbitrate their disputes.

The decision distorts an established choice of law analysis into one that treats California-based businesses differently from businesses based in other states, even though they are engaged in the same transactions with customers in other states. As such, it places California-based businesses at a competitive disadvantage.

The CalChamber asked the 9th Circuit to either rehear the case or for all judges in the court to rehear the case *en banc* because the decision of the court panel creates an inequitable rule that applies only to California-based businesses and is in direct conflict with another decision of the same court.

Costly Litigation

By rejecting the enforceability of a contractual choice-of-law provision, the decision could subject California-based businesses to more costly litigation than businesses based in other states.

The increased likelihood of being sued would create a serious disincentive for businesses to base their operations in California and would adversely affect California’s economy and employment, CalChamber argued in its brief.

Ironically, the choice of law agreements struck down are *consumer-friendly* provisions. The provisions do not seek to require that any particular state’s law be used in a dispute because it is favorable to business. Instead, the provisions apply the law of the consumer’s home state, providing the consumer certainty and placing the risks and burdens of differing state laws entirely on the business.

The decision also creates a conflict within the 9th Circuit, leading to uncertainty and confusion for both businesses and consumers. The home-state choice-of-law provision at issue here gives consumers certainty that the law of their own home state will apply, rather than that of the home state of the corporation. The decision invalidates these consumer-friendly provisions and creates nothing but uncertainty about which state’s law—or even which decision of the 9th Circuit— will apply.

Staff Contact: Erika Frank

Expedited Jury Trial Option Available Soon in California

The California Chamber of Commerce was selected to be part of a working group of attorneys, judges and other associations to provide commentary and feedback on a proposal that would allow expedited jury trials in California.

Two states, South Carolina and New York, currently offer such trials. The proposed rule contains many of the procedures being followed in these two states.

Key Features

Key features are as follows:

- In an expedited jury trial, the two sides voluntarily agree in advance to a high/low amount of damages. There is no

record, the trial lasts a day or two and the agreement is binding.

- In addition, evidentiary issues are decided ahead of time, there are fewer jurors (likely eight jurors instead of 12), and each side has a limited amount of time to present its case.

In South Carolina and New York, both plaintiffs’ and defense lawyers have said expedited jury trials promote efficiency and cost savings.

A typical case for an expedited jury trial is a minor automobile accident in which there is no question that the defendant rear-ended the plaintiff, but the amount of damages is at issue. The plaintiff’s lawyer and the defendant’s

lawyer (as well as the insurance company, if there is one) all agree to the expedited jury trial format to allow a jury to determine the amount of damages.

The high limit might be the insurance policy limit or a lower amount, and the low limit might be \$0 or an amount to cover some fixed expenses the plaintiff has already incurred.

More Information

CalChamber members who would like more information about the current draft proposal for expedited jury trials, please contact Erika Frank, erika.frank@calchamber.com.

Release of State Budget Plan Leaves Many Questions



From Page 1
spending growth was bolstered by \$15 billion in deficit bonds approved by voters in 2004. And in 1999, the fuse was lit on accelerated growth in government employee pensions

with an enormous boost in unfunded benefit increases. In the meantime, very few revenues were set aside in a rainy day reserve.

When the recession arrived, tax revenues took a dive. With no financial cushion available and the Legislature unwilling to make draconian cuts in public services, the state went even more deeply into debt.

Aren't state revenues increasing next year? If so, why are we still facing a deficit?

State General Fund revenues will increase next year by about \$1 billion (1.4 percent), still less than what was estimated last July. But the deficit remains gaping for three main reasons:

- **Historic deficits.** The state begins the year in the hole. California's last fiscal year began with a \$3.6 billion balance and closed last June with a \$5.9 billion deficit. The state must climb out of that hole before addressing the revenue shortfalls and spending demands ahead.

- **One-time solutions.** Spending this year was suppressed temporarily by adopting "savings" or revenues that would last only one year. Most notorious was shifting the payroll date for state employees by one day, to create the obligation in the next fiscal year. In addition, billions in federal aid will expire this year, as well as billions in advanced tax revenues that will be unavailable next year and thereafter.

- **Vanishing solutions.** This year's budget also depended on billions of dollars in solutions that will never come to pass, or that will occur far in the future. The Governor has identified more than \$7 billion worth of phantom solutions that were either stymied by litigation (for example, selling part of the State Compensation Insurance Fund) or never

fully implemented by the Legislature (for example, achieving systemic savings in the Department of Corrections budget).

Taken together, these defects comprise the major component of the state's nearly \$20 billion structural deficit.

If revenues are increasing year-to-year, why not just freeze spending at this year's level?

The effect of the deficits and gimmicks discussed above means that spending this year is still far above available revenues; the Governor is targeting \$83 billion in spending for next year after covering the accumulated deficits and making up for the one-time revenues and stymied previous solutions. The Legislature must still confront actual spending decisions—meaning eliminating programs, reducing local assistance and income support payments, or cutting government employee salaries or jobs—to bring the budget into balance.

Why can't the state restrict expenditures to the same programs and services we had the last time revenues were \$83 billion?

That would be six years ago, and since then, prison populations have increased, state health care entitlement caseloads have grown, and the constitutional guarantee for education spending has continued to rise. Salaries have increased, as has the cost of goods, utilities and other public program inputs.

What a mess! So how does the Governor propose to fix this?

The Governor has three primary strategies: beg, shift and cut.

- The budget solution is predicated in large part on obtaining nearly \$7 billion in federal aid, both in direct funding support or reforms that would permit the state to reduce spending on public services.

- The budget proposes to finance numerous health and welfare programs from existing tobacco and high-earner income taxes. These taxes are currently dedicated to programs enumerated in the authorizing ballot measures. The budget also proposes to eliminate the current state sales tax on motor fuels, replacing it with a new fuels excise tax (that is, per gallon tax). This change will enable the state to cease subventions to local public transit

agencies and General Fund debt service payments for transportation bonds.

- The Governor proposes about \$8.5 billion in spending cuts, primarily in health and welfare programs, corrections, and state employee salary and benefit costs.

Has the Governor proposed any tax increases?

Not immediately or directly, but he has proposed tax increases "in the event that the federal government fails to provide the \$6.9 billion of additional funding proposed in the budget." This "trigger" would provide additional state program cuts (two-thirds) and tax increases (one-third) to replace federal funds not received.

The potential tax increases are:

- Extend suspension of a business's ability to reduce taxable income by applying net operating losses (NOL) from prior years to reduce current income.

- Extend reduction in the dependent credit on the personal income tax from \$319 to \$102.

- Delay use of business credits by unitary groups of corporations and instead retain current law, which requires subsidiaries to have their own tax liability to use research and development and other credits.

- Delay the change to the single sales factor allocation method for multi-state corporate income and instead retain the double weighted sales, property and payroll formula.

- Lower to 30 percent the first year phase-in of the ability of corporations to carry back losses two years to offset prior tax profits.

These tax incentives would be delayed for only one year.

In addition, as described above, the Governor proposes to partially replace the current state sales tax on gasoline and diesel (6 cents per dollar) with a new 10.8 cents per gallon fuel tax. The Governor estimates motorists would save nearly a billion dollars a year from this transaction. Transportation advocates will be worried that, among other concerns, the excise tax will grow more slowly than the sales tax, since the former is based on volume, which grows more slowly than receipts.

Contact: Loren Kaye

New Law Strengthens Schools, Helps State Compete for Federal Funds

California Chamber of Commerce-supported school reform legislation that also helps California compete for federal education funding has been signed into law.

After several months of debate, the Senate, led by President Pro Tem Darrell Steinberg (D-Sacramento) and Senate Education Committee Chair Gloria Romero (D-East Los Angeles), legislators developed legislation to comprehensively address the federal incentive grants offered as part of President Barack Obama's Race to the Top initiative.

Faced with a tight deadline, legislators moved the bills swiftly through both houses of the Legislature last week and Governor Arnold Schwarzenegger signed them on January 7.

State Reforms

Together, SBX5 1 (Steinberg) and SBX5 4 (Romero) will:

- Allow districts to tie teacher and administrator evaluations to student performance if allowed by collective bargaining agreements.
- Require the governing board of a school district to implement one of four interventions set forth in federal Race to the Top legislation if one of its schools has been identified as persistently low-achieving.
- Require the state to participate in the Common Core State Standards Initiative consortium sponsored by the National Governors Association and the Council of Chief State School Officers, or other interstate collaboration efforts.

- Establish a longitudinal data system(s) to aid in educational reform efforts at all levels of government.

- Empower parents to bring meaningful reform to persistently failing schools by requiring districts to take drastic steps to improve persistently failing campuses when more than 50 percent of parents served by that school sign a petition demanding action (limited to 75 schools statewide).

- Allow parents of students in 1,000 of the state's low-achieving schools, as identified annually by the State Superintendent of Public Instruction, to apply for a transfer to a school in another district.

- Establish the Science, Technology, Engineering, Math and Career Technical Education Educator Credentialing Program to increase the number of highly qualified teachers in these critical fields.

Board of Equalization Vice Chair Talks Taxes



Photo by Aaron Lambert

Jerome Horton, vice chair of the State Board of Equalization, comments on budget and tax issues affecting California businesses at the CalChamber Lunchtime Tax Roundtable Discussion on January 7.

Better Opportunities

The CalChamber, one of many groups in favor of strengthening the state's education system, supported both bills, including the more controversial "parent-trigger" and "open-enrollment" provisions, which will help make school reform a more democratic process and provide better opportunities for the state's most under-served student populations.

Race to the Top

President Obama's Race to the Top initiative was adopted as part of the February 2009 economic stimulus legislation.

The legislation used competitive grants to encourage states to develop policies in four areas:

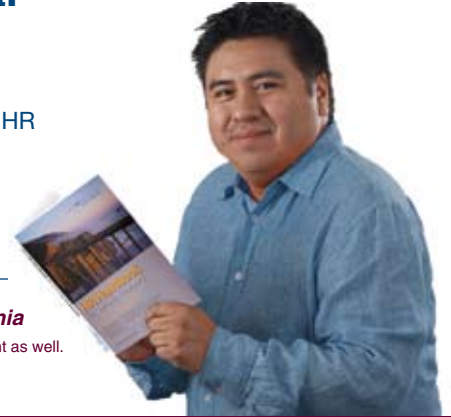
- Adopting standards and assessments that prepare students to succeed in college and the workplace and to compete in the global economy;
- Building data systems that measure student growth and success, and inform teachers and principals about how they can improve instruction;
- Recruiting, developing, rewarding and retaining effective teachers and principals, especially where they are needed most; and
- Turning around the lowest-achieving schools.

Staff Contact: Mira Guertin



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