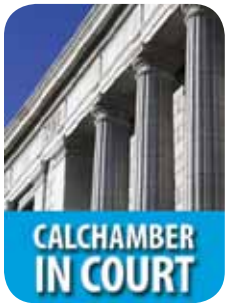


ALERT

VOLUME 37, NUMBER 32 • NOVEMBER 11, 2011



State High Court Hears Meal/Rest Case Arguments



The California Supreme Court heard oral arguments on November 8 in a case that will have a major impact on how employers must handle meal and rest breaks.

The issue in *Brinker v. Superior*

Court is whether the employer must ensure that the employee takes the meal period or if the employer simply must make the period available to the employee.

Specifically, the lawsuit centers on the language of Labor Code Section 512, which states: “An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes.”

What Does ‘Providing’ Mean?

The unresolved issue before the court is the meaning of the word “providing.” Must the employer ensure that the employee actually takes the meal period? Or does the employer meet its obligation if the employer makes the meal period

See State: Page 4

CalChamber, State Agencies Warn of Misleading Solicitations



The California Chamber of Commerce, the state Board of Equalization (BOE) and the state Labor Commissioner are warning businesses to be aware of

misleading solicitations that appear to be official correspondence from a state governmental agency.

According to the BOE and Labor Commissioner, businesses in California have reported that they have received notices from the “California Labor Compliance Bureau,” requesting immediate payment of a “processing fee” of \$275.

The California Labor Compliance Bureau is not a government agency.

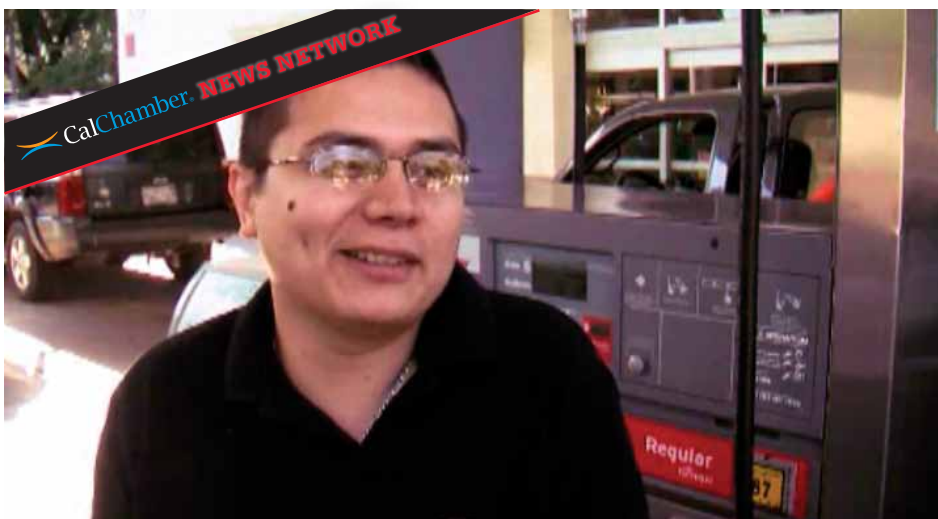
The notices use publicly available information, such as BOE account numbers and industry codes, to make them appear to be official correspondence.

Neither the BOE nor the Labor Commissioner’s office is affiliated in any way with the California Labor Compliance Bureau.

The “processing fee” is purportedly for labor-related notices that California employers are required to post at their business premises informing employees

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News Video Spotlights Air Board Hidden Tax



The latest installment of CalChamber News focuses on the impact of the California Air Resources Board approval of a cap-and-trade program that includes a tax estimated to raise \$2 billion from California businesses. Increased costs will be passed down to consumers. See the video at www.calchamber.com or at YouTube.com/calchamber.

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Labor Law Corner

Employee Signature on Time Card No Excuse for Inaccurate Information



Barbara Wilber
HR Adviser

Does the law require that an employee sign the time record? What regulations govern modification of time records by a supervisor/manager? Does the employee have to sign any changes made on the time card?

Nothing in the law requires an employee to sign a time card or denies a supervisor the right to change a time card to accurately reflect the time worked. The

time record requirements appear in both the Labor Code and Industrial Welfare Commission (IWC) orders, which state in part:

(A) Every employer shall keep accurate information with respect to each employee including the following:

- (1) Full name, home address, occupation and Social Security number.
- (2) Birthdate, if under 18 years, and designation as a minor.

(3) Time records showing when the employee begins and ends each work period. Meal periods, split shift intervals and total daily hours worked shall be recorded. Meal periods during which operations cease and authorized rest periods need not be recorded.

Employer Responsibility

The employer's obligation to keep accurate time records usually is delegated to the employee, but ultimately it remains the employer's responsibility.

Although not a requirement, it is a common practice for employers to ask employees to sign either just the time card or to sign a statement affirming that the time record is accurate.

The fact that the signature exists and appears to confirm the accuracy of the time record in and of itself does not automatically absolve the employer of any liability for unpaid time.

Errors in Records

Different scenarios come to mind. The employee may remember later that he/she worked an additional hour that was not reflected, or the employee may allege that he/she recorded the beginning time incorrectly, or forgot to sign in or out at all.

In other words, there are many reasons the record may be in error, even with an employee's signature.

Further, Labor Code Section 206.5 bars an employer from requiring a signed statement acknowledging, as accurate, a knowingly false time record. Requiring an employee signature is an individual company decision to be made with your legal counsel's advice.

Although nothing prevents modification to reflect the accurate hours worked and to correct any errors, the best practice is to include time-keeping policies in your handbook. Establish how discrepancies will be addressed and limit access to the official record.

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.

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CalChamber-Sponsored Seminars/Trade Shows

More information at
www.calchamber.com/events.

International Trade

Export Training Assistance Program (ETAP). Centers for International Trade Development. November 2–January 18. (714) 310-6908.

International Exhibit of Chemical Industry. Trust International Group. November 28–30, Alexandria, Egypt.

WITmas. Women in International Trade. December 7, Long Beach. (916) 563-3200.

World Ag Expo. California State Trade and Export Promotion (STEP). February 14–16, 2012, Tulare. (209) 384-5892.

CeBIT. California STEP. March 6–10,

2012, Hannover, Germany.
IE Expo. California STEP. March 7–9, 2012, Shanghai, China. (310) 973-3161.

COSMOPROF Worldwide. California STEP. March 9–12, 2012, Bologna, Italy. (562) 938-5018.

GLOBE 2012. GLOBE. March 14–16, 2012, Vancouver, Canada. (800) 274-6097.

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**Next Alert:
December 2**



Governor Releases 12-Point Reform Plan for State/Local Employee Pension Systems



Governor Edmund G. Brown Jr. released a 12-point reform plan for state and local pension systems on October 27. The Governor says the plan will help end systemwide abuses and reduce taxpayer costs by

billions of dollars over the long term.

He initially outlined a pension reform plan during budget negotiations in March 2011; this proposal fleshes out the details from that earlier statement.

The Governor also proposed that these changes apply to all levels of government in California.

CalChamber Reaction

“We commend the Governor for a bold and substantive proposal that addresses California’s unsustainable state and local pensions and retiree health care costs,” said California Chamber of Commerce President and CEO Allan Zaremberg.

“The Legislature should embrace this common-sense plan that, among other things, recognizes that pensions need to change as life expectancy is lengthened. Addressing pension and health care costs will allow state and local governments to fund programs critical to our economy, including higher education, K-12, public safety, and the courts,” Zaremberg said.

Governor’s Plan

According to a news release from the Governor’s office, the 12-point plan addresses key issues affecting pensions in state and local governments. The plan includes the following reforms:

- **Equal Sharing of Pension Costs:** All Employees and Employers. Requiring that all new and current employees transition to a contribution level of at least half of the annual cost of their pension benefits.

- **“Hybrid” Risk-Sharing Pension Plan:** New Employees. The plan would include a reduced defined benefit component and a defined contribution component to be managed professionally to reduce the risk of employee investment loss.

- **Increase Retirement Ages:** New Employees. Set retirement ages at the Social Security retirement age (now 67), but less than that for new safety employees.

- **Require Three-Year Final Compensation to Stop Spiking:** New Employees. Require that final compensation be defined as it is for new state employees—the highest average annual compensation over three years.

- **Calculate Benefits Based on Regular, Recurring Pay to Stop Spiking:** New Employees. Compensation is to be defined as the normal rate of base pay, excluding special bonuses, unplanned overtime, payouts for unused vacation or sick leave, and other pay perks.

- **Limit Post-Retirement Employment:** All Employees. Limit all employees who retire from public service to working 960 hours or 120 days per year for a public employer, plus prohibit retired employees who serve on public boards and commissions from earning any retirement benefits for that service.

- **Felons Forfeit Pension Benefits:** All Employees. Public officials and employees are to forfeit pension and related benefits if convicted of a felony in carrying out official duties.

- **Prohibit Retroactive Pension Increases:** All Employees. Banning the practice of applying pension benefit enhancements to work already performed by current employees and retirees.

- **Prohibit Pension Holidays:** All Employees and Employers. Prohibit all employers from suspending employer and/or employee contributions needed to fund annual pension costs.

- **Prohibit Purchases of Service Credit:** All Employees. The practice of allowing employees to buy additional retirement service credit for time not actually worked will be prohibited.

- **Increase Pension Board Independence and Expertise:** Add two independent public members with financial expertise to the California Public Employees Retirement System (CalPERS) Board.

- **Reduce Retiree Health Care Costs:** State Employees. Require more state service to become eligible for health care

benefits at retirement.

To view the entire plan, visit the Governor’s website, www.gov.ca.gov.

Legislative Analyst Review

In a report issued on November 8, Legislative Analyst Mac Taylor called the Governor’s proposal “a bold excellent starting point.”

Taylor said the proposal could increase public confidence in the state’s retirement benefit systems by shifting more of the financial risk for public pensions to employees and retirees. In doing so, the proposal “would substantially ameliorate this key area of long-term financial risk for California’s government,” Taylor said.

The legislative analyst also praised the Governor’s proposal for aiming to provide public workers with a package of retirement benefits that would be both sufficient to sustain employees’ standards of living during retirement and more closely aligned with benefit packages offered to private-sector workers.

Taylor noted that the Governor’s proposal left unanswered key details about how the hybrid benefit and retirement age proposals would work, as well as issues related to funding problems for the state teachers retirement system and University of California pensions.

The legislative analyst also advised legislators to focus on changes to future workers’ benefits because “raising current workers’ contributions is a legal and collective bargaining minefield.”

Proposed Ballot Measures

On November 2, a group called California Pension Reform filed two proposed initiatives, expressing hopes of putting one on the November 2012 ballot.

The two proposed initiatives “go further than Brown’s proposal, tackling benefits for existing workers as well as future hires,” according to the *Los Angeles Times*. One proposal shifts most state workers to a 401(k)-style plan, as well as capping how much an employer can pay toward a worker’s retirement and asking current workers to pay more of their own retirement than the Governor’s proposal, the *Times* reported.

State High Court Hears Meal/Rest Case Arguments

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available to the employee?

Another important issue before the court is the timing of meal periods and also rest breaks. Before the court is the question of whether the Labor Code requires that the meal period be provided after five consecutive hours of work on a rolling basis.

Does the statute prohibit the practice of requiring an employee to take an early or late lunch? Is an employee entitled to take a meal break at any time during the shift?

Questioning Recap

Following are some highlights of the questioning.

It should be noted that the direction of the questions doesn't always lead toward the ultimate decision of the court.

1. **The justices started their questioning mere moments into the plaintiff's argument.** The first line of questioning related to the legislative history regarding meal periods and rest breaks and whether the Wage Orders issued by the Industrial Welfare Commission prevail over the statutory language of the Labor Code.

2. **Justice Joyce L. Kennard immediately focused on the key dispute:** Must employers merely make meal periods available to employees? Or do employers have to ensure that they are taken? Justice Kennard appeared to view the plain language of the statute, and the use of the word "providing" in that statute, as critical to the resolution of the case.

In response, plaintiff's counsel, Kimberly Kralowec, argued that the Wage Order history indicates the standard is that employers should ensure that meal periods are taken.

3. **Justice Kennard wanted to know how employers can ensure that hundreds of workers take meal periods.** "Let's assume one has hundreds or even thousands of employees," said Justice Kennard. "How is an employer going to ensure each of these hundreds of workers or thousands of workers is actually taking a meal break? Why not give some flexibility?"

Allowing employers "flexibility" was a common theme. Justice Goodwin



Associate Justices Joyce L. Kennard and Goodwin Liu posed questions zeroing in on key meal and rest period issues for employers during the oral arguments in the *Brinker* case.

Liu asked whether it would not be the most protective to workers to leave the decision to the worker to take the meal break once it is made available.

Justice Liu asked, "Isn't the most worker-friendly interpretation of this is that the worker should be able to do whatever he or she wants during a meal period?"

4. **The justices peppered plaintiff's attorneys with questions** about how managers could force employees to take the meal period and if they could fire employees who refused to do so. Some justices appeared hesitant to adopt an argument that could put an employer in the position of firing an employee who chooses to work through his or her lunch.

5. **The justices also questioned plaintiff's counsel** regarding the timing of rest breaks and whether the case was appropriate for class action certification.

6. **Brinker's counsel, Rex Heinke, also opened his argument with a discussion of the statutory history and the wage orders.** Heinke told the court, "We believe the employer has an obligation to make meal periods available to employees. But nowhere in Wage Orders or the statute does it say the employer must force the employee to take 30 minutes."

7. **The justices questioned Brinker's counsel about the timing of the meal break.** Justice Liu's questioning was particularly focused on the issue of whether the employer is obligated to make the meal period available for every five consecutive hours of work and not at

an earlier or later time in the shift.

Brinker's counsel argued that nothing in the statutory language suggests that meal periods must be provided at a certain time. Brinker's counsel argued that employers should have flexibility over when meal periods are taken and that some employees, for instance wait staff, would rather work during a busy stretch than take a meal period, in order to receive better tips.

After nearly an hour of argument, the state high court took the case under submission. **The court has 90 days to issue a decision.** This means that a ruling can be expected on or before February 6, 2012.

Follow-Up Webinar

The CalChamber is urging interested businesses to sign up to receive email notification of the court's decision, plus advance notice of CalChamber's follow-up webinar, "Meal & Rest Breaks: What Does the *Brinker* Decision Mean for Your Workplace?" by December 15. The signup form is available at www.calchamberstore.com.

For the *Brinker* webinar, Susan Kemp, CalChamber senior employment law counsel, and Erika Frank, vice president and general counsel and head of the CalChamber Legal Affairs Department, will analyze the *Brinker* decision and discuss its impact on current meal and rest break requirements. Seminar attendees will also learn best practices and tips on complying with the court's ruling.

Canada's Consul General Speaks on Importance of New Oil Pipeline

Canada's Consul General in Northern California Cassie J. Doyle discussed the importance of a U.S.-Canadian energy partnership at a World Affairs Council of Northern California event co-sponsored by the University of the Pacific, McGeorge School of Law, the McGeorge International Law Society and the California Chamber of Commerce on November 8.

The discussion stressed the importance of U.S. approval of the Keystone XL Pipeline, which would transport increased Canadian oil imports to the Gulf Coast refineries. The project is expected to create 20,000 high-paying jobs and thousands more over the pipeline's lifetime, in addition to creating 118,000 indirect jobs in the communities surrounding the pipeline, said Richard Raisler, moderator of the discussion.

A Partner with Integrity

Canada is the second largest hydrogen energy producer, the third largest natural gas maker, and home to some of the largest oil reserves in the world, Doyle said.

Canada is increasingly developing alternative energy sources, such as windmills and green-powered labs, and is investing in such projects within California. In particular, Canada is investing in clean tech firms in the Silicon Valley, Doyle said.

Since 2006, California has been increasingly importing more oil from Canada, all transported through oil tankers, she said. Construction of a state-of-the-art pipeline, such as the Keystone XL Pipeline, would make the transportation of oil into the U.S. more efficient and environmentally friendly, Doyle added.

Moreover, it would link the United States with a reliable, democratic country that shares many of the same practices and standards as the U.S., she said.

Canada has remained California's second largest export market since 2006, with a total value of \$16.1 billion in 2010, making up 11 percent of all California exports.

For more information, visit www.calchamber.com/canada.
Staff Contact: Susanne Stirling



Photo by Megan Wood

Cassie J. Doyle, consul general of Canada, chats with California Senator Ted Gaines (R-Roseville) following her comments on the U.S.-Canada energy relationship at the CalChamber on November 8.

CalChamber-Sponsored Seminars/Trade Shows

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WorldBEX. California STEP and Northern California Regional Center for International Trade Development. March 14–18, 2012, Manila, Philippines and Singapore. (916) 562-3222.

Sri Lanka Expo 2012. Sri Lanka Consulate. March 28–30, 2012, Colombo, Sri Lanka. (213) 387-0214.

Labor Law

HR 101: Intro to HR Administration Seminar. CalChamber. December 7, Emeryville; January 9, 2012, Costa Mesa; January 12, 2012, Long Beach; January 18, 2012, San Jose; April 11, 2012, Sacramento. (800) 331-8877.

FMLA/CFRA: Beyond the Basics Seminar. CalChamber. December 8, Emeryville; January 10, 2012, Costa Mesa; January 19, 2012, San Jose. (800) 331-8877.

HR 201: California Labor Law Update Seminar. CalChamber. December 9, Sacramento; January 10, 2012, Costa

Mesa; January 11, 2012, Anaheim; January 13, 2012, Long Beach; January 19, 2012, San Jose; January 20, 2012, Emeryville. (800) 331-8877.

CalChamber Calendar

Business Services Committee:

December 1, San Francisco

Water Committee:

December 1, San Francisco

Education Committee:

December 1, San Francisco

Board of Directors:

December 1–2, San Francisco

International Trade Breakfast:

December 2, San Francisco

Annual Meeting:

December 2, San Francisco

Fundraising Committee:

December 2, San Francisco

Public Affairs Council Retreat:

February 2–3, Santa Monica

Export Council Continues Support of Call to Double Exports over Five Years

The National Export Initiative was at the forefront of the agenda when the National Export Council met November 2–5 in Las Vegas.

Representatives of the 58 district export councils (DECs) from across the country, with a membership of 1,500, met to continue their efforts to assist leading exporters to global success. The effort to educate and train small and medium-sized businesses in exporting is the focus. Advocacy, outreach and export support comprise the DEC goals.

More information is available on the CalChamber's District Export Council page, www.calchamber.com/DEC.

National Export Initiative

The National Export Initiative is President Barack Obama's call for the doubling of exports over five years—by 2015.

Only 1% of U.S. companies export, so there is major room for growth, especially as exports are a bright spot in the world's economy.

CalChamber DEC Members

Susanne Stirling, vice president of international affairs for the California Chamber of Commerce, is a long-standing member of the DEC. Several CalChamber member company representatives also are DEC members:

- Roy Paulson of Paulson Manufacturing, a member of the CalChamber Council for International Trade (CIT), is chair of the Inland Empire DEC and is the new secretary and treasurer of the National DEC;

- Paul Oliva of Oliva Communications, a long-standing member of the CalChamber CIT, is chair of the Northern California DEC;

Members are appointed by the secretary of the U.S. Commerce Department.

30th Anniversary

This meeting also celebrated the 30th anniversary of the U.S. Commercial and Foreign Service of 1,430 individuals. Suresh Kumar, director-general of the U.S. and Foreign Commercial Service, attended the celebration and made several presentations regarding export activities.

On a separate note, continued funding of the U.S. Commercial and Foreign Service is of concern for the exporting community as Congress addresses spending priorities.

California STEP

A national project to assist with export growth was a topic of discussion. The California State Trade and Export Promotion (California STEP) project combines a network of state, federal, private and non-profit trade promotion organizations in California to facilitate export promotion activities, serving targeted industries, to drive exports for small businesses.

Survey on Impact of Foreign Non-Tariff Barriers

The DEC has an initiative with the U.S. Department of Commerce Market Access and Compliance Division and is now conducting a survey on barriers.

Companies that export are asked to take a moment to complete this survey on the impact of foreign non-tariff barriers. These barriers have a negative impact on the competitiveness of U.S. exporters. Answers to this survey will be of great assistance to DECs in fulfilling the mission to contribute to America's

international competitiveness.

To take the survey, visit www.calchamber.com/international.

Export Control Reform

The DEC continues its focus to urge the U.S. administration to modernize the export control system. In August 2009, President Obama issued a comprehensive review on export control reform.

The assessment found that the current U.S. export control system does not sufficiently reduce national security risk because its structure is overly complicated, contains too many redundancies, and tries to protect too much.

Trade Promotion Authority

Among other export policy-related discussions and considerations, the National DEC adopted a resolution resolving that Congress should grant a renewal of Trade Promotion Authority (TPA) to the President of the United States for the purpose of negotiating trade agreements. This will ensure that trade agreements will be negotiated in the most efficacious and expedient matter.

The CalChamber has long-standing policy in support of TPA.

Staff Contact: Susanne Stirling

CalChamber Hosts Delegation from Sinaloa



Photo by Megan Wood

A delegation from Sinaloa, Mexico visits the CalChamber offices to discuss the possibility of a trade mission from California to Sinaloa, Mexico in 2012, to explore economic alliances between the two states. From left are: Carlyle "Carl" Brakensiek of AdvoCal; Alberto Perez Lopez; Susanne Stirling, CalChamber; Carlos Balderrama Verdugo, executive president of CODESIN, an organization where employers and government work together on projects, strategies and public policies to attract and retain investment in Sinaloa.

Impact of 2012 Elections on Business Focus of Public Affairs Retreat

The California Chamber of Commerce is hosting the 2012 Public Affairs Council Retreat to provide insights on the 2012 elections and their impact on strategies for business success in California.

The conference will be held in Santa Monica from February 2–3, 2012, and will include an optional evening reception on February 1 and an optional morning program on February 2.

The retreat will address subjects such as:

- Who is the Tea Party and What Impact Will It Have on the 2012 Elections?;
- California Legislative Races Analysis;
- JobsPAC—How the Business Community Can Be Successful;
- Competing for the Latino Voter: Are



They Truly Up for Grabs?;

- A National Snapshot with NBC/Wall Street Journal Pollsters; and
- Initiative Armageddon.

Register by January 4 to Save

Retreat registration includes the optional programs on February 1–2, as well as the dinner on February 2.

Early registration (before January 4, 2012) is \$400 for CalChamber members and \$500 for non-members. Registration after January 4, 2012 is \$450 for CalChamber members and \$550 for non-members.

To register, visit RegOnline.com/PACRetreat2012 or visit CalChamber.com.

CalChamber, State Agencies Warn of Misleading Solicitations

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of their legal rights under the National Labor Relations Act.

The notices in question are available from the National Labor Relations Board (NLRB) website at <https://www.nlr.gov/poster>.

State workplace postings are available from the Department of Industrial Relations website, www.dir.ca.gov/wpnodb.html.

Official Correspondence

Correspondence from the BOE will always feature the BOE's title and/or logo and contain contact information. The agency said if a business receives a notice and questions whether it is official BOE correspondence, the business should contact the local BOE office (a list of BOE field offices is at www.boe.ca.gov/info/phone.htm), or the BOE's Information Call Center at (800) 400-7115.

California Labor Commissioner Julie A. Su has reminded employers that investigators from the state Division of Labor Standards Enforcement who visit businesses to ensure they are complying with labor laws will never request payment in lieu of citations or ask for money on site.

She encouraged employers to ask for state identification and a business card from anyone purporting to be an investigator.

If an employer is approached by someone claiming to be a state investigator who asks for payment on site, Su urged the employer to call her office at (415) 703-4810.

NLRB Posting Requirement

In October, the NLRB announced that it is postponing to January 31, 2012 the start date for requiring employers to notify employees of their rights under the National Labor Relations Act (NLRA).

For more information on the poster requirement, including information regarding exclusions from coverage and language requirements, please see the CalChamber's NLRA Poster Questions and Answers document at HRCalifornia.com, which also includes information regarding the updated date.

Employers should assume they will be required to comply with the posting requirement and post the notice on January 31, 2012. CalChamber is preparing a compliance product in time for employers to distribute it to their employees before the new January 31, 2012, deadline.

The CalChamber *Required Notices Kit* includes all 17 required state and federal employment notices most California employers must display, including the new NLRA poster.

Continue to check the CalChamber store website, www.calchamberstore.com, for updated information.

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Don't miss these essential HR seminars conducted by CalChamber's employment law experts.

HR 101: Intro to HR Administration Seminar

Whether you're new to HR or just want a refresher, get a comprehensive overview of common HR issues. **9:00 a.m. – 4:00 p.m. | \$399.00**

Emeryville (12/7/11), Costa Mesa (1/9/12), Long Beach (1/12/12), San Jose (1/18/12), Sacramento (4/11/12)

HR 201: California Labor Law Update Seminar

Learn how recent state and federal court cases and regulatory changes affect your business and how best to apply them. **8:30 a.m. – 12:00 p.m. | \$189.00**

Sacramento (12/9/11), Costa Mesa (1/10/12), Anaheim (1/11/12), Long Beach (1/13/12), San Jose (1/19/12), Emeryville (1/20/12)

Preferred and Executive Members SAVE 25%. That's an extra 5% off your 20% discount. Just register by 11/18/11 and use priority code RSEMP.



Check out our FMLA/CFRA Beyond the Basics Seminar: www.calchamber.com/fmla

REGISTER NOW at www.calchamber.com/hrseminars or call (800) 331-8877.

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