

# ALERT

VOLUME 38, NUMBER 14 • MAY 4, 2012



## Chambers Unite to Support Pro-Business Candidates

*Funding for Bipartisan, Jobs-Friendly Office Seekers*



The California Chamber of Commerce

and local chambers of commerce are joining forces to ensure the business community has sufficient resources to compete against unions and other anti-business special interests in this year's elections.

"In order to be successful in policy, we must first be successful on the politics,"

said CalChamber President and CEO Allan Zaremborg.

### New Opportunity

Major reforms supported by the CalChamber and approved by California voters have created new opportunities for competitive elections this year:

- Thanks to Proposition 11, candidates will be running for the first time this year in competitive districts drawn by the

*See Chambers: Page 6*

## Hearing Set on Job Creator Bill to Curb Costly Litigation



A California Chamber of Commerce-sponsored job creator bill

protecting

employers that rely on state agencies' written advice from costly litigation will be considered May 8 by the Senate Judiciary Committee.

**SB 1374 (Harman; R-Huntington Beach)** protects employers from inappropriate litigation by affirming they can rely upon the state government to provide them with information regarding how to comply with the law.

The bill is supported by the CalChamber and a broad-based coalition including business/employer groups and local chambers of commerce.

Principal co-authors of SB 1374 are Senator Lou Correa (D-Santa Ana), author of a similar 2011 bill, and Assemblymember Donald Wagner (R-Irvine).

### Agency Guidance

California has more than 500 agencies responsible for interpreting and enforcing laws. Californians are expected and encouraged to seek guidance and information from these agencies to determine how to comply with the state's numerous laws and regulations.

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## CalChamber Cites Flaws of Proposition 29



Photo by Megan Wood

CalChamber Vice President of Government Relations Marc Burgat highlights problems with Proposition 29 at an Assembly legislative committee hearing on May 1. Story on Page 5.

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Four Bills Fall Off 'Job Killer' List: Page 7

## Labor Law Corner

# Sick Leave Reduces Disability Benefit Amount; Vacation Pay Doesn't



**Dana Leisinger**  
HR Adviser

*When an employee goes out on disability (not workers' compensation), do we have to pay him if he's used up all his sick leave? And since he doesn't get his entire salary, do we have to pay him to make his salary whole? Can we use his vacation balance to supplement the disability income?*

California State Disability Insurance (SDI) is a partial wage-replacement insurance plan for California workers. The SDI program is state-mandated, and funded through employee payroll deductions. There is no employer money in the fund—it is entirely employee-funded.

An employee going out on SDI has a waiting period of seven days, and then he/she begins to receive benefits. The benefit rate is approximately 55% of the employee's regular pay, with a cap of \$1,010 per week, so the disabled worker is not receiving 100% of his/her pay in SDI payments.

### Sick Leave

An employee can use sick leave to make his/her income whole, but must be scrupulous in reporting any income from his/her employer, as sick leave can reduce the SDI benefit.

If the employee doesn't have any sick leave, however, the employer is not required to pay/advance sick leave. In addition, recent regulations have mandated that if the employee is receiving disability pay, the employer cannot require that he/she be paid sick leave.

Types of income besides sick leave

that could reduce the SDI benefit are: commissions, bonuses, holiday pay, workers' compensation payments, and military pay.

### Vacation Pay

Vacation pay does not affect the SDI benefit payment, however. Many disabled workers prefer to use their vacation balance to supplement the disability pay.

If an employer is going to allow the disabled employee to integrate SDI with sick or vacation time, it is advisable to ascertain what the Employment Development Department (EDD) is paying first, so there is not an overpayment.

It is interesting to note that only five states have statutory disability plans: California, Hawaii, New Jersey, New York and Rhode Island.

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

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## CalChamber-Sponsored Seminars/Trade Shows

More information at  
[www.calchamber.com/events](http://www.calchamber.com/events).

### Labor Law

Pregnancy Disability Leave and Baby Bonding Webinar. CalChamber.

May 17. (800) 331-8877.

Paid or Unpaid—Leaves of Absence for California Employees Webinar.

CalChamber. June 21. (800) 331-8877.

Hiring and Onboarding Basics Webinar. CalChamber. July 19. (800) 331-8877.

Conducting Effective Performance Appraisals Webinar. CalChamber.

August 16. (800) 331-8877.

Employee Discipline Webinar. CalChamber. September 20.

(800) 331-8877.

### Business Resources

YBITS 2 Bidder's Conference/Outreach & Networking. Caltrans. June 14, San Francisco. (510) 286-0974.

### International Trade

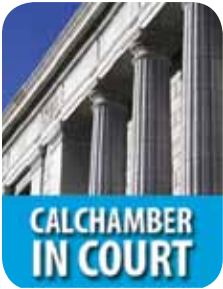
Green Trade Mission to Brazil Briefing.

U.S. Department of Commerce.  
May 9, Los Angeles. (310) 882-1750.  
International Fair of Technologies (IFT) Energy 2012. Chilean Ministry of Energy and CORFO. May 9–11, Santiago, Chile. (877) 492-7028.  
*See CalChamber-Sponsored: Page 4*

Labor law answers  
online [HRCalifornia.com](http://HRCalifornia.com)



# CalChamber Seeks Court Review of Liability, Employment Law Cases



The California Chamber of Commerce is seeking court reviews of cases that will provide businesses with greater certainty on liability and employment law issues.

The CalChamber filed a “friend of the court” brief asking the California Supreme Court to reaffirm that participants in activities beyond sports (in this case a bumper car ride) assume risks inherent in the activity (*Nalwa v. Cedar Fair LP*).

In another “friend of the court” brief, the CalChamber asked the 4th District Court of Appeal to review a lower court decision regarding the legality of rounding employee time entries (*See’s Candy Shops, Inc. v. Superior Court*).

## Assumption of Risk

The fundamental issue in the case of *Nalwa v. Cedar Fair, L.P.* is the legal duties owed by providers of fun and recreational experiences and the reasonable expectations of participants in those activities.

The plaintiff in the case sought damages for an injury suffered from being bumped during a bumper car ride.

The 6th District Court of Appeal held that the primary assumption of risk

doctrine did not apply to the case because the injury occurred in an amusement park.

The CalChamber brief noted that “the very purpose of offering bumper cars is to allow participants the fun and exciting experience of bumping into each other...”

First principles under the assumption of risk doctrine, the CalChamber commented, “dictate that . . . a participant assumes risks inherent in the activity.”

Citing several court cases, the CalChamber pointed out that nothing in California law suggests that courts should adopt a purely categorical approach that somehow limits assumption of risk to “sports.”

The CalChamber continued: “California cases also demonstrate that a sponsor of activities with inherent risks does not have a duty to ‘minimize’ those risks. And California courts have repeatedly rejected the suggestion that there can be no assumption of risk in a regulated activity.”

The CalChamber urged the Supreme Court to reverse the Court of Appeal decision and hold that the primary assumption of risk doctrine can apply to activities other than “sports,” and that commercial enterprises subject to

safety-related regulations may invoke the doctrine.

## Rounding Time Entries

On April 6, 2012, the CalChamber joined the Employers Group and the California Employment Law Council in filing the brief in the *See’s Candy Shops* case.

In October 2011, CalChamber had urged the 4th District Court of Appeal to grant a petition by *See’s Candy Shops* to review a San Diego County Superior Court decision that the practice of rounding employee time entries to the nearest six minutes violates California law.

The issue of rounding time entries is a matter of widespread concern to California employers. The CalChamber regularly receives inquiries from its members concerning the rounding of time entries. Clarifying this issue will be very helpful to California employers and help prevent litigation.

After extensive research, the CalChamber concluded that the California Labor Code does not prohibit rounding and no California appellate decision has held that rounding is illegal.

**Staff Contact: Erika Frank**

## CalChamber Calendar

### International Forum:

May 21, Sacramento

### Water Resources Committee:

May 21, Sacramento

### Host Reception/Host Breakfast:

May 21–22, Sacramento

### Board of Directors:

May 21–22, Sacramento

### CalChamber Fundraising Committee:

May 22, Sacramento

### Environmental Regulation Committee:

May 22, Sacramento



“A stronger economy and jobs climate begins with supporting the ability of businesses of all sizes to succeed, and that’s what CalChamber does.”

FREDERICK R. RUIZ  
CHAIRMAN EMERITUS/CO-FOUNDER  
RUIZ FOODS, DINUBA  
2009 CALCHAMBER CHAIR

CalChamber Member **Feedback**



## Hearing Set on Job Creator Bill to Curb Costly Litigation

*From Page 1*

Ironically, an individual or business that seeks guidance from one of these agencies and relies upon the information provided is given no protection or benefit if litigation is filed to challenge the agencies' advice. For example:

- Under Proposition 13, an insurance company must seek prior written approval from the California Department of Insurance regarding any rate charged to consumers. This approved rate is the only one an insurance company subject to this process is allowed to charge. Yet, if a consumer challenges the rate for being unfair or discriminatory, the insurance company is provided no benefit for being specifically directed by a state agency to charge the rate at issue.

- The Division of Labor Standards Enforcement (DLSE) issues opinion letters on wage, hour and working condition topics, as well as an enforcement manual setting forth the DLSE's interpretation and position on these issues. Employers are encouraged to refer to the DLSE's written materials for "guidance" when there is no published, on-point case available. However, employers are provided with no certainty that they will be shielded from liability if they comply in good faith with the DLSE's written opinions or interpretations.

### Relying on Written Advice

SB 1374 eliminates this problem and provides Californians the security to know that if they seek out and receive written advice from state agencies regarding how to comply with the law, they can rely upon that information.

SB 1374 provides such Californians with legal protection if their actions are challenged in litigation and they can prove their actions were based upon guidance received from a state agency.

This policy provides credibility to California's state agencies charged with the responsibility to enforce such laws and will help to eradicate the negative public perception of state government.

### Precedent

Notably, there is already precedent in the law for giving individuals protection when they rely on the advice of government:

- In California, a taxpayer may be relieved of all taxes, interest and penalties if it can demonstrate that a failure to remit taxes was based upon the taxpayer's reasonable reliance upon the written advice of the chief counsel of the Franchise Tax Board.

- The federal government allows the same defense for employers that rely in good faith upon the advice,

opinion letters and guidance of the U.S. Department of Labor, Wage and Hour Division, regarding the Fair Labor Standards Act. Congress included this defense in the Portal-to-Portal Act, which states that "uncertainty on the part of industry," as well as "the difficulties in the sound and orderly conduct of business and industry," could have a negative impact on commerce.

### Certainty Needed

Uncertainty for Californians regarding the correct application of the state's numerous laws and regulations has a detrimental impact on the state's economy and is a significant burden for those trying to conduct business.

Providing certainty through SB 1374 will help relieve this burden on employers and every other Californian, thereby producing a better business environment, growth in the economy, and improve public perception of state government.

### Action Needed

Contact members of Senate Judiciary and your senator and urge them to **support SB 1374**.

An easy-to-edit letter is available at [www.calchambervotes.com](http://www.calchambervotes.com).

**Staff Contact: Jennifer Barrera**

## CalChamber-Sponsored Seminars/Trade Shows

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Basics of Exporting - Webinars. U.S.

Department of Commerce. May 16-Taking Advantage of NAFTA; May 30-Completing Certificates of Origin; June 13-Financing Your Exports and Getting Paid; June 27-Temporary Exports-Carnets and Other Tools. (800) 872-8723.

Consular Corps Luncheon. Northern California World Trade Center. May 22, Davis. (916) 312-9146.

California Ag Trade Mission to China/South Korea. Fresno Center for International Trade Development. June 9-16, China and South Korea. (559) 324-6401.

U.S.-Africa Infrastructure Conference. Corporate Council on Africa.

June 18-20, Washington, DC. (202) 835-1115.

California Pavilion at Chile-Expo Hospital 2012. Los Angeles Area Chamber of Commerce and CalChamber. June 27-29, Santiago, Chile. (213) 580-7570.

Food Taipei 2012. Taiwan Trade Center, San Francisco. June 27-30, Taiwan. (408) 988-5018.

2012 India Trade Conference. Port of Los Angeles, U.S. Commercial Service, Quanta Consulting. June 28, Cerritos. (949) 480-9466.

Intersolar-North America. Northern California Regional Center for International Trade Development. July 10-12, San Francisco. (916) 563-3222.

Hong Kong Food Expo. Hong Kong

Trade Development Council.

August 16-20, Hong Kong, China. (310) 973-3175.

CA Cleantech Company Trade Mission to China. El Camino College Center for International Trade Development (CITD). August 20-September 2, China. (310) 973-3161.

Green Construction Trade Mission to Brazil. Bay Area CITD. September 9-15, São Paulo and Rio de Janeiro, Brazil.

Expoyalmentaria 2012. Asociacion de Exportadores, Ministerio de Agricultura, Ministerio de Relaciones Exteriores, and Prom Peru. September 19-21, Lima, Peru.

# CalChamber Cites Proposition 29 Flaws

## Measure Creates New Government Bureaucracy with Declining Revenue Stream

California Chamber of Commerce Vice President of Government Relations Marc Burgat highlighted problems with Proposition 29, the tobacco tax measure on the June ballot, at a May 1 legislative hearing.

Proposition 29, **opposed** by the CalChamber, imposes an additional \$1 per pack tax on cigarettes and an equivalent tax increase on other tobacco products to fund research for cancer and tobacco-related diseases.

“While on the surface this may sound like a good idea, we believe that now is exactly the wrong time to be creating a new government program, especially on a declining revenue source when we can’t afford to pay for existing critical programs,” Burgat said at a joint hearing of the Assembly Health and Assembly Revenue and Taxation committees.

### More Opposition

During his testimony, Burgat referred several times to the April 27 *Los Angeles Times* editorial opposing Proposition 29, highlighting the many flaws in the measure.

Burgat reminded the joint committees that Proposition 29 is estimated to raise nearly \$1 billion in new taxes, but nothing in the measure requires the funding to be spent in California or even in the United States.

He cited the *Times* editorial as right on point in explaining that despite

Proposition 29’s intentions, “...it just doesn’t make sense for the state to get into the medical research business...when it has so many other important unmet needs.”

Although there is a statement of intent in Proposition 29 language saying that money raised by the initiative should be used to fund research in California, “there is no mandate to keep it from going to research projects out of state,” the *Times* points out.

Burgat also shared his concern that Proposition 29 circumvents the intent of Proposition 98, which guarantees a minimum percentage of revenue in the General Fund to be used for schools, by creating a special trust fund for the revenue, rather than making it a part of the General Fund. California schools have already faced more than \$20 billion in cuts over the last four years and Proposition 29 will shortchange California’s K–12 programs by more than \$300 million.

“This gimmick ensures that none of the tax revenue collected under Prop 29 will ever go to schools,” Burgat told the joint committee.

### Lack of Accountability

Burgat also reiterated the concern of the *Times* that voters also should be alarmed about the lack of accountability under Proposition 29.

The initiative creates a new

bureaucracy with representatives from three University of California campuses and three members from the state’s federally recognized cancer centers, a physician from an academic medical center and two members from advocacy grounds, but it will have no one representing the public.

The editorial points out that there is “no one to stand up for the idea that taxpayer money should be spent efficiently and fairly, to ensure that salaries aren’t exorbitant and that money doesn’t get sent out of state...”

In conclusion, the *Times* says, “...this initiative takes perfectly good tax money and misspends it... We recommend a no vote on Proposition 29.”

Burgat concluded his testimony by telling the committees that “California needs to focus its priorities and scarce resources on the state’s most pressing issues, including funding for education, health care and the courts. If we are going to increase the tax burden on Californians, we need to address the programs that matter most to California.”

Editorials opposing Proposition 29 also appeared in *The Orange County Register* and *The Press-Enterprise* on May 1.

For more information on the June 2012 ballot measures, visit [www.calchamber.com/ballot](http://www.calchamber.com/ballot).

## CalChamber Positions on June Ballot Propositions

Proposition	Subject	Position
Proposition 28	Limits on Legislators’ Terms in Office	Support
Proposition 29	Additional Tax on Cigarettes for Cancer Research	Oppose

Visit [www.calchamber.com](http://www.calchamber.com) for products and services to help you do business in California.

## Chambers Unite to Support Pro-Business Candidates

*From Page 1*

Citizens Redistricting Commission, rather than ones designed to meet the needs of incumbent politicians.

- The top two candidates open primary will empower voters to choose their representatives in a more competitive general election, rather than a primary election dominated by party extremists.

### Time to Get Involved

“Every business has a responsibility this election season to step up to the plate and help fund pro-jobs candidates,” said Zarembeg. “If Proposition 28 is approved in June, the 2012 elections could very well determine our legislative representatives for the next 12 years.

“We don’t want to look back with regret at squandering this opportunity to have a say in who leads California because employers didn’t raise enough money to support pro-business candidates.”

### More Open Seats

Proposition 28 on the June ballot

reforms term limits to allow legislators elected for the first time this year to serve 12 years in either the Senate or the Assembly.

At least half of seats in the 80-member Assembly are going to change hands this year due to existing term limits and competitive redistricting.

Due to this combination of factors, at least half the candidates elected to the Assembly this year could be incumbents for the next 12 years.

### Business Size No Barrier

“I strongly encourage small and medium employers to engage in the political process rather than just complaining that they are adversely affected by government,” Zarembeg said.

“By pooling resources with business colleagues up and down the state, even small businesses will gain the cumulative clout to influence and win competitive races in California this year.

“Together, we can make sure that job creators have a strong voice in shaping policies that will help, not hurt, the state’s economic recovery.”

### ChamberPAC

The fundraising vehicle for this state-wide, coalition effort uniting chambers of commerce, their members and supporters throughout the state is ChamberPAC, a bipartisan political action committee that makes direct contributions to incumbent office holders and selects candidates who promote and vote for an agenda of private sector job creation.

During the 2010 election cycle, ChamberPAC helped elect four pro-jobs candidates to the Senate (two Democrats and two Republicans), while preventing one party from attaining a two-thirds, veto-proof majority in both houses.

The online contribution form for this bipartisan effort is at [www.calchamber.com/chamberpac](http://www.calchamber.com/chamberpac).

### Special Assistance

CalChamber grassroots coordinator Cathy Mesch will be available to provide resources and other support to help local chambers create bipartisan, pro-business fundraising campaigns.

**Staff Contact: Cathy Mesch**

## CalChamber Committee Examines Health Care Law Implementation



Photos by Megan Wood

Implementation of the federal health care law is the focus of the April 26 meeting of the CalChamber Health Care Policy Committee. Ben Conley (left) of Seyfarth Shaw, LLC, discusses potential U.S. Supreme Court rulings on the constitutionality of the law’s individual mandate with CalChamber Policy Advocate Marti Fisher (right) and committee members. Later (right photo), John Lewis, associate director, and Laura Grossman, program analyst with the California Health Benefits Review Program, talk about the intersection of state health insurance benefit mandates, essential health benefits and the benchmark plan option.



## Four Bills Fall Off ‘Job Killer’ List



Four California Chamber of Commerce-opposed “job killer” bills have been taken off the “job killer” list.

Three bills were amended to remove their job killing status and one bill missed a deadline to move and is dead for the rest of the legislative session.

● **AB 1963 (Huber; D-El Dorado Hills) Targeted Tax on Services** — Originally imposed a new sales-and-use-tax base on numerous services, disadvantaging California businesses that will not benefit by the proposed reduction in other tax rates. Amended on April 25 to require a study of proposed changes.

● **AB 2540 (Gatto; D-Los Angeles) Targeted Tax on Services** — Originally imposed a new sales-and-use-tax base on

numerous services, disadvantaging small businesses that may not necessarily benefit from the proposed tax exemption for the first \$10,000 in business income. Gutted and amended on April 25 to deal with different subject, so no longer a “job killer.”

● **AB 1808 (Williams; D-Santa Barbara) Improper Characterization of Private Employees to Allow Potential Card Check Unionization** — Significantly expands the definition of “public employee” to include employees of any private employer where a public agency “shares” in the employment decisions of those private employees, thereby subjecting private employers to petitions of recognition from public employee unions. In Assembly Public Employees, Retirement and Social Security Committee April 30; Failed deadline for a policy committee to hear and send fiscal bills to the fiscal committee.

● **AB 2149 (Butler; D-Los Angeles) Discourages Settlement Agreements**

— Inappropriately interferes in the contractual relationship between two parties by allowing the sharing of certain information contained in settlement agreements. With April 26 amendments, removed from “job killer” list, but the CalChamber still opposes unless amended to ensure that it will not unnecessarily discourage settlement of disputes.

For updates on the remaining “job killer” bills, visit [www.CAJobKillers.com](http://www.CAJobKillers.com).

**Staff Contacts: Jennifer Barrera, Mira Guertin**



## Governor’s Environmental Leadership Award Applications Available

The California Environmental Protection Agency (Cal/EPA) is now accepting applications for the 2012 Governor’s Environmental and Economic Leadership Award (GEELA).

The agency is encouraging those who have demonstrated a strong commitment to preserving and protecting California’s natural resources to apply.

Established in 1993, GEELA recognizes individuals, organizations and businesses that have demonstrated exceptional leadership for voluntary achievements in conserving resources, protecting and enhancing the environment, and building public-private partnerships.

### Award Categories

Award recipients are chosen in 12



categories: Climate Change; Children’s Environmental Education; Sustainable Practices or Facilities; Ecosystem and Watershed Stewardship; Environmental and Economic Partnerships; Comprehensive Land Use Planning; Technological and Market Innovation (new subcategory for Plug-in Electric Vehicle Community Readiness added for 2012); Sustainable Communities; Enhanced Environmental and Economic Leadership; Waste Reduction; Green Chemistry; and Environmental Justice.

### CalChamber Member

Last year, California Chamber of Commerce member Anheuser-Busch, Fairfield Brewery, was one of 16 recipients of GEELA. The company was commended for reducing its water, waste and electricity usage through employee ideas. It recycled 99.8% of its solid waste, and employed the use of solar and wind power.

### More Information

Applications for this year’s award will be accepted until June 22.

More information is available at the Cal/EPA website at: [www.calepa.ca.gov/Awards/GEELA](http://www.calepa.ca.gov/Awards/GEELA).

They won’t know unless you tell them.  
Write your legislator.  
[calchambervotes.com](http://calchambervotes.com)



## Meal and rest break rules in California have changed.



Preferred and Executive members receive their 20% discount.

The question of whether employers must ensure employees take breaks or must simply provide breaks has been a source of significant litigation in both federal and state courts.

The California Supreme Court recently rendered its long-awaited decision in *Brinker Restaurant Corp. v. Superior Court*. Ensure you're ready to implement the Court's new ruling by purchasing our on-demand webinar: **Meal and Rest Breaks: What Does the Brinker Decision Mean for Your Workplace?**

Our employment law experts break down the decision in plain English. You learn best practices and tips on complying with the Court's decision, too.

### Learn from the California Employment Law Experts



**SUSAN KEMP**  
Attorney, Senior Employment Law Counsel and HelpLine Manager for CalChamber



**ERIKA FRANK**  
Attorney, General Counsel and Vice President of Legal Affairs for CalChamber

**ORDER** online at [calchamber.com/brinkerwebinar](http://calchamber.com/brinkerwebinar) or call (800) 331-8877 and use priority code ALT.

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