

**ACCESS SACRAMENTO****Business Growth Team****Advocacy Issues Background****Issues****Pass SB 696 to Spur Southern California Job Creation**

SB 696 is urgently needed to get southern California's economy moving again. This bill reestablishes the South Coast Air Quality Management District's (SCAQMD) credit bank to continue the District's strict permitting program that protects public health while unfreezing the construction of essential job-creating facilities.

**Establish a Blue Ribbon Commission to Evaluate Business Regulations**

Red tape and regulatory uncertainty inhibit the ability of businesses to start and grow in California to create the jobs and tax revenue our state needs. Each session new laws are passed and there is no mechanism to cumulatively review existing statutes and regulations that may stifle business growth, job creation and new tax revenue for state and local government. The Chamber supports the creation of a blue ribbon commission to review existing laws and regulations that impact California businesses. This holistic approach is essential to identifying comprehensive steps to improve the business climate.

**Pass Meal Period & Flexible Workweek Reforms (*Not Included on Printed Agenda*)**

Businesses and workers in California are hurt by outdated and confusing state regulations governing employee meal/rest breaks and flexible workweek schedules. Clarifying meal/rest break rules will improve workplace morale and reduce unnecessary, expensive litigation. Making it easier to implement alternative workweek schedules (i.e. 4 day/10 hour workweeks or 9/80 scheduling) will improve an employee's quality of life as well as California's business competitiveness with other states.

**Pass SB 696 to Spur Southern California Job Creation****-BACKGROUND-****SUPPORT: SB 696 (Wright; D-Inglewood)**

Currently a lawsuit has blocked implementation of nearly 1,100 South Coast Air Quality Management District permits for schools, fire stations, police stations, water quality plants, pollution control projects, hospitals, electricity generation, manufacturing and others. In addition, more than 2000 existing permits are potentially subject to being cancelled.

Blocking these permits means lost jobs and delays in building needed projects like police stations, fire stations, hospitals, manufacturing and more. Over half of these permits impact small businesses. Altogether, thousands of facilities will be impacted that employ hardworking men and women in southern California.

This problem will make southern California's severe economic downturn even worse. Essential services, small businesses and others will have to pay up to \$4 billion to obtain emission reduction credits –if they are available at all. Job losses will contribute to the downward economic spiral. It will also create hurdles for new economic stimulus projects.

Unless SB 696 is passed, many upgrade projects at aging facilities will be stopped. That means many of these facilities won't be able to replace older equipment with cleaner and more energy efficient equipment and modern pollution control equipment. Consequently, neither the air quality goals of the State Implementation Plan (SIP) nor the greenhouse gas emission reductions planned for in the AB 32 Scoping Plan can be implemented.

SB 696 is urgently needed to get southern California's economy moving again. It reestablishes the South Coast Air Quality Management District's (SCAQMD) credit bank and allows access to its priority reserve to continue the District's strict permitting program that protects public health while allowing essential services and job-creating facilities to be built.

SB 696 is sponsored by the South Coast Air Quality Management District which is the agency responsible for improving air quality in the region along with a growing coalition of public officials, businesses, labor, law enforcement, education and water quality officials.

## **Blue Ribbon Commission to Evaluate Business Regulations**

### **-BACKGROUND-**

California is known for an increasingly difficult business climate largely due to onerous business regulations. The state recently ranked near the bottom – 41<sup>st</sup> overall of the American Legislative Exchange Council's *Rich States, Poor States* report which analyzes the 50 states based on 16 policy variables, including top marginal personal and corporate income tax rates, property and sales tax burdens, state minimum wage, and the number of public employees per 10,000 residents.

“Despite warm weather, sandy beaches and the Pacific Ocean, Californians are leaving in droves to escape the state's oppressive tax burden,” the authors of the report concluded. “No state has ever taxed its way out of prosperity.”

The 2009 “Best and Worst States” of *Chief Executive* asked 543 CEOs to assess their states based on issues such as regulation, tax policies, education, infrastructure, quality of living, and proximity to resources, and to grade each state on three criteria: 1) Taxation and Regulation, 2) Workforce Quality, and 3) Living Environment. California ranked dead last for the fourth year in a row.

One CEO surveyed put it, “Michigan and California literally need to do a 180 if they are ever to become competitive again. California has huge advantages with its size, quality of work force, particularly in high tech, as well as the quality of life and climate advantages of the state. However, it is an absolute regulatory and tax disaster.”

Chamber Position

- Chamber members advocate for the creation of a special blue ribbon task force to examine the effect of existing business regulations on the state's business climate and recommend solutions on how to improve California's standing.
- Blue ribbon commission recommendations often end up filed away on a bookshelf without any action. This effort should complement the already-underway Commission on the 21<sup>st</sup> Century Economy's work to recommend ways to improve the state's tax and fiscal structure. Both reports (should the legislature create a business regulations task force) must be evaluated within 60 days of their release and acted upon accordingly.
- The current economic downturn makes this type of exercise even more urgent especially as other states begin to evaluate their business climate to become more competitive.

## Pass Meal Period & Flexible Workweek Reforms

### -BACKGROUND-

#### Meal Period Reforms

**SUPPORT:** SB 287 (Ron Calderon; D-Montebello); SB 380 (Dutton; R-Rancho Cucamonga); SB 807 (Benoit; R-Bermuda Dunes). *All failed passage this year and are now 2-year bills.*

Clarifying California's meal and rest period rules is critical to businesses throughout the state. Current meal and rest period rules are very confusing and do not reflect the reality of the 21<sup>st</sup> century workplace. As a result, employers are subject to a large number of class action lawsuits while employees must be disciplined for unintentional meal and rest period violations.

The current interpretation of the meal and rest period rules maintains that employers must not only offer the prescribed break period, but also have the burden to ensure that the employee takes that break period regardless of the employee's preference. For example, an employee may choose to eat his/her lunch at their desk while completing a work project or reading a book. An employer may open themselves up to legal liability if they permit an office employee to do so - and lawsuits have been filed in cases similar to this example.

In 2008, California's 4<sup>th</sup> District Court of Appeals ruled in the *Brinker* case that employers only need to *provide* the period, but not ensure that it is taken. However, the California State Supreme Court decided to consider the case for review, but has not done so yet. Thus, the *Brinker* decision has not been enacted and employers in California are still subject to the confusing, onerous rules until either the court acts or the Legislature makes the requested clarifications/changes by law.

Other areas of concern include: (1) Employees may not voluntarily skip the meal period; (2) Employees may not take the meal period at another time; (3) Employees may not return early, leave late, or do any work during the meal period. (4) Non-compliant, independent employee actions with regards to their meal period creates a liability for their employers; (5) The conditions which permit an on-duty meal period are so rigidly interpreted that most workplaces that should appropriately permit on-duty meal periods do not qualify; and, (6) There is confusion over when the meal period should commence.

#### Flexible Workweek Scheduling

**SUPPORT:** AB 141 (Tran; R-Costa Mesa); SB 187 (Benoit; R-Bermuda Dunes).

While flexible workweek scheduling is increasingly sought by both employers and employees, California laws make it very difficult for businesses to adopt these types of schedules. AB 141 and SB 187 are companion bills that would make it easier for businesses to implement flexible workweek scheduling.

Under current law, employers must conduct a secret ballot election with two-thirds of employees in the work unit approving the alternate workweek schedule (i.e. 10 hours per day/4-day workweek). Employers must hold discussion meetings at least 14 days before secret ballot voting. Any deviation from the rigidly controlled process voids the election and subjects the employer to potential lawsuits that can seek up to three years of back overtime pay for affected workers, along with huge penalties and fines.

The onerous process is exacerbated by the California law (one of only four states in the entire U.S.) which bases overtime on hours worked in excess of 8-hours per day rather than the typical 40-hours per week. This means that the last two hours of each 10-hour workday would have to be paid at time-and-a-half wage rates.

Furthermore, the entire work unit is bound by the outcome of the secret ballot vote. Hourly employees cannot individually opt in or out of a proposed alternative week schedule regardless of their personal preference or circumstances. This same "all or nothing" approach does not apply to salaried employees in California who are free to choose based on what their employer offers.

Compressed four-day workweek provides for up to 50 extra days each year for the average full-time employee. This is time that can be spent with family and friends, pursuing an education, holding additional employment, tending to a sick parent or child, or volunteering in their community. It is also a means by which many medium-smaller companies can weather the economic downturn and mitigate layoffs.

AB 141 and SB 187 would make this process easier by establishing a voluntary, employee-driven process where the employees can request and their employer may mutually agree, to a four-day compressed workweek schedule. If the employer agrees to the proposed four-day workweek schedule, the four-day workweek will be paid at straight time rates. Any work performed beyond the compressed work schedule would remain subject to current California overtime requirements.

#### Chamber Position

- Onerous overtime rules and requirements to implement flexible workweek scheduling are major disincentives to do business in California. They need to be modernized and updated immediately in order to spur job growth and improve the quality of life for workers in the state.
- Pass the legislation listed above via by either gutting/amending legislation that is still alive for 2009 or immediately act upon these "two-year" bills in 2010.

# **YES on SB 696**

**Save Jobs, Help Get Southern  
California's Economy Moving**

## **QUESTIONS and ANSWERS ABOUT SB 696**

**Q: What is SB 696?**

**A:** It is critically needed emergency legislation that will allow the issuance of required permits from the South Coast Air Quality Management District (SCAQMD) for the construction of fire stations, police stations, hospital power generators, electricity generators and other projects that are essential public services. Without it, almost 1,100 of these projects will be on indefinite hold, with potentially over 2,000 existing permits in further jeopardy.

**Q: Why can't these projects get permits now?**

**A:** A lawsuit has blocked issuance of emissions credits for these essential projects from a special SCAQMD credit bank. Without the special bank, the small businesses, public agencies and others involved could be forced to spend up to \$4 billion for pollution credits – if they are available at all.

**Q: Why do they need permits in the first place?**

**A:** Southern California's strict air quality rules require that any business or facility adding new equipment must prove they have reduced through other activities the amount of air pollution the new equipment would emit. The SCAQMD kept a special bank of pollution reduction credits from district-monitored facilities that were then issued to these essential projects so they could move forward.

**Q: So what will happen?**

**A:** Almost 1,100 projects are on indefinite hold in the SCAQMD's four-county area and another 2,000 existing permits are potentially subject to cancellation. The situation is bad for the environment and especially troubling in these tough economic times.

**Q: Why bad for the economy?**

**A:** No permits mean lost jobs and delays in building needed projects like police stations, fire stations, hospitals, manufacturing plants and more. More than half the permits impact small businesses. Altogether, thousands of facilities will be impacted that employ hardworking men and women in Southern California.

(more)

**[www.YESonSB696.com](http://www.YESonSB696.com)  
(888) 666-0215**

**Q: Isn't this kind of get –tough policy good for the environment?**

**A:** No, just the reverse. Many of these projects that can't get permits involve installation of more modern, cleaner equipment that will mean a tremendous net drop in harmful emissions. So the impact of this lawsuit could be slower environmental clean-up, a blow to cleaning up air pollution and even setting back efforts to reduce greenhouse gas emissions.

**Q: How does SB 696 impact all of this?**

**A:** SB 696 is urgently needed to get Southern California's economy moving again. It re-establishes the SCAQMD's credit bank and allows access to its priority reserve to continue the district's strict permitting program that protects public health while allowing essential services and job-creating facilities to be built.

**Q: Who's behind SB 696?**

**A:** SB 696 is sponsored by the South Coast Air Quality Management District which feels it is critical to meeting their responsibility for improving air quality in the region. The measure is supported by a growing coalition of public officials, business, labor, law enforcement, education and water quality officials throughout Los Angeles, Orange, Riverside and San Bernardino Counties.

**Q: What can I do to help?**

**A:** SB 696 is emergency legislation that requires a two-thirds vote in both the Assembly and the Senate. You should email or call your Assembly representative and Senator to let them know you support SB 696 to improve Southern California's environment and help get our economy moving again.

# YES on SB 696

Save Jobs, Help Get Southern  
California's Economy Moving

## Support List as of May 26, 2009

### **Southern California Organizations**

#### **Public Agencies/Officials**

South Coast Air Quality Management District  
Los Angeles Unified School District  
Coachella Valley Association of Governments  
(CVAG)  
County Sanitation Districts of  
Los Angeles County  
Orange County Sanitation District  
Eastern Municipal Water District  
Las Virgenes Municipal Water District  
League of California Cities, Los Angeles  
County Division  
Orange County Fire Authority\*  
South Bay Cities Council of Governments  
Southern California Alliance of POTW's  
Valley Sanitary District  
County of San Bernardino  
City of Azusa  
City of Cathedral City  
City of Covina\*  
City of Diamond Bar  
City of Glendora  
City of Industry  
City of Irwindale  
City of La Puente\*  
City of Lakewood  
City of Long Beach  
City of Monterey Park  
City of Pasadena  
City of Pomona\*  
City of Sierra Madre  
City of South El Monte  
City of West Covina  
Lee Baca, Los Angeles County Sheriff\*

### **Labor, Business Organizations and Companies**

Los Angeles /Orange Counties Building and  
Construction Trades Council  
Buena Park Area Chamber of Commerce\*  
Burbank Chamber of Commerce  
Carson Black Chamber of Commerce  
Greater Corona Hispanic Chamber of Commerce  
The El Monte/South El Monte Chamber of Commerce  
El Segundo Chamber of Commerce  
Indio Chamber of Commerce\*  
Kern County Black Chamber of Commerce  
Long Beach Area Chamber of Commerce  
Los Angeles Area Chamber of Commerce  
Greater Los Angeles African American  
Chamber of Commerce  
LA Works  
Manhattan Beach Chamber of Commerce  
Monrovia Chamber of Commerce  
PGI Pacific Graphics, Industry\*  
Regional Black Chamber of Southern California  
Regional Hispanic Chamber of Commerce  
San Gabriel Valley Coalition of Chambers  
San Gabriel Valley Economic Partnership  
Torrance Area Chamber of Commerce  
Victor Valley African American Chamber of Commerce  
Rosemead Chamber of Commerce  
Valley Industry and Commerce Association  
West Covina Chamber of Commerce  
Wilmington Chamber of Commerce  
Akso Noble Coatings, Orange  
Annex Group, Inc., Los Angeles  
Armorcast Products, North Hollywood\*  
Auto Service Plus, Newhall  
Baker Furnace, Inc., Yorba Linda  
Bay Valve Engineered Flow Solutions  
California Steel Industries, Inc.

## **Labor, Business Organizations and Companies (cont.)**

CT Finishing, Inc., Pomona  
Davenport Engineering  
Del Rey Sandblasting, La Puente  
Diversified Printers, La Mirada  
DM Auto Body, Van Nuys  
Embee, Inc., Santa Ana  
GEM Mobile Treatment Services, Signal Hill  
Hillcrest Beverly Oil Corp., Foothill Ranch  
Hilton Auto Collision Center, Pasadena  
J.R. Sandoval Enterprises, Monrovia  
Korean Drycleaners-Laundry Association  
KS 4000, Los Angeles  
L to Z Enterprises, Banning  
Lindus West, Van Nuys  
Pacific States Environmental Contractors,  
Tustin  
Pacific Energy Resources, Ltd., Long Beach  
Pemaco, Alhambra  
Performance Mechanical, Gardena  
Plains All American Pipeline, L.P., Long Beach  
Processes Unlimited  
PRI Real Estate Services  
Redman Equipment and Manufacturing  
Company, Torrance  
Rix Business Sales, Long Beach  
Saint John's Health Center, Santa Monica  
Satin Enterprises/Norge Cleaners  
Solar Turbines\*  
SunWest Engineering, Pomona\*  
Thyssenkrupp Safway, Inc., Long Beach  
View Cleaners, Irvine  
Vulcan Materials Company, Los Angeles  
Woodwest Concepts Inc., Santa Ana  
Wright Color Graphics, Sun Valley\*  
Wyatt-Bennet Equipment Company, Van Nuys

## **Statewide Organizations**

### **Statewide Labor Organizations**

California-Nevada Conference of Operating  
Engineers  
Coalition of California Utility Employees  
California State Association of Electrical  
Workers

California State Council of Laborers  
California State Pipe Trades Council  
Western States Council of Sheet Metal Works

### **Statewide Government and Business Organizations**

Independent Cities Association  
California Contract Cities Association  
California Small Business Alliance  
California Small Business Association  
California Hospital Association  
California Farm Bureau Federation  
California Hispanic Chamber of Commerce  
California Black Chamber of Commerce  
California Auto Body Association  
California Independent Petroleum Association  
California League of Food Processors  
Printing Industries Association of California  
California Manufacturers & Technology  
Association  
Silicon Valley Black Chamber of Commerce  
Chemical Industry Council of California  
California Retailers Association  
California Independent Oil Marketers  
Association  
Industrial Environmental Council  
Sacramento Black Chamber of Commerce  
Western States Petroleum Association  
California Construction & Industrial Materials  
Association  
Western Electrical Contractors Association  
California Furniture Manufacturers  
Association\*  
California Metals Coalition  
California Cleaners Association

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Issue Date: January/February 2009, Posted On: 3/25/2009

### CEOs Select Best, Worst States for Job Growth and Business

Texas, North Carolina, Florida Top List as Best States; California, New York, Michigan Are the Worst



As the nation's unemployment figures continue to reach new heights, *Chief Executive* magazine's 2009 "Best & Worst States" survey took CEO's pulse on what the best and worst places for jobs and business growth are. For the fourth year in a row, CEOs rated Texas as the #1 state to do business and California as the worst.

*Chief Executive's* fifth annual survey asked 543 CEOs to evaluate their states on a broad range of issues, including proximity to resources, regulation, tax policies, education, quality of living and infrastructure. Providing additional insight to the evaluations, CEOs were also asked to grade each state based on the following criteria: 1) Taxation & Regulation, 2) Workforce Quality, and 3) Living Environment.

"Our survey, year-over-year proves that those states with the worst records continue to practice the same policies that alienate businesses," said JP Donlon, Editor-in-Chief of *Chief Executive* magazine. "As the nation's economic problems continue to snowball and an increasing number of states experience budgetary problems, state governments ought to take a hard look at their taxation and unionization policies if they want to turn the page and attract new businesses and capital to their provinces."

Once again, this year, the same states that took the bottom five spots over the past few years preserved their rankings for the most part. For the fourth year in a row, California and New York were ranked the worst and second worst state to do business in, respectively. Michigan was ranked third from the bottom for the second year in a row. The only difference in the bottom five was a flip in the worst fourth and fifth states, as New Jersey took over Massachusetts as the fourth worst state.

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Yes

No

Can't Say

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Plaguing business growth and opportunities in these states are high business taxes exposed on business owners as well as a strongly unionized labor force. Coincidentally, all the bottom three states, California, New York and Michigan, also support some of the nation's highest unemployment rates - 10.1 percent, 7.6 percent and 11.6 percent, respectively, as of January (most recent data available). This compares to a national average of 7.6 percent in the same month (national unemployment rate reached 8.1 percent in February).

Expressing the prevalent attitude among CEOs, one CEO said, "Michigan and California literally need to do a 180 if they are ever to become competitive again. California has huge advantages with its size, quality of work force, particularly in high tech, as well as the quality of life and climate advantages of the state. However, it is an absolute regulatory and tax disaster, as is Michigan."

As states put on an intense competition to attract business and investment in this tough economic environment, *Chief Executive* magazine's Best & Worst States survey experienced a flurry of activity in the top ranks with the entry of three new states into the top five: Florida, Georgia and Tennessee.

Texas maintained its #1 spot in the ranking for the fourth year in a row, as North Carolina, Florida, Georgia and Tennessee all jumped up in ranks, taking the #2, 3, 4 and 5 spots, respectively.

"Texas and the Carolinas are great for business," said one CEO. "South Carolina's Research Authority is exemplary in terms of creating new economic growth and Texas is strategically centered, has low taxes, and outstanding demographics."

As a testament to this statement, in contrast to much of the nation, in fiscal 2008, Texas' gross state product grew by 4.2 percent, compared to 1.9 percent for the national economy.

| Top 5 States   | Rank 2009 | Rank 2008 | Rank 2007 | Rank 2006 |
|----------------|-----------|-----------|-----------|-----------|
| Texas          | 1st       | 1st       | 1st       | 1st       |
| North Carolina | 2nd       | 3rd       | 4th       | 3rd       |
| Florida        | 3rd       | 10th      | 3rd       | 4th       |
| Georgia        | 4th       | 7th       | 6th       | 5th       |
| Tennessee      | 5th       | 6th       | 7th       | 11th      |

| Worst 5 States | Rank 2009 | Rank 2008 | Rank 2007 | Rank 2006 |
|----------------|-----------|-----------|-----------|-----------|
| California     | 51st      | 51st      | 51st      | 51st      |
| New York       | 50th      | 50th      | 50th      | 50th      |
| Michigan       | 49th      | 49th      | 47th      | 48th      |
| New Jersey     | 48th      | 47th      | 46th      | 46th      |
| Massachusetts  | 47th      | 48th      | 49th      | 49th      |

| Biggest Gainers | Positions Gained |
|-----------------|------------------|
| Mississippi     | 15               |
| Pennsylvania    | 10               |

| Biggest Losers | Positions Lost |
|----------------|----------------|
|----------------|----------------|

|            |    |
|------------|----|
| Ohio       | 11 |
| Washington | 10 |
| Minnesota  | 10 |

## 2009 Best and Worst States for Business

[View](#) economic statistics for all states.

### RELATED RESOURCES

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Articles:

- [CEOs Weigh In On Best, Worst States To Do Business - 2008](#)
  - [CEOs Pick Their Best and Worst Presidential Candidates for Business](#)
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  - [Today's 6 Worst Business Books](#)
  - [California Ranked Worst for Business](#)
- 

Comment:

Thursday, March 19, 2009 8:50:24 PM by [rutger](#)

They've obviously not taken a look at North Carolina recently. With an extremely high unemployment rate and businesses paralyzed with fear of uncertainty, many are wondering how it will all end in 2009.

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Rutger

Friday, April 17, 2009 12:58:39 PM by [Joe Jacob](#)

What is Recharge Ohio suggesting we do to move Ohio from the bottom 10 to the top 10 States for job creation and business growth?

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Joe Jacob - Columbus

Wednesday, June 03, 2009 8:38:16 AM by [TemperateFloridian](#)

"Coincidentally, all the bottom three states, California, New York and Michigan, also support (sic) some of the nation's highest unemployment rates - 10.1 percent, 7.6 percent and 11.6 percent, respectively, as of January "

That's a bit disingenuous, at best. 4 of your top 5 Florida, Georgia, North Carolina and Tennessee have higher unemployment rates than New Jersey, Massachusetts and New York. Apparently the CEOs' blessing on a state's policies is the kiss of death for jobs in that state.

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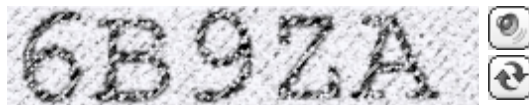
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# California Employers, Employees Will Benefit from Reforms to Workplace Requirements

California employers comply with the most stringent and complex labor laws in the nation and face the threat of the highest fines and penalties. Given the current economic situation and reduced competitiveness, employers are calling for simplification of workplace rules and laws.

Today, employer responsibilities are more challenging due to vague or ambiguous language in rules and regulations, sometimes intertwined with conflicting workplace laws, along with constantly changing government regulations and diminishing corporate resources. Both employers and employees would benefit from easy-to-follow, common-sense workplace rules that provide opportunities to address work/life balance issues.

## Meal/Rest Period Rules Require Simplification

Labor Code Section 512 provides the framework for meal period requirements for employees in California. The Industrial Welfare Commission wage orders are the regulations further defining meal period requirements. The language of the law is brief, remaining silent or ambiguous on critical components of meal periods. The language of the wage orders regarding meal periods is vague and overly broad, leaving employers without meaningful clarification, thereby leading to class action lawsuits against employers and burdensome practices for employers and employees alike.

Generally, in California, an employer must provide an off-duty meal break of at least one-half hour for every work period of more than five hours. If six hours of work will complete the employee's work for the day, however, the employee may voluntarily choose not to take the meal break. For a meal period to be considered off-duty, the employee must be relieved of all duty and be allowed to leave the premises.

The statute is silent regarding on-duty meal periods, split shifts, collective bargaining agreements (with few exceptions) and specifically 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.

The Division of Labor Standards Enforcement (DLSE) enforces the rules — both the law and the wage orders; however, individuals can bypass the DLSE altogether and go straight to the courts to resolve complaints. The courts and the DLSE may interpret the rules differently, which further complicates the ability of employers to comply. Furthermore, due to the threat of huge penalties, many employers settle out of court with multimillion-dollar settlements.

## Problems

Some of the challenges that employers face with the current meal period rules include:

- **“Providing” meal periods.** The Labor Code prohibits an employer from employing an employee for certain durations without “providing the employee with a meal period.” Until October 2008, DLSE had interpreted the phrase “providing the employee with a meal period” to mean it is the “employer’s burden to compel the worker to cease work during the meal period.”

This interpretation was unreasonable and burdensome. It required an employer to police its workforce and watch the clock to ensure that, even if it is not convenient for or preferred by the employee, the meal break is taken at the prescribed time, for the entire time and without interruption.

It means the employee must take the meal period at the prescribed time and for the full 30 minutes or the employer is liable for an hour of pay regardless of whether the employer knew the employee did not take the meal period.

Employees may choose to infringe on their meal periods, even in the face of strong and clearly communicated employer policies prohibiting such actions. Employers have been unfairly held liable for these independent employee actions.

On July 23, 2008, the California 4th District Court of Appeal ruled in the case

of *Brinker Restaurant Corporation et al. v. The Superior Court of San Diego County (Hohnbaum)* that under California law employers need only provide meal periods, but not ensure that they are taken. This was a great victory for California employers; however, employer relief was short-lived. In October 2008, the California Supreme Court decided to consider the *Brinker* case for review. As a result, the *Brinker* case cannot be followed until the Supreme Court rules; therefore, employers are in the same position as they were before the appellate court ruling.

In response to the appellate court ruling in the *Brinker* case, the DLSE issued a memo on October 23, 2008 stating, “until such time that the Supreme Court provides guidance on this fundamental question, the DLSE will rely upon the language of the statute and wage order as well as existing California Supreme Court and Court of Appeal decisions and other recent, persuasive federal court decisions in interpreting Labor Code Section 512 and the meal period provisions set forth in the applicable wage orders. Taken together, the language of the statute and the regulation, and the cases interpreting them demonstrates compelling support for the position that employers must provide meal periods to employees but do not have an additional obligation to ensure that such meal periods are actually taken.”

This memo provides guidance to the division in its enforcement of the statute, but the courts are not bound by the DLSE interpretations. A decision by the Supreme Court on the *Brinker* case will provide further clarification to employers and to the courts. Until the court determines what it means to provide a meal period, however, employers have no clarification on which to rely.

● **On-duty meal periods.** Although the Labor Code is silent regarding on-duty meal periods, the wage orders authorize them. An on-duty meal period is when the employee is provided the opportunity to eat but is not relieved of all duty for the duration of the meal period. The on-duty meal period is allowed in recognition that the nature of certain jobs prevents some employees from being able to be off duty for a 30-minute meal period and is considered time worked. An on-duty meal period is permitted only when certain criteria are met, however (see next page).

Many jobs require employees to be on call, on site or accessible at any given moment. Enforcement by the DLSE of the on-duty meal period provision is so narrow and constraining that it cannot be used in most workplaces. Each on-duty meal period taken but not allowed by the DLSE or by the court creates essentially a missed meal period and therefore obligates the employer to an hour of pay.

● **Employer liability.** Under Labor Code Section 200, for each workday that the employer fails to provide the required meal period, the employer shall pay the employee one hour of pay at the employee’s regular rate of compensation. In *Murphy v. Kenneth Cole Productions*, the California Supreme Court decided that this one-hour-of-pay is a premium wage (and not a penalty). This increases the employer’s liability and makes class action lawsuits more lucrative for plaintiffs because the statute of limitations to file a claim for a wage is three years — sometimes four — as opposed to a one-year statute of limitations to file a claim for a penalty.

Employers are being sued for even minor violations, such as employees allegedly returning five minutes early from lunch. Moreover, workers can sue on behalf of themselves and all prior and current workers who may have missed a meal period. Workers seeking penalties for missed meal periods have filed a large number of class action lawsuits, many of which are seeking millions of dollars from employers.

#### Repercussions

The narrow interpretation of Labor Code Section 512 often forces employers into an adversarial relationship with their employees. Employers must create and enforce rigid policies which require that employees leave their workstation to take

## Sampling of Costly Lawsuit Settlements Including Meal Period Issues

|  |                 |
|--|-----------------|
| Casual Dining Restaurant Company                   | \$10 million    |
| Fast Food Retailer                                 | \$5 million     |
| Financial Marketing and Service Holding Company    | \$30 million    |
| Financial Services Company                         | \$13.6 million  |
| Hospital 1   | \$20 million    |
| Hospital 2   | \$60 million    |
| Lingerie and Beauty Products Retailer              | \$41.25 million |
| Membership Warehouse Club Retail Store             | \$7.5 million   |
| Musical Instrument Retailer                        | \$3.5 million   |
| Package Delivery Company (exclusively meal period) | \$487 million   |
| Technology Services Company                        | \$26 million    |
| Waste Management Firm                              | \$350,000       |
| Wholesale Baker                                    | \$8 million     |

Pending litigation includes three large hospitals and an electronics retailer.

the full, off-duty, 30-minute meal period on time. Employees often are resentful that their employer will not allow them to waive their meal period in order to leave work early or to determine for themselves when it is appropriate to take the meal period.

These requirements have a negative impact on all employers; however, some employers have far greater challenges in ensuring employees take the 30 minutes on time:

- Airline employees, such as mechanics, baggage handlers and ticket agents, despite their best efforts to stay on schedule, frequently are disrupted by inclement weather, air traffic control delays, passenger demands or directives from the Federal Aviation Administration or the Transportation Security Authority.

- Restaurant servers often wish to take a meal break later than the fifth hour of work, due to timing of customers being present, since the servers derive a significant portion of their income from tips.

- Sales professionals can be in the middle of a sale when the fifth hour occurs. Leaving the customer for 30 minutes is detrimental to closing a sale, and customers may not wait or be pleased with the interruption of their transactions with a lunch break.

- Retailers must deal with agitated customers when a clerk must close a cash register or other service area to take a lunch break.

#### On-Duty Meal Periods

According to the Industrial Welfare Commission wage orders, under very limited circumstances, an on-duty meal period is permitted if all of the following conditions are met:

- the employee and employer agree in writing;

- the agreement can be revoked at any time by the employee (except under wage order 14);

- the employer pays the employee for the on-duty meal period as time worked; and

- the nature of the work prevents the employee from being relieved of all duty.

It is the last requirement that has proven to be the significant problem, because there is no clear definition of how compelling the nature of the work must be in order for the on-duty meal period to be permissible. An on-duty meal period

## Key Employment Trends

- Employee demand for flexible work schedules
- Employee demands for customized employment relationships
- Greater demand for time off

Source: SHRM® 2004-2005 Workplace Forecast: A Strategic Outlook

that does not meet the criteria may be considered a missed meal period and creates a liability for the employer of one hour of premium pay for each on-duty meal period.

#### Examples

There are numerous situations in which an on-duty meal period is appropriate, but may not be permitted. For example:

- In a plant control center, an engineer must monitor controls and instruments at all times. If a change in the process occurs, the engineer is available to respond immediately. Throughout the shift, however, there is significant downtime for the employee to eat while still monitoring the controls.

- Refineries commonly are located in remote areas. In this situation, supervisors or other employees may leave the site to pick up lunch for all their workers, who must remain on site to keep the plant running.

- Operation of construction equipment, such as well-drilling and concrete-pouring, are critical, often requiring employees to remain on duty through the entire process to effectively deliver the finished product, as well as for the safety of the employees and those in the vicinity. Supervisors also need to be on site during this time to oversee and make critical decisions.

- In the health care industry, relieving surgery staff in the middle of surgery can compromise patient care. In addition, due to health care industry staffing ratios, it may be impossible to find qualified coverage for meal periods on days where the patient census unexpectedly increases. Because staffing ratios are in place at all times, an off-duty meal period may not be possible on those days. Once again, on-duty meal period agreements in these situations are appropriate to allow dedicated health care professionals to carry

out their job duties.

- Security guards may work alone on a shift and not be able to safely leave their post for a meal, but have ample time to eat while on duty.

#### Scenarios

There are three scenarios for employers when providing an on-duty meal period:

- If an on-duty meal period is deemed to be in compliance with the narrow interpretation of when it is allowed, the employee works eight hours and takes the meal period while on duty. The employer pays the employee for eight hours of work.

- If an employee takes an on-duty meal period, but it is determined that the criteria for an on-duty meal period were not met, the employer must pay the employee one hour of premium pay for each non-compliant on-duty meal period within the same pay period in which the meal period occurred. In total, the employer must pay the employee for eight hours of work plus one hour of premium pay for each day the employee took an on-duty meal period that does not meet the specified criteria.

- If the employee takes an on-duty meal period and it is later found to have not met the criteria, the employer is liable for not only an hour of premium pay for each on-duty meal period as a missed meal period, but also for additional penalties.

In the second scenario above, the employer voluntarily acknowledges the missed meal period and compensates the employee with an hour of premium wage in the same pay period for each missed meal period, or each meal period that is identified as not meeting the allowable criteria.

In the third example, the employer did not voluntarily recognize and compensate the employee within the same pay period

as the on-duty meal period that does not meet the criteria. It is this situation that could lead to legal action by the employee or representative class of employees.

#### **Improvement Needed**

To summarize, the DLSE's narrow and ambiguous interpretation of the "nature of the work" criterion for on-duty meal periods should be broadened and clarified. The guidance provided by the DLSE is narrowly focused and creates a situation where almost every scenario could be challenged. The broad concepts of "nature of work" and "necessary job duties" are not sufficient to help guide businesses. The reality of many business operations today is that it is not always practical or safe for employees to take uninterrupted, off-duty meal periods.

#### **State Action**

In 2005, the DLSE proposed regulations to clarify when meal periods must be given during a work period and give employers needed flexibility in accommodating employee scheduling needs, among other provisions. The California Chamber of Commerce strongly supported the modifications, but they were not approved.

Recognizing the difficulties and the liability that employers face with meal period rules, Labor Commissioner Angela Bradstreet called two public forums upon her appointment in 2007 to educate herself about the challenges employers and employees alike face with the enforcement of the meal period rules. The Labor Commissioner's summary report of the hearings stated that "conflicts and confusion in the statute and in the IWC wage orders have proven problematic. The forums demonstrated an urgent need for common-sense solutions by the Courts and by the Legislature which would greatly benefit workers and businesses throughout California."

In 2008, the CalChamber, along with more than 40 business organizations, sponsored and supported SB 1539 (Calderon; D-Montebello), which would have provided clarity and guidance for the compliance and enforcement of meal period laws. The bill was a comprehensive solution that would have served employers and employees across all industries, regardless of size or union status, clarifying what it means to "provide" a meal period so employees have the opportunity to take meal breaks, enter into on-duty meal period agreements in appropriate

situations, and collectively bargain for meal periods. The bill passed the Senate Labor and Industrial Relations Committee with amendments, then was held in the Senate Rules Committee.

Although 2008 also brought the issue of meal period clarification to the state budget talks to be included as part of economic stimulus, the effort was unsuccessful.

As a result of increasing public awareness of the issue and excessive litigation against employers, the CalChamber and other business groups are hopeful that relief will come in the 2009 legislative session.

#### **Flexible Work Schedules**

Hectic days, long commutes, traffic congestion, high gasoline prices and conflicting work and personal schedules continue to show up as items employees and employers list as barriers to achieving work and life balance in California. Responsibilities such as young children, elderly parents and continuing education can make conventional eight-hour workday schedules difficult to maintain.

Due to increasing competition and rising costs, employers are taking a hard look at areas that once were considered part of the cost of doing business — such as employee turnover, absenteeism and downtime on the job.

In October 2007, CCH (a Wolters Kluwer company) released the findings from its 17th annual Unscheduled Absence Survey. CCH's employment law analyst Pamela Wolf says many workers today are part of dual-earning families, single parents or caregivers for aging parents. They are willing to go the extra mile for the company, but they want time when they need it to care for themselves and their families, and take that time by calling in sick when they are not.

Personal illness was the real reason that employees stayed home from work and called in sick only about one-third of the time in 2007. The other 66 percent of used sick time was because of family issues, personal needs and a feeling of entitlement. Flexible workweek scheduling can provide an option for employees and employers to reduce absenteeism through the use of sick time for other reasons.

What needs to be done to accommodate today's increasingly fast-paced lifestyle that is fair to both employer and

employee? The reform of overtime laws in California is a way to provide much-needed relief to work/life schedules. It is time for California to change workplace laws to permit flexible schedules that include four-day workweeks for individual workers desiring to find a balance between work and personal lives.

The California Air Resources Board Economic and Technology Advancement Advisory Committee report (2008) suggests that flexible working hours could reduce commute travel and result in reduced greenhouse gas emissions. A reduction of one day per weekly commute could result in a 10 percent reduction in emissions if just 10 percent of employees followed a four-day workweek schedule. Traffic congestion and emissions of priority air pollutants also would be reduced. Allowing a compressed workweek schedule would reduce traffic congestion at peak hours and reduce emissions through less idling and 20 percent less commute time per week per employee.

Research shows a flexible work life is good for health. Researchers at the Wake Forest University School of Medicine reported in the *Journal of Occupational and Environmental Medicine* (December 2007) that if people have the ability to compress workweeks, they are more likely to make healthier lifestyle choices, to exercise more and to sleep better. Perhaps the flexibility gives people the time to fit healthier lifestyle activities into their everyday regimen or maybe it just enables people to better manage their time.

#### **Background**

California law requires that overtime compensation be paid for work performed by an employee in excess of eight hours in a single day, regardless of whether the employee works fewer than 40 hours in that week.

The federal Fair Labor Standards Act (FLSA) requires overtime compensation for salaried, non-exempt employees based on 40 hours worked per week, rather than total hours worked per day. California is one of only four states that do not conform their wage laws to the national FLSA.

Of the three states with overtime requirements, Alaska has substantially similar overtime payment requirements as California. Nevada has an eight-hour requirement but also permits 10-hour days when a worker and employer have

a mutual agreement. Colorado requires overtime pay for hours worked in excess of 12 hours in a workday. Florida overtime pay triggers at 10 hours per day.

Flexibility in daily overtime rules benefits both employers and employees. A statutory change should allow employees to work four 10-hour days a week, work 80 hours in nine work days, or some combination thereof that works for both employer and employee. These flexible scheduling arrangements could provide for a weekly or biweekly extra day to spend with family, attend children's school activities, take care of dependent elders, go to medical appointments or attend to other private affairs that usually cannot be accomplished on a weekend, and could eliminate or minimize the use of sick leave for family responsibilities and personal time.

#### **No Flexibility**

Under current (and very detailed) Labor Code and Industrial Welfare Commission wage orders, employers may institute alternative work schedules only if all affected employees agree to the arrangement in writing and by secret ballot. Employers must hold discussion meetings at least 14 days prior to voting. Two-thirds of the company's employees must agree to the change and all must follow it. Any deviation from the rigidly controlled process voids the election.

The rules also state that daily work schedules are limited to a maximum of 10 hours per day, with a daily minimum of four hours. Moreover, variances in schedules or the use of more than one schedule is prohibited without repeating the voting process. This effectively eliminates most employers and employees from choosing schedule options such as flextime, part-time, job sharing, telecommuting and compressed workweeks.

Only a handful of employers in California (11,000 of 800,000-plus) are currently trying to operate under the re-

strictive wage orders. Employers who are offering a flexible work schedule without going through the election process are operating in violation of the law.

Employees covered by collective bargaining agreements are exempt from daily overtime — these include all state, county and city employees, such as those employed by school districts, water districts and a multitude of other governmental agencies. Employees working in the mining, construction and logging industries also are exempt from daily overtime requirements.

#### **Improvement Needed**

California businesses are leaders in designing new workplace practices aimed at striking a better balance of work and life obligations. Experts note that workplace flexibility isn't just about working families or women. It is about changing demands, both in society and the workplace, to include time for quality of life, time for loved ones and time for individual pursuits.

The CalChamber strongly believes that permitting individual workers and their employers to arrange and use a four-day workweek and other flexible workweek scheduling will provide employees and employers the ability to be more responsive to employee work/life needs.

#### **State Action**

In the last four years, the CalChamber has sponsored legislation to allow an employee to request, and an employer to agree to, a four-day workweek. In 2005, AB 640 (Tran; R-Garden Grove) failed passage in the Assembly Labor and Employment Committee on a party-line vote. In 2006, AB 2217 (Villines; R-Clovis) and SB 1254 (Ackerman; R-Tustin), both failed passage in their respective labor policy committees on party-line votes. In 2007, AB 510 (Benoit; R-Bermuda Dunes) failed passage in committee on a bipartisan vote. In 2008, Assemblyman John J. Benoit carried AB 2127, which

also failed in its first legislative policy committee. The bill was known as the Small Business Family Scheduling Option and would have allowed a small business employer to agree to a request of an employee for an alternative workweek schedule.

The concept of allowing an employer to agree to an employee's request for an alternative workweek schedule was proposed as an economic stimulus in the 2008 budget negotiations as well as in the 2008 special session on the budget. The CalChamber remains hopeful that the concept will gain support for enactment in 2009, either through the budget process or in the regular 2009 legislative session.

#### **CalChamber Position**

The CalChamber supports sensible changes in state labor laws and regulations aimed at making the workplace easier to administer. It makes sense to find ways to make compliance with state labor laws and regulations simple and straightforward so employers and employees can understand and follow the law. The CalChamber plans to continue to push for flexible workplace schedules and to actively work to resolve conflicts in meal and rest break rules and regulations.



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