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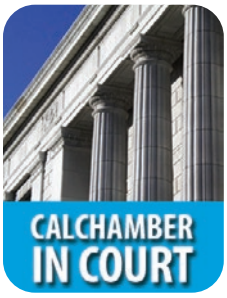
ALERT

State High Court Rules on Arbitration Fee Payments

Narrow Interpretation of Law



Earlier this month, the California Supreme Court decided a case that determines whether federal law preempts a California law enacted in 2019 that regulates when arbitration fees must be paid.

The California Chamber of Commerce joined other groups in filing a friend-of-the-court brief in the case of *Hohenshelt v. Superior Court*. The court ruling addresses whether the Federal Arbitration Act (FAA) preempts Senate Bill 707.

Since SB 707 was enacted in 2019, all but one of the 12 appellate courts had interpreted the law as imposing an inflexible mandate requiring arbitration agreements to be waived whenever a business failed to pay its arbitration fees on time, regardless of the reason for or length of the delay.

The California Supreme Court, however, rejected the inflexible interpretation. Instead, in a 5-2 decision, the state high court said the law should be interpreted to result in an automatic waiver of arbitration only when "nonperformance is willful, grossly negligent, or fraudulent."

That narrower interpretation, the court majority said, is not preempted by the FAA.

In a blog post, attorneys from Mayer Brown LLP who filed the friend-of-the-court brief, list a number of important considerations for businesses as a result of the Supreme Court's *Hohenshelt* ruling:

- Choosing FAA procedures instead of California arbitration law may be a way to work around SB 707 in contracts.
- The court expressly endorsed arbitration agreements that allow for extended payment schedules.
- When the state law applies, courts must consider on a case-by-case basis whether to apply the penalties of the state law, rather than automatically invalidating arbitration agreements.
- Timely payment remains the safer course considering uncertainties over how lower courts will apply SB 707 going forward.
- Businesses can continue to argue in federal court that the FAA preempts SB 707.

Given the disagreements among the courts, there is likely to be more litigation about whether untimely payment of arbitration fees will result in a party losing the right to arbitrate or having to pay penalties for a delayed payment.

Staff Contact: Nicole Wasylkiw

US Justice Department Issues Guidance on Diversity Programs

Recently, the U.S. Department of Justice (DOJ) sent a memorandum to all federal agencies providing guidance for federal-funding recipients on applying federal antidiscrimination laws to diversity, equity and inclusion (DEI) programs.

Though this memo is directed primarily toward federal-funding recipients, it may be helpful for all private employers, who are covered by federal law, as it provides several examples of unlawful policies and programs.

As previously reported, the current federal administration has increased its scrutiny of DEI programs — issuing executive orders targeting what were referred to as "illegal" DEI initiatives.

The Equal Employment Opportunity Commission (EEOC) subsequently issued employer guidance, which helped to clarify some uncertainty the executive orders created and provided some helpful examples of the types of DEI policies and practices the EEOC could find unlawful.

Memorandum

Like the EEOC's guidance, the DOJ's memorandum reinforces that DEI programs must comply with federal antidiscrimination laws — such as Title VII of the Civil Rights Act — and that employers and other entities covered by federal antidiscrimination laws must ensure that their

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Cal/OSHA Corner

Revised Rule on 'Floor Openings' Fall Protection Takes Effect Oct. 1

Mel Davis
Workplace Safety Expert

What is happening with the fall protection standard that Cal/OSHA has been working on since 2019?

The Occupational Safety and Health Standards Board (OSHSB) has adopted revised Construction Safety Orders Section 1635 to address fall protection related to structural steel erection, specifically fall protection around floor openings and leading edges.

The Western Steel Council and District Council of Iron Workers (petitioners) filed Petition 570, which was approved for action by the Board on January 17, 2019.

The petitioners originally sought amendments to Section 1710, Structural Steel Erection, relating to protections around floor openings and leading edges. The petitioners proposed to add rules regarding the use of cones and bars as barricades for work involving openings, when work is considered as work in progress.

The petitioners' recommended revisions were based on several years of onsite workers' hours demonstrating an extensive track record about the safety record of the proposed process. An advisory committee was held and revisions and fine tuning resulted in a cleaner and easier operating safety system.

The Board determined that Section 1635 was the more appropriate section to amend.

Revisions

Section 1635 Floors, Walls and Structural Steel Framed Buildings, has been revised to incorporate a fall protection system to be referred to as the cone and bar barricade (CBB) system.

Simply stated, where a floor opening exists, the floor opening shall be barricaded by guardrails, the CBB system or be covered when not attended by steel erection personnel. The CBB is an alternative to the planking system

Where a CBB system is used, specific materials and construction are required. Specific colored cones are required, the cones are to be labeled and of a minimum height and weight. The cones are to be firmly connected to each other and maintained a maximum and minimum distance apart around the floor opening.

A new appendix to Section 1635 shows general cone locations and a personal fall protection device.

As with any process or employee procedure, employees are to be trained and the training documented.

The regulation permitting the use of the CBB system was heard on December 19, 2024, adopted and filed with the Secretary of State on July 15, 2025, and takes effect on October 1, 2025.

More information about the revisions are available at the Standards Board's website.

Column based on questions asked by callers on the Labor Law Helpline, a service to California Chamber of Commerce preferred members and above. 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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Human Resources

Conducting California Workplace Investigations. CalChamber. August 28, Virtual Seminar. (800) 331-8877.

HR Boot Camp. CalChamber. September 11–12, Virtual Seminar. (800) 331-8877.

Discipline and Termination: Do's and Don'ts. CalChamber. September 18, Webinar. (800) 331-8877.

International Trade

California State Trade Expansion Program (STEP) Export Training Series. Governor's Office of Business and Economic Development (GO-Biz). June 30, 2025–March 31, 2026. Event website.

Green Expo Mexico. GO-Biz. September 2–4, Mexico City. GO-Biz will host four to six businesses in its California Pavilion. Register interest.

14th World Chambers Congress. World Chambers Congress. September 2–4, Melbourne, Australia. ***https://wcc.iccwbo.org/***.

Aquatech Mexico. GO-Biz. September 2–4, Mexico City. GO-Biz will host four to six businesses in its California Pavilion. Register interest.

Zambia-U.S. State-Level Partnership Roadshow 2025. Zambia Development Agency. September 2–14, California, Texas and Georgia. See state-by-state schedule.

Medical Fair Thailand. GO-Biz. September 9–12, Bangkok, Thailand. GO-Biz will host five businesses in its California Pavilion. Application portal.

Executive Order Will Levy Duties on Low-Value Imports from World At-Large

Starting August 29, imported goods sent through means other than the international postal network that are valued at or under $800 and that would otherwise qualify for the *de minimis* exemption will be subject to duties.

President Trump signed an executive order on July 31 that suspended duty-free de minimis treatment for low-value shipments. The White House described the executive order as closing a loophole used to evade tariffs and potentially funnel deadly synthetic opioids as well as other unsafe or below-market products.

Starting May 2, President Trump had ended duty-free *de minimis* treatment for low-value imports from the People's Republic of China and Hong Kong.

International Postal System Methods

• For goods shipped through the international postal system, packages instead will be assessed duties according to one of the following methodologies:

- Ad valorem duty: A duty equal to the effective tariff rate imposed under the International Emergency Economic Powers Act (IEEPA) that is applicable to the country of origin of the product. This duty shall be assessed on the value of each package.
- Specific duty: A duty ranging from $80 per item to $200 per item, depending on the effective IEEPA tariff rate applicable to the country of origin of the product. The specific duty methodology will be available for six months, after which all applicable shipments must comply with the ad valorem duty methodology.

• Longstanding exemptions remain in place, so U.S. travelers still can bring back up to $200 in personal items and individuals can continue to receive bona fide gifts valued at $100 or less duty-free.

• Packages entering the United States using the duty-free *de minimis* exemption typically are subject to less scrutiny than traditional imports; however, the packages can pose health, safety, national and economic security risks.

• Between 2015 and 2024, the volume of *de minimis* shipments entering the United States increased from 134 million shipments to more than 1.36 billion shipments. On average, U.S. Customs and Border Protection processes more than 4 million *de minimis* shipments into the U.S. each day.

Background

Congress established the *de minimis* policy in 1938 as Section 321 of the Tariff Act of 1930 allowed travelers returning to the United States to bring with them goods worth up to $5 without declaring them to customs. Since 2016, the threshold has been $800 and the *de minimis* rule has helped to reduce administrative burdens while it has grown to encompass more than 90% of all cargo entering the United States — 60 % from China.

After Congress raised the qualifying threshold to shipments valued at less than $800 in 2016, the *de minimis* shipments increased — especially during the COVID years. China accounted for the majority of the shipments by far. In 2023, 62% of all *de minimis* shipments, valued at nearly $34 billion, came from China, according to U.S. Customs and Border Protection.

From 2018 to 2023, the amount of low-value e-commerce exports from China ballooned, according to the Congressional Research Service. The People's Republic of China (PRC) expanded its global e-commerce exports more than tenfold.

A key part of China's global e-commerce growth has been expanding PRC and PRC-tied e-commerce firms into the U.S. market. The U.S. retail e-commerce market makes up more than half of all global e-commerce sales. PRC e-commerce policies have promoted PRC exports while limiting the scope of PRC e-commerce imports.

Staff Contact: Susanne T. Stirling

US Justice Department Issues Guidance on Diversity Programs

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programs and activities do not discriminate on the basis of any protected characteristics, regardless of the program's "labels, objectives, or intentions."

The DOJ provides several examples of the types of policies and programs it describes as unlawful, including:

• **Granting preferential treatment based on protected characteristics.** Programs that create advantages or disadvantages based on protected characteristics are presumed unlawful unless they meet very narrow exceptions. This includes programs such as race-based programs or scholarships, preferential hiring or promotion practices, and access to facilities or resources based on protected characteristics.

• **Prohibited use of proxies for protected characteristics.** Employers may not use neutral criteria that they consider as a substitute for protected characteristics. DOJ's guidance examples include recruitment efforts targeting specific geographic areas, inquiring into candidates' "cultural backgrounds," "lived experience," "cross cultural skills," or requiring "diversity statements" from candidates.

• **Segregation based on protected characteristics.** Organizations may not use protected characteristics when organizing programs, activities and resources. This may include, for example, race-based training sessions, segregation in facilities or resources, or implicit segregation through program eligibility, such as a DEI workshop where individuals are asked to identify with protected characteristics.

The memorandum notes an exception to impermissible segregation in the form of "sex-segregated intimate spaces." The DOJ says failing to maintain sex-separate spaces, "rooted in biological differences" and disregarding gender identity, such as restrooms, showers, locker rooms or lodging, can violate federal law. This, however, is contrary to California law. Under California's Fair Employment and Housing Act, all employees have the right to use a restroom or facility that corresponds to the employee's gender identity or gender expression, regardless of the employee's assigned sex at birth.

• **Use of protected characteristics in candidate selection.** The DOJ reiterates that entities cannot consider any protected characteristics when considering candidates for employment, contracts or program participation. This includes using "diverse slate" policies in hiring under which interview slates must include a minimum number of candidates from protected groups, or any policy uses anything resembling benchmarks or quotas based on protected characteristics.

• **Training programs that promote discrimination or hostile environments.** Unlawful DEI training programs are those that stereotype, exclude or disadvantage individuals based on protected characteristics.

Best Practices

The DOJ's guidance also recommends best practices to help organizations comply with federal antidiscrimination laws, including:

• Ensure inclusive access to all workplace programs, activities and resources.

• Focus on the skills and qualifications directly related to job performance.

• Prohibit demographic-driven criteria, which may have a discriminatory influence on demographic representation.

• Document legitimate nondiscriminatory reasons for making employment decisions.

• Scrutinize neutral criteria to determine whether they are proxies for protected characteristics.

• Eliminate diversity quotas.

• Avoid exclusionary training — ensure trainings are open to all qualified participants, regardless of protected characteristics.

• Include nondiscrimination clauses in contracts to third parties and monitor compliance.

• Establish clear anti-retaliation procedures and create safe reporting mechanisms.

The DOJ's guidance, like the EEOC's guidance, isn't groundbreaking, but it provides some helpful examples for employers with DEI initiatives. Employers with DEI initiatives should review the guidance and consult with legal counsel to ensure their programs comply with the law.

California employers should also keep in mind where the federal guidance differs from California law — most notably with respect to the use of restrooms and other facilities based on gender identity and expression.

Staff Contact: James W. Ward