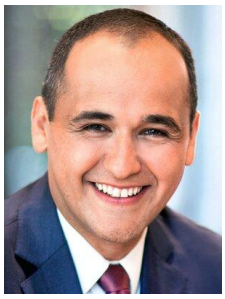
What To Expect As Calif. Justices Weigh Arbitration Fee Law

By **Elliot Schatmeier and Kimmy Yu** (August 7, 2025)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On May 21, the California Supreme Court heard oral arguments in Hohenshelt v. Superior Court of Los Angeles County, a case that may significantly affect how arbitration agreements are enforced in California, particularly as it relates to late arbitration fee payments.

At the center of the case is a conflict between the Federal Arbitration Act, which allows for more flexibility in handling delayed payments, and the California Arbitration Act, which imposes strict payment deadlines with no exceptions.


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If the court rules that the FAA does not preempt the CAA, California employers and businesses could lose the right to arbitrate over minor procedural delays, changing the way arbitration is approached in the state.

The Facts of Hohenshelt

In 2020, Dana Hohenshelt, a former employee of Golden State Foods Corp., brought claims against the company for retaliation and failure to prevent retaliation under the California Fair Employment and Housing Act, and for failure to timely provide copies of wage statements and personal records under the state's Labor Code. The trial court granted Golden State's motion to compel arbitration according to the parties' agreement and stayed the court proceedings.

Arbitration commenced via JAMS pursuant to the trial court's order. Golden State paid over $50,000 in arbitration fees, but it missed two invoice deadlines by more than 30 days. Although JAMS extended the payment deadlines and Golden State subsequently paid accordingly, Hohenshelt nevertheless withdrew the matter from arbitration and moved to lift the stay pursuant to Code of Civil Procedure, Section 1281.98, asserting that Golden State had waived its right to arbitrate by failing to pay on time.

The trial court denied Hohenshelt's motion, holding that the arbitrator's extension rendered the payments timely. The Court of Appeal for the Second Appellate District, however, reversed the decision and found that Golden State had materially breached the arbitration agreement by failing to pay within the mandated 30-day period following the due date. The

Court of Appeal further rejected Golden State's argument that the FAA preempted the CAA.

Other Conflicting Appellate Decisions

California's appellate courts remain sharply divided on this issue. For instance, in Hernandez v. Sohnen Enterprises Inc. in May 2024, a different panel in the Second Appellate District, held that Section 1281.97 imposes a stricter requirement for only arbitration contracts, which makes it harder to enforce arbitration agreements and is contrary to the FAA's objectives.[1]

The court in the Hernandez case ultimately held that where the parties have not expressly selected the CAA to apply to their agreement, the FAA preempts the portion of Section 1281.97 that dictates findings of material breach and waiver as a matter of law.[2]

In contrast, the First Appellate District in Keeton v. Tesla Inc. in June 2024 **found** that the FAA did not preempt the CAA, and that the relevant section of the CAA did not unconstitutionally impair the arbitration agreement.[3] The court further held that Tesla had materially breached the arbitration agreement by failing to pay its arbitration fees within the 30-day period, and the employee was entitled to proceed with her claims in court.[4]

To resolve this conflict, the California Supreme Court granted review in the Hohenshelt, Hernandez and Keeton cases.

The Legal Debate Over S.B. 707

At the oral arguments in the Hohenshelt case, several employer and business groups, supported by the U.S. Chamber of Commerce, criticized California's S.B. 707 — enacted in 2019 and codified in Code of Civil Procedure, Sections 1281.97-1281.99 — as unfairly punitive by singling out arbitration agreements.

S.B. 707 was initially designed to protect consumers and employees from being left in procedural limbo by businesses that fail to pay the required arbitration fees after compelling arbitration.[5] But the business groups argued that the statute's automatic penalties violate the FAA's equal-treatment principle and that no other contract imposes such rigid sanctions for a single late payment. Even force majeure events (e.g., natural disasters) or errors by third parties (e.g., the post office) would not excuse a delay under the CAA.

In contrast, the employee and consumer advocates, supported by the California attorney general, defended S.B. 707 as a necessary safeguard against bad faith arbitration delays, emphasizing that the law helps ensure prompt arbitration access and deters companies from using nonpayment as a strategy to stall claims.

The California attorney general further contended that, despite the statute's strict language, courts could still apply equitable doctrines — such as excusable neglect — to prevent unduly harsh outcomes, even though such flexibility is not explicitly stated in the statute. In response, counsel for the employer argued that S.B. 707, as currently written, provides no room for judicial discretion and equitable relief.

When the CAA Applies: Strict Deadlines and Harsh Consequences

Under the CAA, missing an arbitration fee payment deadline, even by a single day and even if the payment is eventually paid, can constitute a material breach of the agreement and a waiver of the right to arbitrate. Specifically:

- Section 1281.97(a)(1), provides that in an employment or consumer arbitration, if the drafting party (typically the employer or company) fails to pay initiation fees "within 30 days after the due date[,] the drafting party is in material breach of the arbitration agreement, is in default of the arbitration, and waives its right to compel arbitration."
- Section 1281.97(b), further provides that "if the drafting party materially breaches the arbitration agreement and is in default under subdivision (a), the employee or consumer may do either of the following: (1) withdraw the claim from arbitration and proceed in a court of appropriate jurisdiction; (2) compel arbitration in which the drafting party shall pay reasonable attorney's fees and costs related to the arbitration."
- Section 1281.98, is nearly identical to Section 1281.97, but applies to the fees and costs required to continue an arbitration, rather than to initiate an arbitration.
- Section 1281.99, provides that if arbitration is withdrawn, the court shall impose attorney's fees and costs on the drafting party resulting from the breach. The court may also impose evidentiary, terminating or contempt sanctions, unless the breach was substantially justified or sanctions would be unjust.

Notably, as the Second Appellate District explained in Gallo v. Wood Ranch USA Inc. in 2022, the statute defines a material breach "as a matter of law to be the failure to pay

anything less than the full amount due by the expiration of the statutory grace period, rather than leaving materiality as an issue of fact for the trier of fact to determine."[6]

The statute is strictly applied whenever a drafting party fails to pay arbitration costs and fees by the statutory deadline, i.e., 30 days after the due date. There is no room for excusable neglect, no consideration of whether payment was ultimately made and no prejudice requirement.

When the FAA Applies: A More Flexible Approach Using Traditional Contract Law Analysis

Contrary to the CAA's strict compliance rule, if an arbitration agreement expressly states that the FAA governs, courts apply traditional contract law principles to determine whether a delay in fee payment constitutes a material breach or waiver of arbitration rights. Under this framework, which requires fact-specific inquiries, a missed payment deadline does not automatically void the right to arbitrate.

To find a material breach under the FAA, courts typically require more than a mere late payment. Breach is usually found only if the drafting party utterly refuses to participate in arbitration proceedings, or an arbitration provider terminates the proceedings because of the unpaid fees.[7] Absent a "time is of the essence" clause, slow payment — as opposed to no payment at all — is not usually sufficient to constitute a breach under general principles of California law.[8]

Like material breach, the doctrine of waiver is governed by principles of contract law.[9] To establish waiver, two elements must exist: (1) knowledge of an existing right to compel arbitration; and (2) intentional acts inconsistent with that existing right.[10] According to the U.S. District Court for the Northern District of California's 2019 ruling in Brunner v. Lyft, Inc.: "The Ninth Circuit imposes 'a heavy burden of proof' on any party asserting waiver."[11] Tardy payment alone is likely insufficient to establish waiver.[12]

When an Agreement Is Silent on Choice of Law

If the arbitration agreement doesn't specify whether it is governed by the FAA or CAA, the resolution of a late payment may depend on which forum you are litigating in.

Many federal courts, especially in the Northern District of California, have ruled that S.B. 707's rigid 30-day rule and automatic waiver provisions conflict with the FAA's flexible,

contract-based approach, rendering them preempted.[13] However, similar to California's state courts, federal courts are also divided on this issue.[14] The U.S. Court of Appeals for the Ninth Circuit has yet to weigh in definitively.

As stated above, California state courts are split in authority. But in the Keeton ruling, the First Appellate District held that if the "parties' arbitration agreement does not expressly incorporate the CAA, 'the procedural provisions of the CAA apply in California courts by default.'"[15] This determination means that anytime a plaintiff seeks relief from arbitration in California state court, that court may feel bound to apply the CAA's bright-line rules unless the parties clearly opt out.

The California Supreme Court's forthcoming ruling will resolve the split in authority among California state courts — but not for federal courts, which are not bound by the California Supreme Court's interpretation of FAA preemption. Until the Ninth Circuit addresses the issue, district courts continue to have wide latitude to determine on a case-by-case basis whether the FAA preempts Section 1281.97 and what follows.

Practical Tips: Protecting the Right to Arbitrate

Arbitration is often chosen for good reason — confidentiality, speed, streamlined discovery, a bench trial and the avoidance of class action claims. To protect those benefits, below are some tips to protect your employer-clients' right to arbitration.

First, unless there is a reason for the CAA to apply in your particular situation, always ensure that the arbitration agreement explicitly states that the FAA governs. This may offer a stronger defense against automatic waiver under S.B. 707 — particularly in federal courts where judges are more likely to find preemption.

Second, if your arbitration agreement is silent regarding the CAA or the FAA, and a plaintiff initiates the case in state court, prior to moving to compel, consider whether there is a basis to remove the case to federal district court — including which district would handle the case. This will ensure that a federal court interprets federal law. It also ensures a stay of the case if you disagree with the district court's application of Section 1281.97.[16]

Third, employers should establish internal protocols ensuring prompt payment of initiation and continuation fees. Ensure that fees are paid, even if late. If the arbitration forum cancels the arbitration because your clients have made no attempt to pay, it will likely be considered as waiving your right to arbitrate, even in federal courts.

And last, employers should also consider updating existing arbitration agreements to confirm enforceability under current standards. In light of the upcoming outcome in the Hohenshelt case, revisions may be necessary to clarify governing law.

Conclusion

The Hohenshelt decision will mark a pivotal moment for employers navigating California's evolving arbitration landscape. Regardless of how the court rules, the case highlights the importance of clarity in arbitration agreements and strict internal controls around fee payments. By proactively updating agreements and strengthening compliance procedures, employers can preserve the advantages of arbitration and avoid costly procedural missteps.

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[1] Hernandez v. Sohnen Enterprises, Inc., 102 Cal.App.5th 222, 243 (2024), review granted 553 P.3d 866 (Cal. 2024).

[2] Id.

[3] Keeton v. Tesla, 103 Cal.App.5th 26 (2024), review granted, 555 P.3d 2 (2024).

[4] Id.

[5] Gallo v. Wood Ranch USA, Inc., 81 Cal.App.5th 621, 634 (2022).

[6] Id. at 644.

[7] Belyea v. Greensky, Inc., 637 F. Supp. 3d 745, 760 (N.D. Cal. 2022).

[8] Id. at 759-760.

[9] Brunner v. Lyft, Inc., No. 19-CV-04804-VC, 2019 WL 6001945, at *1 (N.D. Cal. Nov. 14, 2019) (internal citation omitted).

[10] Hill v. Xerox Bus. Servs., LLC, 59 F.4th 457, 468 (9th Cir. 2023).

[11] Brunner, at *1.

[12] Miller v. Plex, Inc., Case No. 22-cv-05015 (SVK), 2024 WL 348820, at *7 (N.D. Cal. Dec. 27, 2024); Belya, 637 F. Supp. 3d 760-61.

[13] See, e.g., Miller v. Plex, Inc., No. 22-CV-05015-SVK, 2024 WL 348820 (N.D. Cal. Jan. 30, 2024); Belyea v. Greensky, Inc., 637 F. Supp.3d 745 (2022); Lee v. Citigroup Corp. Holdings, Inc., No. 22-CV-02718-SK, 2023 WL 6132959 (N.D. Cal. Aug. 29, 2023); Burgos v. Citibank, N.A., No. 23-CV-01907-AMO, 2024 WL 3875775 (N.D. Cal. Aug. 16, 2024).

[14] See, e.g., Agerkop v. Sisyphian LLC, No.CV-19-10414-CBM, 2021 WL 1940456, at *4-*5 (C.D. Cal. Apr. 13, 2021); Postmates, Inc. v. 10,356 Individuals, No.CV-20-2783-PSG, 2021 WL 540155 at *7-*10 (C.D. Cal. Jan. 19, 2021).

[15] Keeton, 103 Cal.App.5th at 38.

[16] S.B. 365.