Oregon Business Lawyer

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FinCEN's New Reporting Requirement for Nonfinanced Residential Real Estate Transactions: What Business Lawyers Need to Know

Taylor K. Gersch, Gleaves Swearingen LLP

Effective December 1, 2025, the Financial Crimes Enforcement Network (FinCEN) will implement a new nationwide reporting requirement aimed at helping government agencies prevent illicit actors from anonymously laundering money through residential real estate transactions. This requirement, issued by the US Department of Treasury, is set forth in the final rule 89 Fed. Reg. 70258 (Final Rule) published on August 29, 2024. Efforts are being made to overturn the new reporting requirement, but for now, the effective date continues to be December 1, 2025.

The Final Rule requires certain individuals involved in real estate transactions to report to FinCEN information about themselves, the transferor, the transferee, the real property, and the payment information when the transaction involves a **nonfinanced transfer** of **residential real property** to a trust or legal entity. The final rule curtails the ability of illicit actors to evade the scrutiny of financial institutions that have Anti-Money Laundering (AML) programs, Countering the Financing of Terrorism (CFT) programs, and Suspicious Activity Report (SAR) requirements.

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How lawyers may be affected

Business lawyers may very well find themselves in the position of filing one of these reports with FinCEN come December 1. One of the most common scenarios where this reporting requirement will arise for lawyers is where a married couple owns residential property and they want to transfer the property into a legal entity. This qualifies as a nonfinanced transfer of residential real property to an entity. If there is no closing or settlement agent involved, and the attorney filed the deed with the recorder's office, then the lawyer has an obligation to file the report with FinCEN.

To understand whether a transaction is considered a reportable transfer, let's walk through the basics with a hypothetical case study.

Your client wants to purchase a small ranch-style home in Eugene from her aunt. She wants to pay with cash, and she wants to buy it in the name of her limited liability company because she plans to remodel the home and use it as a rental property. Is this a reportable transfer according to FinCEN's new rule? Yes, and here's why:

Residential real property

The small ranch style home is a residential property and therefore meets the first element for a reportable transfer. Residential real property is property located in the US that meets one of the following requirements:

- Contains a structure designed principally for occupancy by one to four families (includes

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FinCEN

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single-family houses, townhouses, and entire apartment buildings)

• Is land (vacant or unimproved) on which the transferee intends to build a structure designed principally for occupancy by one to four families

• Is a unit designed principally for occupancy by one to four families within a structure (e.g., a condominium)

• Are shares in a cooperative housing corporation

Additionally, the transfer of mixed-use property may be reportable if a portion is considered residential real estate (e.g., a single-family residence located above a commercial enterprise).

Nonfinanced transfer

The client's LLC is paying all cash to purchase the home, and thus this transaction is a nonfinanced transfer. A transfer is financed when it involves an extension of credit to the transferee that meets one or both of the following criteria:

• The transfer is secured by the transferred residential real property.

• The transfer is extended by a financial institution that has both an obligation to maintain an anti-money laundering program and an obligation to report suspicious transactions.

Types of nonfinanced transfers include all-cash transfers and transfers without consideration.

Exceptions to reporting

The client's proposed transaction does not fall under any of the following exceptions where a transfer is not reportable:

• A transfer that is a grant, transfer, or revocation of an easement

• Transfer resulting from the death of an individual, whether pursuant to the terms of a will, the terms of a trust, the operation of law (transfers from intestate succession, surviving joint owners, or transfer on death deeds), or by contractual provision (transfers from beneficiary designation)

• Transfer incident to divorce or dissolution of marriage or civil union

• Transfer to a bankruptcy estate

• Transfer supervised by a court in the U.S.

• Transfer for no consideration made by an individual, either alone or with their spouse, to a trust of which that individual, their spouse, or both of them are the settlor(s) or grantor(s)

• Transfer to a qualified intermediary for purposes of 1031 exchange

• Transfer for which there is no reporting person

Reporting person

Now the question is who actually files the report for the client. The final rule institutes a cascading approach to determine primary filing responsibility, and the lawyer should evaluate the parties involved in the transaction and whether any have the primary filing responsibility over the lawyer. A good rule of thumb is that if there is no closing or settlement agent involved, the lawyer is likely up next if they filed the deed with the recorder's office.

Assuming the lawyer is required to file the report with FinCEN, the lawyer must file information about themselves, the transferee, the transferor, the real property, and the payment information. Much of the information required is similar to that collected under FinCEN's Corporate Transparency Act, particularly regarding beneficial ownership, though the rules are not identical.

Electronic filing, retention of records, and penalties

Once the lawyer compiles all the necessary information for the report, the lawyer electronically files the information in a "Real Estate Report." The report must be filed by the later of (1) the final day of the month in which closing occurred or (2) thirty calendar days after the date of closing. The reporting person must maintain a copy of the certification by the transferee or transferee's representative as to the identities of the beneficial owner of the transferee for five years. But the reporting person is not required to retain a copy of the real estate report.

The regulation does not explicitly address potential penalties for failing to file a report. Instead, according to the Federal Register, "FinCEN believes that it is unnecessary to list potential penalties in the regulatory text because the applicable penalties are already set forth by statute," including the Bank Secrecy Act.

At the end of the day, the client can still purchase the small ranch-style home. But the lawyer will need to analyze the potential reporting obligations they may have under the cascading approach. ◆

Oregon's SB 426 (2025): What It Does, Why It Matters, and How the Construction Industry Should Respond

Jacob Zahniser, Miller Nash LLP

On June 9, 2025, Governor Tina Kotek signed Senate Bill 426 into law. SB 426 rewrites an important part of the liability picture in the Oregon construction industry by making property owners and prime contractors potentially jointly and severally liable for unpaid wages owed to unrepresented (i.e., non-union) employees of subcontractors at any tier. The law takes effect January 1, 2026. This article summarizes SB 426, traces its legislative history and purpose, explains the mechanics of how SB 426 accomplishes its purpose, identifies the main risks SB 426 creates for lenders, owners, and prime contractors, and recommends practical risk-management measures to alleviate those risks.

Summary of the text of the bill

In plain terms, SB 426 adds new sections to ORS chapter 652, allowing civil actions to recover unpaid wages (including fringe benefits, penalties, interest, and attorney fees) from an owner and prime contractor when a subcontractor does not properly pay an "unrepresented employee." Per SB 426 § 2(1)(i), an "unrepresented employee" is a person that is "not represented by a construction trade labor organization that has established itself or its affiliates as the collective bargaining representative for persons performing work on a project" or "not covered by a collective bargaining agreement" with a procedure or mechanism for recovering unpaid wages.

Key features of SB 426 include:

• **Joint and several liability**: Per SB 426 § 2(2), the owner "shall be jointly and severally liable with" the prime contractor "for any unpaid wages, including fringe benefit contributions and penalties" owed to an unrepresented employee who worked on the project. Neither the owner nor prime contractor can avoid liability by claiming the person was an independent contractor "unless the person qualifies as an independent contractor under ORS 670.600." SB 426 creates a "rebuttable presumption" that a person performing labor on a construction project is not an independent contractor.

• **Who may sue**: SB 426 authorizes an unrepresented employee, an authorized third-party representative (e.g., a worker advocate or payroll compliance organization), or the Oregon Attorney General to bring a civil action to recover unpaid wages, interest, penalty wages, damages, and attorneys' fees.

• **Notice requirement**: Before filing a lawsuit, the claimant must provide notice to the owner and prime contractor that specifies the alleged violation and the nature of the claim. The notice, however, does not limit the owner's or contractor's liability or prevent amendment of the complaint later. The owner or prime contractor has twenty-one days from the date of the notice to correct the alleged violation.

• **Records requirement**: Upon request, subcontractors are required to provide the owner and prime contractor the following records: (1) certified payroll reports with sufficient information to determine whether the subcontractor has paid all wages earned by its employees working on the project, (2) the names of all its employees working on the project and whether the employee is an independent contractor, and (3) an affidavit attesting whether the subcontractor or any of its principals have been involved in any wage claim in the last five years, and the outcome of that claim.

• **Statute of limitations**: An action to recover unpaid wages must commence within two years from the date when the wages and fringe benefits became due.

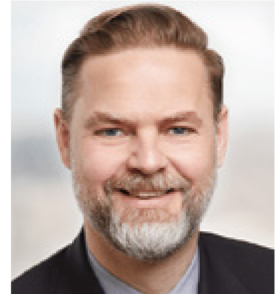
• **Scope**: SB 426 applies to wages (and related compensation) for labor performed on a project "within the scope of the construction contract" and reaches unrepresented employees at any tier of subcontracting.

Those are the core statutory mechanics. The enrolled bill and digest provide the exact statutory language and technical definitions inserted into ORS chapter 652. These can be found here.

History of the bill

The measure originated as part of a wave of efforts to address wage theft and enforce wage-payment obligations on construction projects where the worker who is shorted pay may be several contracting tiers removed from the owner. Media coverage and employer organizations debated the bill's merits and possible unintended consequences while worker advocates and labor organizations supported the bill as an enforcement tool. Legislative analysis and stakeholder commentary accompanied committee hearings and floor debate.

National and local legal and business outlets (including labor-advocacy groups and employment



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law firms) published early analyses warning of the bill's implications and describing how it differs from prior Oregon law, which placed more limited direct liability on owners and prime contractors for subcontractor wage violations. Opponents include the National Association of Minority Contractors, the National Federation of Independent Business, and Multifamily NW. They expressed concern that expanded liability could increase project costs, lead owners and prime contractors to be more restrictive in who they contract with, create friction in multi-prime and public-private contractual arrangements, and disproportionately impact emerging business owners (such as Minority Business Enterprises (MBE) and Women Business Enterprises (WBE)) that may not have the administrative resources needed to comply with SB 426's requirements.

Supporters emphasized the need to close enforcement gaps that leave workers without a remedy when subcontractors go out of business or otherwise fail to pay their laborers.

Purpose of the bill

By expanding the pool of potential defendants (owners and direct contractors), SB 426 aims to ensure workers recover unpaid wages when the immediate employer fails to pay. Supporters say this reduces barriers, like collection difficulties when a subcontractor has little assets or disappears, leaving workers uncompensated.

Exposing owners and prime contractors to liability creates financial incentive for those parties to verify payroll compliance down the subcontracting chain, requiring better oversight, stronger contracting terms, or prequalification of subcontractors.

Authorizing certain third-party representatives and the Attorney General to sue expands enforcement capacity beyond individual workers bringing their own claims.

In short, the policy goal is worker protection and deterrence of wage theft by reallocating enforcement leverage to parties higher in the contracting chain.

How the bill achieves its purpose

SB 426 achieves its purpose through three legal mechanics. First, SB 426 creates a statutory right to pursue owners and direct contractors for unpaid wages (jointly and severally). SB 426 increases the set of financially responsible parties a claimant can pursue. That directly helps wage recovery where the paying subcontractor is either insolvent or otherwise judgment-proof.

Second, by authorizing not only workers but also third-party representatives and the Attorney General to bring action, the bill reduces practical obstacles (language, fear of retaliation, lack of legal resources) that may otherwise prevent workers from suing for unpaid wages. This creates more enforcement activity and a higher likelihood of remedies.

Finally, by creating a two-year limitations period and statutory recovery of wages, fringe benefits, penalties, interest, and attorney fees improves prospects for full recovery, SB 426 makes lawsuits more attractive to plaintiffs and their counsel—again increasing enforcement reach.

The combination of these changes is deliberate: increase who can be sued, who can sue, and what can be recovered, thereby closing gaps in wage enforcement that leave workers uncompensated.

Risks to lenders, developers, and general contractors created by the bill

While SB 426 advances worker protection, it creates significant business and legal risks for industry stakeholders.

First, owners now face joint and several liability for unpaid wages, exposing the ownership entity, often a single-purpose entity, to significant unexpected claims. Note, SB 426 §2(7) specifically excludes projects relating to the owner's primary residence or where the project "consist[s] of five or fewer residential or commercial units on a single tract…." For those owners not excluded under SB 426, they may demand more conservative contracting, including stronger indemnities, escrowed wage funds, or expanded vetting of the trades, each of which increases transactional friction and project costs.

Second, prime contractors are now on the hook not only for their own payrolls but potentially for wage shortfalls several tiers down the subcontracting chain, adding contingent liability and potential cash-flow stress if they must post bond or pay claims. Further, allowing third-party representatives and the Attorney General to sue makes litigation more likely. Prime contractors may face more frequent claims, discovery burdens, and reputational exposure, which may be factored into overall project costs.

"SB 426...prioritizes worker recovery and deterrence of wage theft by widening the net of potential defendants and empowering third-party enforcement."

Third, lenders rely on predictable cash flow from projects and clear priority of liens. Wage claims against owners/prime contractors could complicate borrower creditworthiness, cause liens or judgments that impair loan collateral, or force lenders to become involved in resolving claims to protect loan performance. SB 426 may require lenders to adjust underwriting assumptions, require stricter borrower covenants (e.g., payroll compliance representations), or demand additional protections (e.g., escrowed funds, increased reserves) to account for contingent wage liabilities lasting up to two years from substantial completion.

Fourth, smaller subcontractors, particularly MBE/WBE, may find it harder to obtain work if owners and prime contractors restrict the subcontractor pool to reduce exposure. At a minimum, prime contractors will certainly negotiate subcontracts to reallocate or limit exposure under SB 426, leading to nonstandard contract terms, increased subcontract administration and paperwork, and a reduced willingness from subcontractors to engage in the project.

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How to alleviate the risks of SB 426

SB 426 does not make the risk of a wage claim unavoidable. Nevertheless, lenders, owners, and prime contractors can take measured, practical steps to manage exposure and preserve project viability.

Lenders will build the possibility of wage-related claims into loan underwriting: increase reserves, adjust loan-to-cost metrics, and require borrower representations about payroll compliance processes

"...the law reallocates contingent risk upward in the contracting chain and increases litigation probability, with real implications for owners, prime contractors, and lenders."

and cash reserves for payroll. Lenders could impose loan covenants that require borrowers to provide regular payroll compliance certifications and maintain escrow accounts for payroll disbursements on financed projects. Lenders may also investigate title insurance and litigation searches that include wage-claim risk assessments. Finally, lenders could include reporting requirements and third-party inspections to detect potential payroll problems early and require corrective action before claims escalate.

Owners can require the prime contractor to include contractual warranties and strong indemnities for payroll compliance by subcontractors and express duty to defend against third-party wage claims. Owners should make sure indemnities are clear, enforceable, and backed by insurance/bonds where possible. Note, indemnities do not change statutory liability to third parties; rather, indemnities shift risk among contracting parties. Further, owners can consider escrow accounts or retainage expressly tied to payroll compliance structured so that a portion of contract funds is available to cover potential wage claims without unduly impeding subcontractor operations. SB 426 §3(4)(a), (b) specifically allows the owner or prime contractor to "withhold payment to a subcontractor" if the subcontractor fails to provide the required certified payroll records and/or in the event the owner or prime contractor paid the subcontractor's employee directly. Finally, owners can consider requiring payment and performance bonds with explicit payroll claim processes and include contractual representations of payroll compliance as part of the progress payment applications and as a condition to release retainage.

As for prime contractors, first, they should tighten subcontractor prequalification (financial health, payroll practices, reference checks) and require payroll reporting or third-party payroll-surplus verification for critical trades. They should consider including explicit payroll-payment obligations, audit rights, indemnities, and strong remedy provisions to subcontractors. At a minimum, prime contractors should start requiring subcontractors to provide payroll records, certified payrolls, and proof of tax and fringe benefit payments on demand, if not as part of the pay application process.

Second, prime contractors should implement subcontractor onboarding checks, periodic audits, and real-time payroll verification (via payroll service providers or clearinghouses). Subcontracts should include payroll compliance clauses tied to the release of progress payments or final payment, subject to the statutory restraints of ORS 701.625, Oregon's prompt pay act.

Third, prime contractors should consider limiting tiers of subcontracting or using subcontractor prequalification pools to reduce the number of unknown payroll actors on a project. Where multiple tiers are unavoidable, prime contractors should require the immediate subcontractor to warrant payment of lower-tier labor and to carry responsibility for flow-through payments.

Finally, prime contractors may require subcontractors to carry appropriate insurance, maintain adequate working capital, and provide payment & performance bonds (where commercially viable).

Conclusion

SB 426 represents a significant policy shift in Oregon: it prioritizes worker recovery and deterrence of wage theft by widening the net of potential defendants and empowering third-party enforcement. SB 426 will benefit many workers who historically have had little practical remedy when subcontractors fail to pay. At the same time, however, the law reallocates contingent risk upward in the contracting chain and increases litigation probability, with real implications for owners, prime contractors, and lenders. To address the risks of SB 426, owners, prime contractors, and lenders will need clear contract drafting, tighter subcontractor vetting, payroll monitoring, and escrow/bonding strategies. The next few months (before SB 426's January 1, 2026 effective date) are a critical window for the industry to adapt: review contract templates, update procurement and underwriting practices, and put compliance programs in place so projects continue to move forward while workers' wage claims are enforced more effectively. ◆

Business Law Section Executive Committee Nominations

The OSB Business Law Section is currently recruiting new members-at-large for the 2026 Executive Committee. The Executive Committee manages the activities of the Business Law Section, ranging from planning CLE programs and networking events to producing informational newsletters and tracking relevant legislation. Member-at-large terms are two years in length and begin on January 1, 2026.

If you are interested in serving, please submit a letter of interest to the Nominating Committee Chair, Joe Cerne, at CerneJ@ballardspahr.com by Friday, October 10, 2025. To find more information about the Business Law Section and our current Executive Committee, see our website, https://businesslaw.osbar.org/.

Barrister Banter: Michael T. Faulconer

The purpose of the series is to bridge the gap between junior and senior business lawyers in Oregon, fostering understanding and camaraderie. For this quarter's installment, we interviewed [Michael T. Faulconer](), an attorney at Gleaves Swearingen in Eugene, Oregon. Read on to learn about how Michael found his way from Tokyo to Eugene, his advice about the importance of critical thinking and a work-life balance, and his take on AI.

1. Tell me about your path to being a lawyer. What inspired you to pursue this career?

My path was not a traditional one. With degrees in International Studies and Japanese in hand, I went to Tokyo after college and worked for a little over three years in a Japanese government office as an international relations consultant. Following that, I went to work for a Japanese tech company. It wasn't until I was in my late twenties that I began to think about law as a potential path for me. Although those experiences were priceless, I was looking for a career that would afford me a greater opportunity to apply analytical and problem-solving skills. I was very drawn to the idea of law school and the practice of law because there is no better medium for developing and applying those skills, particularly in a way that allows me to do good for people and for causes that I care about. That led me to Michigan Law School and becoming a lawyer.

2. What is your practice area?

My practice focuses on business transactions and general corporate guidance. Although there is a particular focus on mergers and acquisitions (M&A), I enjoy assisting clients with all sorts of transactions, including commercial real estate sales/leases, financing transactions, and commercial contracts of all types. I got my start at Sidley Austin in Los Angeles, where my focus was mainly on finance and international transactions, but gradually my interest led me more toward M&A and other types of transactional work. I learned much during my time in LA, but making the move to Eugene gave me the opportunity to broaden my practice to include all types of transactional work, which was a welcome change.

3. How long have you been in your current role?

I started at Gleaves Swearingen in 2007, and became a partner soon after. My role has grown to include firm administration as part of our management committee.

4. How have you seen the practice change since you started practicing?

I think it has become less personal. It feels like we spend less time in the same room with clients and other legal professionals than we used to, and we don't get to know people as well. Since I started practicing there have been numerous technological advancements that have enhanced our ability to provide services to our clients, but not without a cost. In this sense, I tend to think of technology as both a blessing and a curse.

5. What do you wish you had known before you started working as a new lawyer?

A great work/life balance is the key to happiness. Life is too short to spend all of it working. After a few years in LA, I realized that I was missing out on too much, so I made the decision to move back to Oregon and situate myself in a community where I can have it all—a sophisticated business law practice, meaningful involvement in my community, family time, and time to spend on things that I enjoy. One of those things is coaching. I coached club and high school softball teams for fifteen years, giving me the opportunity to make a positive impact on the lives of young people in our community in a way that I couldn't achieve with my lawyer hat on.

6. What are your career highlights?

Over the years there have been many large deals involving many millions of dollars, and it's easy to point to those and say those are the highlights. But there have also been many deals involving small business owners, nonprofits, and other members of our community that have been just as rewarding. Every time we helped a client achieve their goal counts as a highlight in my book.

(On the coaching side, two 6A state titles as the head coach at Sheldon High School stand out as highlights that I'm proud of. Go Irish!).

7. What is your favorite part of the job?

I love solving puzzles and coming up with creative solutions to problems, and those are big parts of this job. I also enjoy my colleagues and coworkers that I work with on a daily basis. We have an amazing team here at Gleaves, and it makes the job all the more fun and rewarding when you have great people around you.

8. What parts of the job do you wish you could outsource to AI?

You are asking the wrong guy. I'm pretty convinced we are just a few short steps away from finding ourselves in The Matrix or being destroyed by Cylons (shoutout to Battlestar Galactica). But all joking aside, being a good lawyer requires critical thinking, good judgment, and the ability to communicate with people, and these are things that can't be outsourced. They are also what makes being a lawyer challenging and fun.

9. What advice would you give a new business lawyer?

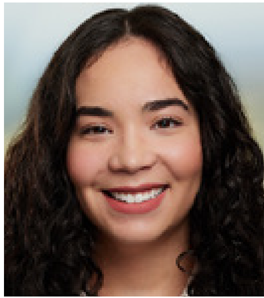
Don't be in too big of a hurry. Focus on the quality of your work. Think critically, challenge assumptions, write clearly and with precision, and review thoroughly. Then double check everything. Good things will come to young lawyers who do these things.

10. What advice would you give a senior lawyer who is charged with mentoring a new lawyer?

Law school was great for developing critical thinking skills, but I think most of us learn how to be a lawyer from other lawyers. Remember those who mentored you, and be patient and generous with your time in paying it forward. ◆

Navigating Tariffs: Essential Knowledge and New Legal Trends

Incainti Sofia McDonald and J. Dino Vasquez, Miller Nash LLP



Sofia McDonald is a dedicated associate in the firm's international practice team, where she focuses on cross-border transactions and export/import issues. In this capacity, she supports clients in navigating the complexities of regulations, assisting in the reduction of liability, and ensuring compliance with ever-evolving laws. Her practice also has a focus on both bankruptcy and commercial lending and she provides clients with efficient and tailored solutions to complex financial matters. Sofia can be reached at 503.205.2544 or sofia.mcdonald@millernash.com.

Introduction

A tariff is a tax imposed by a government on goods imported into the country. Though the concept may appear straightforward, tariffs play a central and complex role in international trade policy. Governments employ tariffs to shield domestic industries from foreign competition, to generate revenue, and to leverage negotiating power in trade agreements. At the same time, tariffs can influence consumer prices, supply chains, and diplomatic relations.

The United States, like most countries, uses a structured classification and valuation system to determine how and when tariffs are applied. For importers, manufacturers, and policy professionals alike, a clear understanding of tariffs and their legal framework is essential to navigate the regulatory landscape and mitigate associated costs.

Tariffs and import duties

It is important to distinguish between tariffs and the broader category of import duties, which encompass a range of taxes imposed on imported goods. Tariffs are a subset of these duties, but other forms also exist to address specific trade concerns.

Customs duties are the most general form, typically calculated based on product category or declared value. **Excise duties**, in contrast, apply to specific goods such as alcohol and tobacco, and they often reflect public health or regulatory considerations rather than purely economic concerns. **Anti-dumping duties** are levied when a foreign company is found to be selling products in the U.S. market at prices below fair market value, potentially undermining domestic producers. Similarly, **countervailing duties** are imposed to counteract subsidies provided by foreign governments to their exporters, which may distort competitive conditions in the U.S. market.

Each of these duties can be imposed independently or in combination with standard tariffs, depending on the origin, nature, and purpose of the imported goods.

Categories of tariffs in the United States

In the U.S. tariff system, there are three main types of tariffs, each calculated differently and serving different regulatory purposes.

The first category is **ad valorem tariffs**, which are based on the value of the goods being imported. This value often reflects the declared cost of the goods, including insurance and freight, and it may be influenced by international commercial terms (known as INCOTERMS). For instance, if goods are imported with a declared value of $500,000 under Cost, Insurance, and Freight (CIF) terms and the applicable tariff rate is 10 percent, the importer would be responsible for paying $50,000 in tariffs.

The second type is the **specific tariff**, which is calculated based on physical measurements such as weight, quantity, or volume. Unlike ad valorem tariffs, specific tariffs are fixed and do not fluctuate with market price. They are commonly applied to raw materials or agricultural products, where valuation based on volume or weight is more practical and consistent.

The third category is the **compound tariff**, which combines both ad valorem and specific components. For example, imported aluminum may be taxed both as a percentage of its value and an additional amount per ton. These tariffs can be more complicated to calculate, requiring precise classification, documentation, and often additional scrutiny from customs authorities.

The Harmonized Tariff Schedule of the United States (HTS)

The cornerstone of the U.S. tariff classification system is the Harmonized Tariff Schedule of the United States (HTS). The HTS is maintained and regularly updated by the U.S. International Trade Commission. It codifies the duty rates for every type of imported product and serves as the basis for customs processing and trade statistics. Each product receives a unique ten-digit code based on its material composition, function, and other distinguishing characteristics. These codes not only determine the applicable duty rates but also assist in tracking trade data and enforcing trade restrictions.

For example, automotive wheel covers and hubcaps may be classified under HTS code 8708.70.60.45. This classification sequence begins at the section level (covering transport equipment), narrows to the chapter on motor vehicles, then further specifies the relevant part or accessory and its intended use. The general duty rate for these items may be 2.5 percent, but the rate can vary dramati-

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cally depending on the country of origin. Products imported from countries such as Cuba or North Korea may be subject to a 25 percent rate due to political restrictions, while goods from China may incur an additional 25 percent under Section 301 tariffs. These variations illustrate the importance of accurate product classification, which is often managed by licensed customs brokers due to the complexity involved.

Businesses of any size or individuals can hire a licensed customs broker; the more complex a shipment is or the greater the value of goods being imported, the more important a licensed customs broker is for risk mitigation. For those who wish to hire a broker, U.S. Customs and Border Protection (CBP) provides a list of permitted customs brokers and contact information.

Legal authorities for imposing tariffs: Section 301 and IEEPA

The U.S. government has multiple legal mechanisms at its disposal to impose tariffs, each rooted in distinct statutory authorities. Two of the most significant are Section 301 of the Trade Act of 1974 and the International Emergency Economic Powers Act (IEEPA). Each provides the executive branch with tools to respond to trade-related threats and unfair practices, although they differ in scope, purpose, and procedural requirements.

Section 301 of the Trade Act of 1974

Section 301 authorizes the Office of the United States Trade Representative (USTR) to investigate and respond to foreign trade practices that are deemed unfair or discriminatory and that burden or restrict U.S. commerce. The process is designed to be methodical, transparent, and consultative, involving multiple stages of investigation, negotiation, and, where necessary, enforcement.

Investigation

Investigations under Section 301 can be initiated in one of two ways. An interested party, such as a business, trade association, or labor group, may file a formal petition with the USTR, prompting an official inquiry. Alternatively, the USTR may initiate an investigation independently, based on its own assessment of foreign trade practices.

Consultation

During the consultation period, the USTR conducts consultations with the petitioner and seeks input from a variety of stakeholders. These include representatives from the private sector, members of industry advisory committees, and relevant agencies such as the U.S. International Trade Commission. Public comments are also solicited and reviewed through notices published in the Federal Register, ensuring transparency and public engagement.

Negotiation

If the investigation finds that a foreign policy or practice is an unfair or harmful to U.S. trade interests, the USTR will attempt to resolve the issue through negotiation. Where a formal trade agreement exists between the United States and the foreign country in question, any dispute resolution procedures outlined in that agreement are typically followed.

Retaliation

If a resolution cannot be achieved, the USTR may proceed to retaliation, imposing duties or other import restrictions on the goods of the offending country. The goal is to implement measures equivalent in value to the estimated harm suffered by the U.S. economy. Section 301 provides the USTR with broad authority to take action, which may include increasing tariffs, suspending trade concessions, restricting import licenses, or entering into binding agreements that compel the foreign country to eliminate the offending practice.

Once imposed, Section 301 tariffs remain in place for four years unless formally extended following a review.

In recent years, Section 301 has been used extensively to address trade imbalances and intellectual property concerns, particularly involving China. The USTR announced on April 17, 2025, that it would be pursuing further action targeting China's maritime, logistics, and shipbuilding sectors. The proposed measures include new fees assessed on Chinese-owned vessel operators, fees on Chinese-built ships based on net tonnage or container capacity, and charges applied to foreign-built car carriers with ties to Chinese financing. These fees are designed to escalate over time, signaling long-term scrutiny of the sector.

Public involvement has played a significant role in shaping these decisions. For example, in connection with the maritime investigation, the USTR sought public comments and held a hearing in May 2025. More than six hundred written submissions were received, and sixty individuals testified. Based on this input, the USTR proposed modifying the structure of the tariff fees by shifting the basis of calculation to net tons. This iterative process high-

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lights the importance of public participation in U.S. trade enforcement policy.

This procedure serves as a proactive channel for affected parties to influence tariff implementation and shape policy outcomes.

The International Emergency Economic Powers Act (IEEPA)

In contrast to the structured, investigatory process established under Section 301, the International Emergency Economic Powers Act (IEEPA) grants the president broad authority to regulate imports and other economic activities in response to national emergencies. Enacted in 1977, 50 U.S. Code § 1701 of the IEEPA enables the president to impose tariffs, sanctions, and other trade restrictions when faced with an "unusual and extraordinary threat" to the national security, foreign policy, or economy of the United States.

On April 2, 2025, President Trump invoked the IEEPA in Executive Order 14257 to declare a national emergency arising from what he characterized as "persistent and harmful annual U.S. goods trade deficits." The administration cited a lack of reciprocity in global trade relationships and predatory foreign policies as justification for sweeping changes in the U.S. tariff regime. Following the declaration, several adjustments were made to existing tariff rates, the list of affected countries, and the scope of covered goods.

Unlike Section 301, actions taken under IEEPA do not require an evidentiary investigation or public comment period. However, they are subject to judicial review and have been the focus of considerable litigation, with plaintiffs challenging the factual basis and legality of the declared emergency. Courts have begun scrutinizing whether the IEEPA framework permits such expansive use of tariff authority absent a clear and imminent threat, and further rulings may clarify the limits of presidential discretion under this statute.

Tariff preferences, exemptions, and trade agreements

While most imported goods are subject to tariffs under the HTS, various trade agreements and development programs offer exemptions or preferential treatment to certain products and countries.

One such program is the African Growth and Opportunity Act (AGOA), enacted in 2000. AGOA allows for tariff-free access to the U.S. market for over 6,800 product categories from eligible Sub-Saharan African countries. To qualify, participating nations must meet a series of criteria, including adherence to the rule of law, democratic governance, protection of human rights, and efforts to eliminate barriers to U.S. investment and trade. As of 2025, thirty-two countries remain eligible, with South Africa being the largest beneficiary, particularly through automobile exports. However, the AGOA program is currently scheduled to expire in September 2025, and its future remains uncertain pending congressional action.

Another major trade agreement is the United States-Mexico-Canada Agreement (USMCA), which took effect in July 2020 as a successor to the North American Free Trade Agreement (NAFTA). Under USMCA, most goods traded between the U.S., Mexico, and Canada continue to enjoy duty-free treatment, provided they meet strict rules of origin requirements. These rules stipulate that products must be primarily manufactured or sourced within the member countries. Determining eligibility, however, can become complicated for products composed of global components or subject to variable manufacturing processes.

Current litigation

In April 2025, President Trump issued a declaration of national emergency, citing the ongoing U.S. trade deficit and lack of reciprocal trade practices as threats to national security and the economy. Pursuant to IEEPA, a series of tariffs were introduced or increased on products from various countries. This move has been the subject of significant legal scrutiny.

Several cases have been filed. Litigants have generally argued that IEEPA does not authorize the imposition of tariffs and even if it did, that no genuine national emergency exists to justify such measures. In one court's response, the U.S. Court of International Trade (CIT) held that if the president wants to address a trade deficit through tariffs, the president already has the tariff authority specific to balance-of-payment issues provided in Section 122 of the Trade Act of 1974—not IEEPA. The Federal Circuit stayed the CIT's nationwide injunction pending the appeal that was subsequently filed. On August 29, the Federal Circuit affirmed the CIT's holding that the reciprocal tariffs exceeded the president's authority. Again, the administration has appealed the case and requested that the Supreme Court make a final ruling. The eventual outcome of the case may reshape the legal boundaries of presidential authority in trade matters.

Who bears the cost of tariffs?

Contrary to common perception, tariffs are not paid by foreign exporters or governments. The responsibility for payment lies with the importer of record, which may be the brand owner, distributor, or even the final customer depending on the nature of the supply chain. The importer is responsible for the cargo declaration before the goods are shipped. Once goods arrive at port, the goods are held by the CBP. The importer of record then fills then the relevant CBP entry forms for customs release. As such, where there is significant risk to an inexperienced importer, retaining a customs broker to assist with the import paperwork is recommended.

Tariffs are typically paid upon customs clearance at the port of entry. In cases where goods are routed to bonded warehouses, duties may be deferred until the products are released into U.S. commerce. The contractual terms between buyer and seller are often defined by INCOTERMS, which further clarify who is liable for tariffs and at what stage. For example, under FOB (Free on Board) terms, the buyer assumes responsibility for tariffs once the goods are loaded for

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shipping. Under DDP (Delivered Duty Paid) terms, the seller takes on the full burden, including import duties and customs clearance. EXW (Ex Works) places the maximum responsibility on the buyer, who must arrange and finance all aspects of the transport and importation process, including tariffs.

Mitigation strategies for importers

While tariffs are often unavoidable, businesses may implement several strategies to reduce their financial impact.

One such approach is the **First Sale Rule**, which permits the importer to declare the customs value based on the original sale between the manufacturer and the middleman, rather than the final resale price. By using the lower, initial transaction value, the importer can reduce the assessed tariff.

Another option is **tariff engineering**, where products are designed or modified to qualify for lower-duty classifications. This may involve changing the composition, assembly, or origin of the goods. For instance, importing parts separately or avoiding specific finishes can lead to reclassification under a more favorable duty rate.

Companies may also take advantage of **Foreign Trade Zones**. These designated areas allow goods to be imported, stored, and even assembled without incurring customs duties until they enter U.S. commerce. If the goods are ultimately re-exported or destroyed, no duties are paid at all.

Bonded warehouses offer a similar benefit by permitting duty-free storage of goods for up to five years. This can be useful for products with uncertain demand or longer distribution timelines.

Lastly, businesses may be eligible for **duty drawbacks**, which are refunds on duties paid for goods that are subsequently exported, destroyed, or returned. Several types of drawbacks exist, including direct identification manufacturing, substitution manufacturing, unused merchandise, and non-conforming goods. Depending on the category, companies may recover up to 99 percent of the duties initially paid.

Conclusion

In the modern global economy, tariffs are more than just taxes—they are instruments of economic strategy, tools of diplomacy, and mechanisms for enforcing trade policy. Navigating the U.S. tariff system requires a nuanced understanding of product classification, valuation, legal authority, and available exemptions or mitigation strategies. As international trade continues to evolve amid shifting geopolitical and economic conditions, businesses and policymakers must remain vigilant, informed, and adaptive in their approach to tariffs. ◆

Business Law Section's Annual CLE

When: November 7, 2025

CLE and Lunch: 8:00 a.m.–4:40 p.m.

James B. Castles Award Presentation and Reception: 4:40 p.m.–5:40 p.m.

Where: The Nines Hotel

525 SW Morrison Street

Portland, Oregon 97204

Speakers include*:

- David Angeli
- David Elkanich and Amber Bevacqua-Lynott on Ethics
- Melissa Jaffe on Attorney Wellness
- A Shareholder Disputes Panel moderated by Matt Colley featuring Heather Harriman, Alex Naito, and Aurelia Erickson
- Holly Hayman and Tony Kullen on distressed businesses and bankruptcy
- Valerie Sasaki on Business Law in 2036 (not a typo)

Speakers and schedule subject to change

The mission of the Oregon State Bar Business Law Section is to provide excellent service to the diverse group of business law practitioners throughout the State of Oregon by providing regular, timely, and useful information about the practice of business law, promoting good business lawyering and professionalism, fostering communication and networking among our members, advocating improvement of business law, and supporting Oregon's business infrastructure and business community.

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