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November 5, 2021

Dear Representative:

On behalf of NFIB, the nation's leading small business advocacy organization, I write in strong opposition of H.R. 5376, the *Build Back Better Act*. This legislation would increase taxes, impose new mandates, and increase penalties on small business owners, threatening to disrupt the fragile small business recovery. **H.R. 5376 will be considered an NFIB Key Vote for the 117th Congress**.

NFIB opposes efforts to raise taxes on small businesses. The *Build Back Better Act* broadens existing passive income taxes and applies them to active income, creating a true "Small Business Surtax." Specifically, the legislation substantially expands the 3.8% net investment income tax (NIIT) on pass-through business income and applies it to all business income above $400,000 (individual filers) and $500,000 (joint filers).[1] The threshold is even lower for family businesses held as trusts, with the surtax applying to income above $13,000. These thresholds are not indexed for inflation, so the "Small Business Surtax" will impact an increasing number of businesses and an increasing percentage of business income every year.

Three-quarters of small employers are organized as pass-through entities (S Corporations, LLCs, Sole Proprietorships, and Partnerships). The "Small Business Surtax" would negatively impact more than 750,000 pass-through businesses and over half of pass-through business income.[2] When combined with the other surtaxes on certain pass-through businesses,[3] these tax changes create a 48.8% federal effective tax rate on pass-through business income before even considering state and local taxes.[4] In NFIB's latest tax survey, small business owners shared that federal business income taxes were the most burdensome tax on both a financial and administrative basis.[5] These taxes will divert resources away from job creation, compensation increases, and business investment and further complicate tax compliance. The permanent tax increases fund temporary spending programs, meaning additional tax hikes will be necessary if the programs are extended and offset.

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[1] Section 138201. *Application of Net Investment Income Tax to Trade or Business Income of Certain High Income Individuals*.
[2] *SOI Tax Stats – Individual Income Tax Returns Complete Report*, Publication 1304, Internal Revenue Service, 2018, https://www.irs.gov/statistics/soi-tax-stats-individual-income-tax-returns-complete-report-publication-1304.
[3] Section 138203. *Surcharge on High Income Individuals, Estates, and Trusts*. This section imposes a 5% surtax on business income in excess of $10,000,000 and an additional 3% surtax on business income excess of $25,000,000.
[4] Alex Muresianu, Garrett Watson, and Erica York, *Lawmakers Consider, Untested and Complex Policies to Fund Reconciliation Bill*, Tax Foundation, October 28, 2021, https://taxfoundation.org/97-percent-small-businesses-wont-pay-more-income-taxes-under-biden-tax-plan/.
[5] William C. Dunkelberg and Holly Wade, *NFIB 2021 Tax Survey*, NFIB Research Center, August 2021, https://assets.nfib.com/nfibcom/NFIB-Tax-Survey-Full-Report.pdf.

NFIB is also concerned about the impact of a government-run paid family and medical leave program may have on small employers. The *Build Back Better Act* creates a four-week federal paid family and medical leave program for all workers without regard to employer size.[6] This program would be a significant change to small employers (fewer than 50 employees) who are currently not subject to the Family and Medical Leave Act (FMLA). Congress wrote this exemption into law because they understood that an employer mandate like FMLA would be burdensome, and compliance would be difficult. In a recent NFIB member ballot, 90% of small businesses believe that small employers should be exempt from paid sick and family leave mandates.[7] Requiring small business participation in a federal paid family and medical leave program would take away the flexibility many small businesses need to be able to manage their workforce at a time when half of small business owners are struggling to fill open positions.[8]

NFIB opposes increased penalty amounts and increased penalty exposure on small businesses. The *Build Back Better Act* increases civil monetary penalties on small businesses with isolated errors when trying to comply with complicated federal employment law[9] and increases penalty exposure for employers by expanding the Affordable Care Act's employer mandate.[10] Fair Labor Standard Act (FLSA) violations currently operate under a strict liability standard, meaning employers who make an honest misinterpretation of the law or make an isolated mistake are not given leniency. The legislation also increases civil monetary penalties for violations under the Occupational, Safety, and Health Act (OSHA), as well as those under the National Labor Relations Act (NLRA). If penalties are substantially increased, a single error could ruin a small employer and permanently put them out of business. Further, the legislation lowers the definition of "affordability" for the ACA's employer mandate, which would drive up health insurance costs for employers. Small businesses do not have the operating revenue of larger businesses and cannot simply absorb these substantial fines and cost increases. They also do not have legal and human resources departments to negotiate lower fines with agency officials or lower premiums with health insurers.

Small businesses are struggling with labor shortages, rising inflation, supply chain disruptions, and increasing threats from COVID-19 variants.[11] Congress should not impose significant tax increases, inflexible mandates, and massive new civil monetary penalties on small businesses as they would compound these problems and damage the fragile small business recovery. **NFIB opposes H.R. 5376 and will consider the legislation an NFIB Key Vote for the 117th Congress**.

Sincerely,

Kevin Kuhlman

Kevin Kuhlman
Vice President, Federal Government Relations
NFIB

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[6] Section 13001. *Comprehensive Paid Leave*.
[7] *NFIB Member Ballot*, Mandate, vol. 578, March 2021.
[8] *NFIB Small Business Jobs Report*, NFIB Research Center, November 4, 2021, https://assets.nfib.com/nfibcom/2021-Oct-Jobs-Report.pdf.
[9] Section 21004. *Adjustment of Civil Monetary Penalties*. This section increases civil monetary penalties on small businesses for FLSA violations. The maximum minimum wage and overtime violations are increased from $1,100 to $20,740 per violation, and the maximum tipped credit violation is increased from $1,100 to $11,620.
[10] Section 137302. *Modification of Employer-Sponsored Coverage Affordability Test in Health Insurance Premium Tax Credit*. This section lowers the ACA's employer mandate affordability definition from 9.5% of household income to 8.5% of household income.
[11] *COVID-19 Small Business Survey (20)*, NFIB Research Center, November 3, 2021, https://assets.nfib.com/nfibcom/Covid-19-20-Survey-FINAL.pdf/.