

The Brief

FALL 2020

Small Business in the Supreme Court – A Look Back and A Preview of Next Term

The 2019 Supreme Court term included the fewest number of small business cases in recent years. However, the cases the Supreme Court did decide were a net plus for America's job creators.

- ***Seila Law LLC, v. Consumer Financial Protection Bureau*** – This case was an important win for ensuring government accountability to the people. In June 2020 the Supreme Court agreed with the NFIB Small Business Legal Center and ruled that the Consumer Financial Protection Bureau's structure was unconstitutional because it delegated unchecked power to a single, unaccountable director who could not be fired by the President.
- ***Comcast Corp. v. The National Association of African American-Owned Media, and Entertainment Studios Networks, Inc.*** – The Supreme Court's March 2020 ruling upheld existing law, which requires that the plaintiff show that racial discrimination actually resulted in injury to a plaintiff and wasn't simply one of many factors responsible for the plaintiff's injury. As the Legal Center advocated, the

Court rejected a "mixed-motive" standard, an easier showing that discrimination was one of several reasons for the plaintiff's injury. Among other things, this decision helps protect small businesses from frivolous employment discrimination claims.

- ***Hawaii Wildlife Fund v. County of Maui*** – NFIB filed an amicus brief arguing that Clean Water Act regulation should apply only in interstate commerce; intrastate waters should only be subject to state regulation. The Supreme Court disagreed, allowing Clean Water Act regulation to extend to certain intrastate lands with underground water. Rest assured the Legal Center will continue its fight against further expansions of federal regulation of small business owners' property rights.

Looking at the upcoming 2020 Supreme Court term, the NFIB Small Business Legal Center has already filed briefs in these two important cases:

- ***CIC Services LLC, v. IRS*** – The NFIB Legal Center filed an amicus brief in the case arguing that taxpayers should be able to challenge illegal

Internal Revenue Service regulations before paying tax penalties. The Anti-Injunction Act (AIA) generally prevents lawsuits for the purpose of restraining the assessment or collection of taxes. The purpose of this provision is to prevent taxpayers from filing frivolous challenges to tax collection to delay payment. However, the IRS asserts that the AIA applies even when the taxpayer is challenging the legality of the tax at issue. The NFIB Legal Center argues that the AIA should not protect the IRS from accountability for promulgating legally dubious regulations.

- ***U.S. Fish and Wildlife Service v. Sierra Club*** – In this case, the NFIB Legal Center filed an amicus brief challenging the government's assertion that the Freedom of Information Act (FOIA) shields certain regulatory documents from public disclosure. The documents in question were part of a formal interagency consultation concerning a proposed regulation that was later modified. We argue that public disclosure of the regulatory rulemaking process trumps the government's secrecy interest.



COVID-19 Takes Center Stage at the NFIB Small Business Legal Center

By Karen R. Harned, Executive Director

Over the last several months, the NFIB Small Business Legal Center has answered tens of thousands of questions from individual small business owners through calls, e-mails, and our webinars on COVID-related issues ranging from Payment Protection and Emergency Injury Disaster Loans, as well as the new employee leave requirements under the Families First Coronavirus Response Act.

We know how hard this time has been for you, the small business owner. But we also have seen first-hand your resilience. Your creativity and perseverance during this crisis are nothing short of amazing. And I confidently echo what I said in my last note to you — I know that you will get through this. The NFIB Small Business Legal Center remains here for you as you continue to navigate the pandemic for your business, your employees, your families, and yourselves. You may contact us directly or e-mail us at info@nfib.org. Someone from our staff is typically able to be back in touch with you within 24 hours.

Speaking of staff, I'm excited to introduce you to the newest member of the NFIB Small Business Legal Center team — Rob Smith. Rob graduated from the Antonin Scalia Law School at George Mason University last year, where he served on the school's law review. Following graduation, he clerked for a Wisconsin State Supreme Court judge. Rob will be a tremendous asset to the Legal Center and the small businesses we serve. Rob knows he has big shoes to fill, replacing Luke Wake, who we wish well in his new position as an attorney at the Pacific Legal Foundation.

Looking ahead, the Supreme Court already has announced it will hear two cases next term that will be important for small business regarding all Americans' ability to challenge legally dubious IRS regulations before the agency imposes penalties on taxpayers (*CIC Services, LLC v. IRS*) and ensure transparency and government accountability in rulemaking (*U.S. Fish & Wildlife Service v. Sierra Club*). It is likely we will be filing in more cases this term and we will keep you apprised of that work.

But, like everything else in 2020, we are starting to see much of our casework turn to issues relating to COVID-19. Unfortunately — and not surprisingly —

elected officials and special interests alike are not letting this crisis go to waste when it comes to trying to claim more and more power.

The NFIB Small Business Legal Center already has engaged in two of these battles. In Pennsylvania we filed an amicus brief supporting the commonwealth's legislature in their unsuccessful attempt to limit the Governor's use of executive authority. In Ohio we filed a brief arguing that the state's constitution's "in-person" requirements for getting initiatives on the ballot are legal and must be followed. That case is still pending and groups, including many unions, are trying to loosen the procedures by which new initiatives can be put on the ballot for a vote. As the pandemic continues, we likely will be engaging in more of these types of cases in the months ahead.

Finally, a very special thank you to those who have continued to support our work during this difficult time. Although COVID-19 likely will be with us for a while, please know the NFIB Small Business Legal Center will be there for you during this pandemic and beyond.

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COVID-19 and You:

NFIB's Frequently Asked Questions From Small Businesses

To say that 2020 has been a difficult year for small business is an understatement. This year has challenged Main Street like no other, and the NFIB Small Business Legal Center has been at the forefront in getting vital information to small businesses across the country. During the past several months, we have answered questions concerning the Paycheck Protection Program (PPP), Economic Injury Disaster Loans (EIDL), and the Family First Coronavirus Response Act (FFCRA). Below are some of our most frequently asked questions, drawn from our weekly COVID-19 relief webinars and thousands of small business inquiries.

1. Q: When I originally applied for a PPP loan, the covered period was only 8 weeks. Now I hear that some people have a 24-week covered period. Can I extend my covered period as well?

A: Yes. If you received a PPP loan disbursement before June 5, 2020, you may choose to use either an 8-week covered period or a 24-week period. All PPP loans disbursed on or after June 5, 2020 have a 24-week covered period.

2. Q: I have opted to use the extended time frame for my PPP loan. Do I have to wait until the end of the extended period to file for PPP loan forgiveness?

A: You can apply for forgiveness whenever your lender starts accepting loan forgiveness applications and once you have finished spending all of your money.

3. Q: Is a business owner's compensation eligible as payroll for PPP forgiveness?

A: Yes, although there are some restrictions on what compensation owner-employees may receive. For **owner-employees**, compensation is limited to eight weeks' worth (8/52) of 2019 owner-employee compensation (up to \$15,385) for an eight-week covered period or 2.5 months' worth (2.5/12) of 2019 owner-employee compensation (up to \$20,833) for a 24-week covered period, in total across all businesses. Compensation includes cash compensation and may include health and retirement benefits for certain owners.

- C-corporation owner-employees may include employer retirement and health insurance contributions made on their behalf. S-corporation owner-employees may include employer retirement contributions made on their behalf, but

employer health insurance contributions made on their behalf cannot be separately added because those payments are already included in their employee cash compensation.

- Self-employed business owners, including Schedule C or F filers and general partners, may not include health or retirement benefits as eligible payroll costs.

4. Q: How do I know if I qualify as an owner-employee under the PPP?

A: SBA and Treasury recently clarified who is an owner-employee. In a C- or S-corporation, shareholders with a 5% or more ownership stake qualify as owner-employees. Unfortunately, the definition of owner-employee has not been defined for other business forms, but owner-employees are likely to include any person who has 'a meaningful ability to influence decisions over how loan proceeds are allocated.' Owner-employees therefore likely include: self-employed individuals, independent contractors, sole proprietors, and, in partnerships, general and limited partners who manage the business.

Note – LLCs may be treated as either a C-corp, S-corp, partnership, or sole proprietorship depending on their tax treatment.

5. Q: We are using the alternative covered period for PPP payroll expenses. Do we use the alternative period for nonpayroll costs as well, or do we use 24 weeks from the day the loan was funded for nonpayroll expenses?

A: The alternative covered period is for qualifying payroll costs only – this includes wages, compensation, bonuses, commissions, and tips as well as state and local employer-side taxes and group health and retirement benefits, etc. For the alternative covered period, you can elect to align your loan with the first payroll period after you received your loan disbursement. For non-payroll costs, the covered period starts from the date of disbursement.

6. Q: We paid our annual contribution to our pension plan during the PPP covered period. Can I include the entire contribution, or should I prorate it over the covered period?

A: You need to prorate. The SBA explained that employer contributions for retirement benefits are eligible if they were paid or incurred by the borrower during the covered period or the alternative covered period. However, you cannot "accelerate" payments from periods outside the covered period or the alternative covered period.

7. Q: What is a "transportation utility" for PPP loan forgiveness?

A: A transportation utility is defined as a transportation utility fee assessed by state and local governments. It is a utility fee that some municipalities impose on businesses for road upkeep and transportation infrastructure.

8. Q: I applied for and received an EIDL. Are there restrictions on how I can spend the funds?

A: Yes, but there are fewer restrictions on how you can use the EIDL compared to the PPP. EIDL funds must be used by the business as "working capital," meaning expenses that are ordinarily incurred in the course of business.

9. Q: I received both a PPP loan and an EIDL advance grant. Will I need to repay either of these funds?

A: Yes. If you received an EIDL advance grant, that amount will be subtracted from any PPP forgiveness you would otherwise qualify for.

10. Q: My business employs fewer than 50 people. Am I exempt from providing paid sick and/or family leave under the FFCRA?

A: All employers with fewer than 500 employees are required to provide paid sick and/or family leave under the FFCRA and are eligible to receive tax credits for providing this leave. Certain small employers with fewer than 50 employees may be exempt from providing only paid family leave (but not paid sick leave) if "providing an employee such leave would jeopardize the viability of the business as a going concern."

11. Q: My employee claims they were exposed to someone who tested positive for COVID-19, but they have not shown any symptoms. They stated that they are self-quarantining and are taking leave under the FFCRA. Am I allowed to ask for a doctor's note?

A: The DOL has stated that an employee requesting paid FFCRA sick leave must provide their employer with the following information:

- Name
- Dates of requested leave
- Reason for leave
- State that the employee is unable to work for the above reason

An employer may require the employee to identify his or her symptoms and a date of a test or a doctor's appointment. Employers may not require further documentation that he or she sought a diagnosis or treatment from a health care provider for the employee to take paid sick leave.

Media Mentions

NFIB Small Business Legal Center

May 11, 2020 - Washington Examiner reports the \$600 unemployment benefit disincentivizes some employees from returning to work, "We have a number of members call us or email us and say they have offered their employees to come back, and they said, 'No, I want to keep my unemployment.' ... We are definitely hearing stories that this is real," said Karen Harned, NFIB Small Business Legal Center Executive Director.

🔗 <https://www.washingtonexaminer.com/news/lawmakers-ey-e-reforms-to-600-unemployment-benefit-in-bid-to-save-jobs>

May 25, 2020 - The Buffalo News reports on Harned's presentation during a Bipartisan Policy Center webinar on lawsuits. Harned said that lawsuits can cause expensive damage to businesses even if they are destined to fail in court. "Bottom-feeders of the trial bar...will literally extort our members and say, 'We're going to take you to court unless you give us X amount of money.' "

🔗 https://buffalonews.com/news/local/what-do-personal-injury-lawsuits-have-to-do-with-the-pandemic-maybe-a-lot/article_2ba20d67-e24b-5fb7-82ef-352c2c436ddd.html

June 26, 2020 - The Washington Post reports White House officials have discussed easing enforcement of some paid leave reporting requirements. "As employees are trying to get back to work, this is not the time to be bringing down the hammer on someone who forgot to dot an 'i,'" Harned said. "We have been hoping they can really use their enforcement discretion."

🔗 https://www.washingtonpost.com/climate-environment/citing-an-economic-emergency-trump-directs-agencies-across-government-to-waive-federal-regulations/2020/06/05/6a23546c-a0fc-11ea-b5c9-570a91917d8d_story.html

August 3, 2020 - Speaking with Newsweek, Harned complimented Senator Cornyn's COVID-19 liability protection legislation for recognizing businesses should be rewarded if they are "trying to do the right thing and keep your employees and customers safe."

🔗 <https://news.bloomberglaw.com/daily-labor-report/in-dol-loss-judge-expands-virus-paid-leave-rule-to-more-workers>