

The Brief

SPRING 2021

Small Business Legal Center Starts 2021 Off Strong In Federal And State Courts

The NFIB Small Business Legal Center continues its aggressive caseload representing small businesses in state and federal courts.

In federal court, we are supporting Ohio and several other states in five different cases challenging as unconstitutional a provision in the American Rescue Plan, which prohibits states from "directly or indirectly" offsetting a "reduction in net tax revenue" with COVID-19 relief funds. Our briefs argue that this section of the law could block states from reducing the tax burden on their citizens, including small businesses.

In March, we filed an amicus brief in the Third Circuit supporting Federalist Media, LLC. After one of its officers sent out an ill-advised tweet about employees organizing, another twitter user complained. The National Labor Relations Board found the officer's tweet constituted an unfair labor practice under the National Labor Relations Act. We argued the NLRB lacked jurisdiction because the person filing the complaint was not a "person aggrieved" as required by the NLRA.

At the U.S. Supreme Court, we are supporting Americans for Prosperity

in its lawsuit against California. The California Attorney General required 501(c)(3) organizations to disclose major donors and their contributions. Our amicus brief argued this requirement has no law-enforcement related purpose and is unconstitutional, because it stifles speech and associational rights protected by the First Amendment.

In the District Court for the District of Columbia, the Washington Post and other media companies sued the Small Business Administration, claiming they were entitled to personal borrower information from PPP loans, including loan status, Dun & Bradstreet numbers, and social security and employer identification numbers, under the Freedom of Information Act. Our amicus brief supported the SBA, arguing that this information was exempt from disclosure.

Taxes and COVID-19-related mandates on small business represent the bulk of the Legal Center's state work this year. Our lawsuit against the Nevada Legislature, which enacted two laws that raised taxes on its citizens without the two-thirds majority vote required

under the state's constitution, continues. Although we won the first round in district court, the state appealed. The case is currently before the Nevada Supreme Court.

In Wisconsin, the governor sought to release the names of businesses that had employees test positive for COVID-19. We filed an amicus arguing this would harm businesses. The circuit court agreed and stopped the policy from taking effect. We defended the ruling in the court of appeals and lost. It is our hope the Wisconsin Supreme Court will take this case. If it does, our fight against this disclosure requirement will continue.

In California, we are supporting small businesses challenging Governor Newsom's shutdown and restrictions. Our amicus brief argues Governor Newsom exceeded his authority and the restrictions harm small businesses.

We continue to aggressively monitor legislation and litigation across the country to ensure your voice is heard and your rights are protected. Do not hesitate to let us know if you hear of a case we should enter or a law we should challenge on behalf of small business.



The “Unwinds”

By Karen R. Harned, Executive Director

When I sat down to write this column last year, the United States had been dealing with the global pandemic for over a month. Many of your businesses were under government orders to be closed and the end of the economic and health devastation of the COVID-19 pandemic was nowhere in sight.

What a difference a year makes!

Hopefully, like me, you are seeing the bright light at the end of the tunnel. Step-by-step you can see your life, your business, and your balance sheets coming back. But getting back to pre-COVID normal may not be that easy if federal and state regulators have their way. For over a year, governors, state legislators, the President, Senators, congresspeople, and bureaucrats have wielded a tremendous amount of power as the country navigated the pandemic and worked to prevent as many deaths as possible.

Now it is time for the “unwind.” But how willing will our policymakers be to give up their newly attained power?

The NFIB Small Business Legal Center is fighting to ensure that the “unwind” happens. We have been active in Pennsylvania -- and continue to fight in Wisconsin and California — governors who overstepped their executive authority through the mandates they placed on small business. At the federal level, we are challenging an effort by the Washington Post and other news outlets to obtain private information of businesses who have received a loan through the Paycheck Protection Program. And we just took up a fight against Congress’ attempt to prevent states who receive COVID-19 relief funds to cut certain taxes.

Yet the COVID-19 “unwind” is not the only one that we are watching.

Sadly, we also are beginning the fight against the “unwind” of the Trump Administration’s deregulatory efforts. We are challenging a court decision issued last fall that severely pulled back much of the clarity and flexibility a 2020 final rule provided employers for determining who is and is not a joint employer. Additionally, the Department of Labor has issued a

proposed rule to withdraw the independent contractor rule that provided small businesses with a clearer and more flexible standard for determining the independent contractor status of their workers.

We also continue to monitor the Occupational Safety and Health Administration, which was directed by President Biden in January to consider imposing new, temporary, COVID-19-related safety regulations on small businesses, called “emergency temporary standards.” Given the fact that vaccinations are rolling out by the millions and COVID cases continue to decline, it becomes more questionable every day whether any standards OSHA enacts would be a legal use of the agency’s emergency authority.

Finally, we expect a significant unwind of the deregulatory actions of the past administration in most of the other federal agencies, including the Environmental Protection Agency. Because small businesses are disproportionately burdened by unreasonable and complicated regulation, as compared to larger businesses, the Legal Center is committed to fighting as many deregulatory “unwinds” as we can.

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Taking Advantage of the Employee Retention Tax Credit

The **Employee Retention Tax Credit (ERTC)**, alongside the PPP, has been one of the federal government's main economic responses to the business community devastated by the ongoing global pandemic, and the SBLC has worked tirelessly to help the small business community reap its benefits.

The ERTC allows employers with 500 or fewer employees to take a dollar-for-dollar deduction against their federal employment taxes based on wages paid to each employee during a qualifying quarter.

If you haven't already, you should talk to your tax professional or bookkeeper about taking advantage of the expanded ERTC.

Employers can qualify each quarter their business:

- Was shut down (partially or fully) by a governmental action, OR;
- In 2020, experienced a drop in gross receipts in excess of 50% compared to the same quarter in 2019.
 - The business will remain qualified until gross receipts reach at least 80% of their 2019 status.
- In 2021, experienced a drop in gross receipts in excess of 20% compared to 2019.

The ERTC is not taxable income, instead it provides a refundable credit against the federal taxes already owed and paid quarterly per Form 941 – Employer Federal Tax Return. The ERTC can and should be applied each quarter beginning in March 2020 (starting on the 13th) ending in 4th quarter of 2021. To claim the ERTC for 2020, employers can file an amended quarterly payroll report (941-X).

Employers claim the ERTC in 2021 by withholding payroll taxes for the amount of qualified employee wages. Because the tax credit is refundable, if your withholdings do not cover the entire tax credit, the Internal Revenue Service will send you a check for the remaining amount.

The amount of the credit for each employee in the 2020 calendar year was 50% of all wages paid up to \$10,000, capping the credit at \$5,000 per employee. For 2021, the credit was expanded to 70% of all wages up to \$10,000 paid for each quarter, for a max credit of \$28,000 per employee.

Counting employees for the ERTC varies based on number of full-time employees, defined as those who work 30 hours or more in a week, or 130 hours or more in a month.

- Employers with more than 100 full-time employees can only claim the ERTC for employees receiving wages but NOT working.
- Employers with fewer than 100 full-time employees can claim the ERTC for all payroll, regardless of whether the employee continued to work.

Here are five steps to determine ERTC eligibility:

Step 1: Determine Qualifying Quarters

- Apply the qualification test to each quarter from March 2020 to Q4 2021.
 - Was the business at least partially shutdown by government order? If not,
 - Did the business suffer a drop in gross revenues of at least 50% from the same Q in 2019 to 2020? Or a 20% drop from 2019 to 2021?

Step 2: Collect Wage Information

Step 3: Exclude Any "Double Dip" Periods

- The ERTC cannot be used during quarters when a business remained shut down after a government order expired, or when payroll is covered by PPP loans or other payroll credits.

Step 4: Remove Unqualified Employees

- Wages paid to related individuals are not considered qualified wages for the ERTC. A related individual includes:
 - A child, or the child's descendant;
 - A brother, sister, stepbrother, or stepsister;
 - A father or mother, or their ancestor;
 - A stepfather or stepmother;
 - A niece or nephew;
 - An aunt or uncle;
 - A son-in-law, daughter-in-law, father-in-law, mother-in-law, brother-in-law, or sister-in-law.

Step 5: Add Health Care Costs (When Applicable)

- The ERTC is based on "Qualified Wages" including, "allocable qualified health plan expenses." Employers covering health care costs incurred by employees not working should be sure to include those costs in ERTC calculations.

Media Mentions

NFIB Small Business Legal Center

February 18, 2021

Karen Harned tells Bloomberg Law frivolous suits are a particular threat for small businesses, as “bottom-feeder” plaintiffs’ lawyers often sue to force a settlement. Harned said, “When they’re finally making it through this pandemic, the last thing they need is a lawsuit that’s going to take them down.”

🔗 <https://news.bloomberglaw.com/daily-labor-report/virus-liability-shields-can-be-redundant-making-exceptions-key>

March 24, 2021

The Financial Regulation News reports on a brief the NFIB Small Business Legal Center filed challenging the disclosure of certain information of small businesses that received a Paycheck Protection Program loan during the COVID-19 pandemic. “The program was designed to help business owners pay their employees and meet financial obligations during an economic crisis that was of no fault of their own. Disclosing borrower information is not what small employers signed up for and is a violation of their privacy,” said Harned.

🔗 <https://financialregnews.com/nfib-files-brief-regarding-paycheck-protection-program-borrower-information/>

March 25, 2021

Senior Executive Counsel Beth Milito discusses with NBC Los Angeles small business struggles getting government secured loans because banks have not made needed changes.

🔗 <https://www.nbclosangeles.com/investigations/andy-responses/some-small-businesses-still-struggling-to-secure-federal-government-money/2559598/>

April 11, 2021

The Highland County Press reports on the Legal Center’s amicus brief challenging the mandate against states reducing taxes in the American Rescue Plan. Harned said, “Congress passed the American Rescue Plan to help alleviate the financial devastation caused by the pandemic. The provision in the Act that prevents states from cutting taxes is eroding state sovereignty and hurts Main Street.”

🔗 <https://highlandcountypress.com/Content/In-The-News/Headlines/Article/NFIB-amicus-brief-argues-against-tax-mandate-in-American-Rescue-Plan/2/73/67900>

U.S. Supreme Court Update

One under-talked about aspect of Supreme Court litigation, and our work at the SBLC, is convincing the nation’s highest Court to take a case.

Supreme Court review is discretionary, meaning the Court can choose not to hear a case. Parties asking for Supreme Court review start by filing a petition for certiorari, which includes briefing on why the Court should take the case. If four justices of the Court agree to hear the case, the Court will grant review. During this phase third parties like NFIB can file amicus briefs supporting the petition and urging the Court to hear the case. The SBLC has done this in dozens of cases over its history and, as a result, has had a significant impact on the cases the Court ultimately takes.

In *Eychener v. City of Chicago*, we are urging the Court to clarify when the government may utilize eminent domain based on economic development, and even further, to overrule *Kelo v. City of New London*. In *Kelo*, the Supreme Court allowed the government to take private property from one person and give it to another private entity, holding that the “taking” was an appropriate “public purpose” because it would lead to economic development of the land.

Similarly, in *Pakdel v. City of San Francisco*, the SBLC argues the Court should review the case and adhere to the “unconstitutional conditions” doctrine. This doctrine prevents a government from forcing someone to give up a constitutional right to receive a discretionary government benefit.

Finally, the SBLC is urging the Court to reverse a Sixth Circuit ruling in *Just Energy v. Hurt*, which held that Just Energy’s door-to-door solicitors were not exempt “outside salesmen” under the Fair Labor Standards Act. NFIB argues that the salesmen were exempt employees under the FLSA.