SCOTUS Gives Business Community a Monumental Victory in NFIB Lawsuit Against OSHA's Unprecedented Vaccine Mandate

In our last newsletter, we informed you of NFIB's lawsuit against the Occupational Safety and Health Administration's COVID-19 emergency temporary standard. As promised, the NFIB Small Business Legal Center, with your support, continued the fight against the unprecedented mandate all the way to the U.S. Supreme Court.

After the U.S. Court of Appeals for the Sixth Circuit wrongfully upheld the OSHA mandate, NFIB quickly petitioned the Supreme Court for an immediate stay of the ETS. In a rare move, the Court quickly scheduled and heard oral arguments on the stay petition.

On January 13th, the Supreme Court issued its opinion in NFIB v. OSHA. It sided with NFIB and saved America's businesses from the onerous and unlawful Biden vaccine mandate. In a 6-3 decision, the Court blocked OSHA from enforcing the ETS.

In its opinion, the Court said OSHA has authority to "ensure occupational safety" and "set workplace standards," but not to set "broad public health measures" acting as a "blunt instrument" drawing no "distinctions based on industry or risk of exposure to COVID-19." The Court further stated that the "universal risk" from COVID-19 is "no different from the day-to-day dangers that all face from crime, air pollution, or any number of communicable diseases. and [p]ermitting OSHA to regulate the hazards of daily life" would expand OSHA's statutory authority without congressional approval.

Justices Gorsuch, Thomas, and Alito authored a concurring opinion stressing that the Constitution requires Congress and the states to take the lead in responding to the pandemic and public health emergencies. As such, OSHA had no authority to issue this ETS without a clear grant of authority from Congress.

After the Supreme Court's decision, OSHA withdrew the ETS.

Thanks to your generous support, NFIB was able to stop OSHA's unlawful vaccine mandate.

To keep up with the Legal Center's other work, visit nfib.com/legal.
Bracing for Impact

By Karen R. Harned, Executive Director

Like me, you have experienced one or two harrowing flights over your lifetime. The turbulence is so strong you find yourself clutching the armrests so tight that your knuckles are white. The good news, for me and I hope you, is I have never heard a pilot say those dreaded words -- “brace for impact” -- and I hope we never will!

Over the last two decades, as Congress has made naming post offices a higher priority than passing legislation addressing the important policy issues of our time, federal agencies have stepped in to fill the void. And it seems with each new president, the stakes for small business are higher than ever before.

Clearly, President Biden got the memo that his pen and phone are his biggest assets when it comes to enacting his policy agenda. And, as we feared, that policy agenda is filled with new mandates that will directly impact your bottom line. Below are just a few of the regulations the NFIB Small Business Legal Center is preparing to fight if needed.

Department of Labor Effort to Raise the Salary Threshold for Exempt Employees: Although the Trump administration promulgated a modest increase of the threshold to $35,568 from $23,660 a year beginning in 2020, DOL is drafting a new proposed rule to raise it once again. We don't know how much it will be raised, but it could be significant. As you may recall, we successfully stopped in court the Obama Administration's attempt to raise the salary threshold to $47,476 a year.

National Labor Relations Board Revisiting Joint Employer Standard: For franchisees, subcontractors, and contractors, who is and is not a “joint employer” under the law can have significant consequences. If the standard of when two entities jointly employ a worker is too strict, in many cases, both entities are liable for legal issues relating to that employee, including discrimination, wage and hour, and other employment related claims. After the Trump Administration established a standard only imposing liability on the business who directly controls the employee, the NLRB is considering returning to the Obama-era standard in which a business is considered the employee’s employer even when they only exercise indirect control over another business' employees.

NLRB Considering Stringent Independent Contractor Status: The NLRB is considering imposing a more-stringent Obama-era standard when determining whether a worker is an employee or independent contractor. The NFIB Small Business Legal Center supports current law and argues the NLRB does not have authority to issue a new rule. Moreover, a new standard would harm small businesses, many of whom rely on independent contractors to perform important work for their business.

Unfortunately, these actions are just a part of a bigger regulatory agenda we are watching and engaging as President Biden (and the federal agencies he oversees) aggressively look for new ways to regulate your business. Rest assured, that the NFIB Small Business Legal Center is not just “bracing for impact.” If an agency oversteps its authority and acts illegally, thanks to the support of our generous donors, the Legal Center will be there to challenge those actions in courts across the country on behalf of your business.

Karen R. Harned

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Legal Center 2021 Amicus Wrap-Up

The SBLC ended 2021 with some final amicus filings in important federal and state cases with the potential to impact small businesses in a big way.

In the Tennessee Supreme Court, the SBLC is defending a small business owner against the City of Nashville in a dispute over a Nashville ordinance that prevents home-based businesses from serving clients. NFIB’s brief argued that the ordinance infringes on the fundamental rights of a homeowner to use their property and an individual’s right to earn a living. The case is Shaw v. Nashville.

Moving on to the United States Supreme Court, the Legal Center filed a brief that will help determine how much authority Congress gave to the Environmental Protection Agency under the Clean Air Act. The Legal Center’s brief argued Congress did not clearly give EPA the authority under the CAA to issue the challenged regulations on the energy industry. Our amicus also argued that upholding the EPA rules will drastically raise energy prices on small businesses. The case is West Virginia v. EPA.

Finally, NFIB filed a brief with the Ohio Supreme Court in Brandt v. Pompa regarding the constitutionality of Ohio’s statutory limit on non-economic damages. When implementing the limit on non-economic damages, the Ohio Legislature sought to maintain predictability in the civil justice system and economic stability for all Ohioans by choosing a considerable, but not unlimited, remedy for damages. NFIB’s brief argued that damage limits are constitutional and provide economic certainty to small businesses facing a civil lawsuit in Ohio.


In South Dakota v. Wayfair, the Supreme Court in 2018 ruled that states could require out-of-state sellers to collect and remit sales taxes if they perform a significant quantity of business in that state. In doing so, the Supreme Court overruled a previous decision that allowed states to collect sales taxes only if the seller maintained a physical presence within the state’s borders.

Post-Wayfair, more and more states are requiring remote sellers to collect and remit taxes if the seller has a “substantial nexus” with the taxing state. Unfortunately, small businesses who sell online and are unaware of the sales tax requirements are subject to state tax assessments and penalties if they transact business across state lines. In a post-COVID-19 world where states may be seeking to increase their revenues, small businesses out of compliance with their remote seller obligations are convenient targets.

To help small businesses navigate post-Wayfair sales tax obligations, the NFIB Legal Center has put together a State Sales Tax Guide, which is available at https:/www.nfib.com/out-of-state-sales-tax-requirement s/

*NFIB’s Small Business Legal Center strongly recommends small businesses work with a CPA or tax professional in navigating their post-Wayfair sales tax obligations.

Support the SMALL BUSINESS LEGAL CENTER with an estate or planned donation.

NFIB.com/legal-center
Media Mentions
NFIB Small Business Legal Center

January 5, 2022
NPR’s Rachel Martin talks to Karen Harned about NFIB’s opposition to OSHA’s vaccine and testing requirements for private employers.
https://www.npr.org/2022/01/05/1070471317/the-supreme-court-to-hold-a-hearing-on-bidens-vaccine-and-testing-mandate

January 10, 2022
Karen told the Wall Street Journal, “Every minute of uncertainty is adding to the problems small-business owners are already facing.”

January 10, 2022
The Washington Times quotes Karen on small business’ need for a quick decision in the OSHA vaccine mandate case. “We made the case we really need to know soon ... This uncertainty is just not good for small business when they’re dealing with everything else.”

January 13, 2022
CNN quoted Karen -- "As small businesses try to recover after almost two years of significant business disruptions, the last thing they need is a mandate that would cause more business challenges. We are pleased the Supreme Court stopped the rule from taking effect while the courts consider whether or not it is legal."

January 14, 2022
NBC reports, “They sighed a big sigh of relief yesterday,” said Karen Harned, executive director of the NFIB Small Business Legal Center. “We’re already hearing from members that omicron is impacting them,” as waves of workers call out sick. “Employees aren’t coming to work if they’re sick. As a result, that’s made the labor shortage even worse. This will help prevent a pile-on,” she said.