

The Brief

SPRING 2022

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.

SUPREME COURT OF THE UNITED STATES

Nos. 21A244 and 21A247

NATIONAL FEDERATION OF INDEPENDENT
BUSINESS, ET AL., APPLICANTS

21A244
v.
DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY
AND HEALTH ADMINISTRATION, ET AL.

OHIO, ET AL., APPLICANTS

21A247
v.
DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY
AND HEALTH ADMINISTRATION, ET AL.

ON APPLICATIONS FOR STAYS

[January 13, 2022]

PER CURIAM.

The Secretary of Labor, acting through the Occupational Safety and Health Administration, recently enacted a vaccine mandate for much of the Nation's work force. The mandate, which employers must enforce, applies to roughly 84 million workers, covering virtually all employers with at least 100 employees. It requires that covered workers receive a COVID-19 vaccine, and it pre-empts contrary state laws. The only exception is for workers who obtain a medical test each week at their own expense and on their own time, and also wear a mask each workday. OSHA has never before imposed such a mandate. Nor has Congress. Indeed, although Congress has enacted significant legislation addressing the COVID-19 pandemic, it has declined to enact

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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.

Selling Out of State? NFIB Legal Center State Sales Tax Guide Helps Small Businesses Determine Out-of-State Tax Collection Rules

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

The graphic features the NFIB logo and the title "OUT-OF-STATE SALES TAX REQUIREMENTS". It includes a quote from the Supreme Court in *South Dakota v. Wayfair* regarding the "substantial nexus" test. Below the quote, it states that NFIB's Small Business Legal Center strongly recommends small businesses work with a CPA or tax professional. At the bottom, there is a table with columns for STATE, SALES TAX ID, COVERED ITEMS, REFERENCE PERIOD, REMOTE SELLER REQUIREMENT, and STATE CONTACT INFORMATION. The table lists requirements for Indiana and Nevada.

STATE	SALES TAX ID	COVERED ITEMS	REFERENCE PERIOD	REMOTE SELLER REQUIREMENT	STATE CONTACT INFORMATION
Indiana	A	Remote proceeds of all retail sales (except tangible personal property)	Previous Calendar Year	> \$200,000	Indiana Department of Revenue
Nevada	B	Gross sales from property, products, or services delivered into Nevada	Previous or Current Calendar Year	> \$100,000 or 200 transactions	Nevada Nevada Sales Tax Administration

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-requirements/>

*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.

The graphic has a dark background with white and green text. It says "Support the SMALL BUSINESS LEGAL CENTER with an estate or planned donation." followed by the URL "NFIB.com/legal-center" in green.

NFIB Legal Center Takes on the Unions Joining in Three NLRB Cases

Recently, the National Labor Relations Board has indicated that it intends to aggressively advance labor union demands. The NFIB Legal Center has argued in briefs filed in three cases that small business interests must be protected against more liability involving unionization, employee misclassification claims, and intrusive anti-small business regulation.

Thryv Inc.

The NLRB has alleged that the employer wrongfully terminated six employees without first bargaining with the labor union. In the past, the board has ordered companies to reinstate wrongfully terminated employees and provide back pay as well as restoration of benefits and seniority rights. However, in this case the NLRB is also considering levying "consequential [economic] damages" against the employer. The Legal Center's brief argued that the NLRB has no authority under the National Labor Relations Act to order an employer to pay these additional damages.

American Steel Construction.

In this case, the union filed a petition seeking to establish a bargaining unit to represent a small group of field ironworkers. The employer objected to the proposed micro-unit, arguing it was inappropriate because the interests of the represented group were not distinct from other workers in the plant who were not represented by the unit. The Legal Center's brief argued that the NLRB should adhere to its current standard, which prohibits smaller micro-units.

The Atlanta Opera, Inc.

A group of makeup artists and hairstylists contracted by the Atlanta Opera attempted to form a union, and the Atlanta Opera argued that as independent contractors these workers cannot unionize. The Legal Center's brief argued that many small businesses rely on independent contractors to perform work for them. Reinstatement of a more stringent Obama-era standard of determining who is an employee damages employers, especially small businesses, in a wide variety of industries.

The NFIB Small Business Legal Center, a 501(c)(3), public interest law firm, protects the rights of America's small business owners by serving as the voice of small business in the courts and the legal resource for small business owners nationwide. It is not a legal defense fund for small business, but a legal tool to affect precedent-setting legal decisions that will influence small business' bottom line.

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.

🔗 <https://www.wsj.com/articles/bulk-of-biden-administrations-vaccine-mandate-takes-effect-11641847533>

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."

🔗 <https://www.washingtontimes.com/news/2022/jan/10/oshavaccine-mandate-takes-hold-supreme-court-just/>

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."

🔗 <https://www.cnn.com/2022/01/13/business/us-supreme-court-ruling-vaccine-mandate/index.html>

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.

🔗 <https://www.nbcnews.com/business/economy/mixed-response-businesses-scotus-ruling-vaccine-mandates-rcna12288>

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