

# DOL Amicus Updates

## NFIB Joins Lawsuits Challenging Department of Labor Wage and Hour Rules

In May 2022, the NFIB Small Business Legal Center joined two federal lawsuits that challenge burdensome, and potentially illegal, U.S. Department of Labor (DOL) wage and hour rules.

The NFIB Legal Center filed an amicus brief in the case *Restaurant Law Center, et al. v. United States Department of Labor* in the United States Court of Appeals for the Fifth Circuit. The case challenges DOL's 2021 final rule on the Fair Labor Standards Act (FLSA) tip credit provision.

NFIB has heard from many restaurant owners that the 2021 rule creates onerous and unworkable regulations for small business owners.

The Legal Center's amicus brief argues that the rule, which attempts to limit when employers can use the sub-minimum wage, or tip credit, conflicts with the FLSA and makes compliance nearly impossible for small business owners. NFIB asks the Fifth Circuit to reverse the district court's decision and remand to the district court with instructions to enter a preliminary injunction enjoining the Department from enforcing the final rule pending final judgment in the case.

Also in May, the Legal Center filed an amicus brief in the case *Brooke Clark, et al., v. A&L Home Care and Training Center, LLC, et al.* at the United States Court of Appeals for the Sixth Circuit. The case concerns the FLSA and whether district courts have clear and substantive guidance for collective action cases.

Small businesses are concerned that some collective action cases could lead to frivolous litigation, significant and unnecessary discovery costs, and vast liability. NFIB's amicus brief calls on the Court to clarify that the well-established procedural safeguards of traditional class action certification under Rule 23 should apply.

To keep up with the NFIB Small Business Legal Center's work in the courts, visit [nfib.com/legal](http://nfib.com/legal) or email [info@nfib.org](mailto:info@nfib.org).

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

## May 19, 2022

The Center Square reports on the Arizona tax mandate case, and quotes Karen, "Preventing states from cutting taxes, as the provision in the American Rescue Plan tries to do, is bad policy that needs to change. Small businesses across the state are applauding the Ninth Circuit's ruling allowing Arizona to challenge the constitutionality of this harmful provision."

[https://www.thecentersquare.com/national/arizona-gets-a-win-in-court-challenge-to-biden-covid-funds-tax-restriction/article\\_33f771ae-d7b2-11ec-971f-3bc0a9a7fb03.html](https://www.thecentersquare.com/national/arizona-gets-a-win-in-court-challenge-to-biden-covid-funds-tax-restriction/article_33f771ae-d7b2-11ec-971f-3bc0a9a7fb03.html)

## May 27, 2022

The Southern California Record discusses with Karen the problem of American Disabilities Act lawsuits against small businesses and how California's Private Attorneys General Act (PAGA) exacerbates it.

<https://socalrecord.com/stories/626436429-la-district-attorney-sues-over-copypcat-ada-complaints-targeting-small-business>

## June 13, 2022

Pennsylvania Business Report highlights NFIB's coalition amicus brief in a lawsuit challenging Regional Greenhouse Gas Initiative as an energy tax.

<https://pennbizreport.com/news/23588-business-leaders-press-views-on-rghi-tax-in-court-brief/>

## June 17, 2022

Oregon Business Report quotes Karen applauding the Supreme Court's decision that the Federal Arbitration Act's pro-arbitration mandate should apply to individual California PAGA claims. Karen argues the decision "will go a long way in protecting small businesses from an onslaught of PAGA litigation, including many frivolous lawsuits, brought under PAGA and similar state laws."

<https://oregonbusinessreport.com/2022/06/nfib-applauds-supreme-court-arbitration-ruling/>

## July 7, 2022

Scotusblog discusses the historic Supreme Court term noting, among other things, NFIB's successful challenge to OSHA's vaccine mandate. Quoting the article, "*In National Federation of Independent Business v. Department of Labor*, the court ... stressed that although Congress had given the Department of Labor the power to establish safety standards for the workplace, it had not given the agency the authority to enact such a 'significant encroachment into the lives – and health – of a vast number of employees.'

<https://www.scotusblog.com/2022/07/in-a-historic-term-momentum-to-move-the-law-often-came-from-the-five-justices-to-the-chiefs-right/>

## July 15, 2022

The Salem Business Journal quotes Karen discussing NFIB's lawsuit against Oregon's Climate Protection Program, "The rule limits the availability of covered fuels and will increase energy costs for small businesses and negatively impact their bottom line. The Oregon state legislature failed to pass cap-and-trade legislation in recent years and the agency is overstepping its authority by using administrative fiat to pass statewide rules with financial penalties."

<https://salembusinessjournal.org/article/nfib-joins-business-coalition-opposing-oregons-climate-change-rules/>



# The Brief

SUMMER 2022

## SCOTUS 2021-2022 Term Wrap Up

The Supreme Court just finished its 2021-2022 term, which included several significant cases for small businesses.

Improving upon its 80% win rate from last term, the NFIB Small Business Legal Center (SBLC) posted an astonishing 100% win rate at the Court this term. Below is a summary of those cases and the Court's outcome.

### **NFIB v. Department of Labor, OSHA**

In one of the most high-profile cases of the term, NFIB fought back against the Administration's vaccine mandate. We argued that the Occupational Safety and Health Administration (OSHA) did not have congressional authority to commandeer the nation's businesses. The Supreme Court agreed, rebuking OSHA's attempt to regulate any universal risk or hazard of daily life that may also be present in the workplace. Going forward, this outcome imposes a firm boundary on the regulatory authority of OSHA over workplaces.

### **Boehler, P.C. v. Commissioner of Internal Revenue**

The Tax Code gives a person or business 30 days to file a petition for review of an Internal Revenue Service (IRS) levy in the Tax Court. Boehler questioned whether failure to adhere to this time limit stripped the Tax Court of jurisdiction. NFIB's amicus argued that it did not, and

emission (GHG) standards? We argued that it does not. The Court agreed, holding that the CAA does not give the EPA authority to impose nationwide GHG standards transforming the nation's electricity grid. Hindering future broad claims of agency authority, the Court made clear that only Congress or an agency with a "clear delegation" from Congress could make such a consequential decision.

### **Cummings v. Premier Rehab Keller, P.L.L.C.**

Title VI of the 1964 Civil Rights Act and other similar statutes prohibit discrimination and allow for victims to recover compensatory damages. Cummings asked whether this includes emotional distress damages. Our amicus argued it did not. The Supreme Court agreed, correctly limiting small business liability.

the Supreme Court unanimously agreed. Because of this outcome, small businesses will have more leeway to appeal IRS tax determinations.

### **Viking River Cruises v. Moriana**

The Federal Arbitration Act (FAA) requires enforcement of arbitration agreements. California's Private Attorneys General Act (PAGA) allows one employee to recover damages on a representative basis for additional employees. California courts will not enforce an arbitration agreement waiving an employee's right to bring PAGA claims. Moriana asked whether the FAA requires enforcement of these agreements. NFIB argued that it does. Mostly agreeing, the Court held that the FAA requires arbitration of individual claims brought under PAGA.

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our Facebook page.

[facebook.com/NFIB.legal](https://facebook.com/NFIB.legal)



# 100% Win Rate at U.S. Supreme Court

By Elizabeth Milito, Acting Executive Director

Our cover story says it all – the NFIB Small Business Legal Center had its best Supreme Court term yet, winning 100% of the cases we engaged.

Of all the wins – two stand out. Our great defeat of the vaccine mandate the Occupational Safety and Health Administration tried to impose on all employers with 100 or more employees in *NFIB v. Department of Labor*. And the Supreme Court's rebuke of the Environmental Protection Agency's attempt to dramatically restructure and regulate America's energy industry in *West Virginia v. EPA*. In one term, the Supreme Court struck two big blows to the power of federal agencies in Washington. Most importantly, in both cases the Supreme Court said that it is the job of Congress – not federal agencies – to make new laws.

As we look to the next Supreme Court term, the issue of how much authority the federal agencies have is once again on the docket. The Court will be hearing, for the second time, the case of *Sackett v. EPA*. The Court will consider how far EPA's jurisdiction extends regarding the regulation of land that may contain water part of the year, like wetlands. The Legal Center has been a part of this case from the beginning and has consistently argued that we need a bright line rule that "navigable waters" subject to EPA regulation need to be actual bodies of water that flow between states and not simply a ditch that may collect water after a big rainstorm.

It is because of your support that we can continue to fight these battles on your behalf in the Supreme Court. We have made great strides in beating back the heavy hand of federal regulation, but we know we have more work to do.

I also want to announce and thank Karen Harned for her over twenty years of service to the small business community. Karen was instrumental in moving the NFIB Legal Center to center stage taking on landmark cases, such as *NFIB v. Sebelius*, before the U.S. Supreme Court and in federal and state courts around the country. Karen traveled widely and

popped up frequently on TV shows, as she shared small business' viewpoint on pressing issues such as healthcare, lawsuit abuse, and regulatory matters. We are so grateful to have had her skills and expertise over the last two decades.

Karen has moved on to join your ranks as a small business owner and we wish her well.

As always, the NFIB Small Business Legal Center continues to fight for you in courts across the country and our team is happy to help assist you as you navigate legal challenges facing your business.

## CONTACT US



**Beth Milito**

(202) 406-4443 | [Elizabeth.Milito@nfib.org](mailto:Elizabeth.Milito@nfib.org)  
Acting Executive Director



**Rob Smith**

(202) 314-2027 | [Rob.Smith@nfib.org](mailto:Rob.Smith@nfib.org)  
Staff Attorney



**William Klepp**

(202) 314-2070 | [william.klepp@nfib.org](mailto:william.klepp@nfib.org)  
SBLC Member Outreach Coordinator

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[NFIB.com/sblcgive](http://NFIB.com/sblcgive)

## ACT NOW! Small Businesses Face Unprecedented Threat of ADA Lawsuits

If your small business has not recently updated its website to bolster accessibility for those with disabilities, you are playing with fire. It is only a matter of time before someone sues your business alleging lack of compliance with the Americans with Disabilities Act (ADA).

### ADA Website Accessibility Lawsuits by the Numbers

Seyfarth Shaw LLP<sup>(1)</sup> tracks ADA website accessibility lawsuits, and their numbers demonstrate that these claims against America's businesses are increasing at alarming rates.

In 2017, there were 814 suits in federal court. One year later, that number jumped to 2,258. Meanwhile, 2021 witnessed the largest number of lawsuits filed in a single year -- a double-digit rate increase from 2020. In 2021, 2,895 separate ADA website accessibility lawsuits were filed against unsuspecting businesses--averaging 241 per month and roughly 8 per day! Keep in mind that these figures only account for lawsuits filed in federal court, meaning that hundreds or thousands more are filed in state courts every year.

The SBLC can attest to the growing number of ADA website lawsuits. In the past year alone, we have begun to hear monthly from businesses regarding an ADA website lawsuit filed against them or a demand letter received. Are you inclined to proceed with the risk and take a chance that your website will fly under the radar? If so, here are a few things to consider.

The civil penalties for violations of the ADA are substantial. First violations can result in a penalty up to \$75,000 and subsequent penalties carry a penalty up to \$150,000. Additionally, there are payday-seeking attorneys who target business websites. These attorneys have prospective plaintiffs helping them, and these people spend their days searching the internet for businesses whose websites are not fully accessible. These attorneys send form demand letters to thousands of businesses whose websites are out of compliance, and they make their living by scaring small businesses into settlements. Even these settlements can range from thousands to tens-of-thousands of dollars.

### NFIB SBLC Efforts to Provide Clarity

While there is no clear standard to achieve full website compliance under the ADA, this lack of clarity **does not** relieve businesses from the obligation to make their websites fully accessible to those with disabilities.

[NFIB.com/SBLCSummer221<sup>\(1\)</sup>](http://NFIB.com/SBLCSummer221) [NFIB.com/SBLCSummer222<sup>\(3\)</sup>](http://NFIB.com/SBLCSummer222) [NFIB.com/SBLCSummer223<sup>\(5\)</sup>](http://NFIB.com/SBLCSummer223)  
[NFIB.com/SBLCSummer224<sup>\(2\)</sup>](http://NFIB.com/SBLCSummer224) [NFIB.com/SBLCSummer225<sup>\(4\)</sup>](http://NFIB.com/SBLCSummer225) [NFIB.com/SBLCSummer226<sup>\(6\)</sup>](http://NFIB.com/SBLCSummer226)

The NFIB SBLC has strongly advocated for clearer guidance so that small businesses know what they must do to comply.

● In 2020, we created an ADA Website Compliance Tip Sheet,<sup>(2)</sup> discussing what small business owners should do to increase the accessibility of their websites.

● Last year, the SBLC published a white paper, entitled "The ADA and Small Business: Website Compliance Amid a Plethora of Uncertainty."<sup>(3)</sup>

● Finally, former SBLC Executive Director Karen Harned testified before a House Judiciary Subcommittee hearing on Oversight of the Americans with Disabilities Act of 1990: The Current State of Integration of People with Disabilities.<sup>(4)</sup>

### The Department of Justice Is Watching

Indicative of the increased focus on lack of ADA compliance through business websites, the Department of Justice (DOJ) issued new guidance for website accessibility under the ADA.

The "Guidance on Web Accessibility and the ADA"<sup>(5)</sup> provides an accessible business website should include, but is not limited to, the following:

- Color contrast between the text and background
- Text cues when using color in text
- Text alternatives ("alt text") in images
- Video captions
- Online forms with labels, keyboard access, and clear instructions
- Text size and zoom capability
- Headings
- Keyboard and mouse navigation
- Automated accessibility checkers
- Ability to report website accessibility issues

The DOJ also points to the Web Content Accessibility Guidelines (WCAG)<sup>(6)</sup> as helpful guidance in website accessibility. At the very least, a business website should conform to the WCAG 2.0 AA guidelines. But the 2.0 guidelines were adopted in 2008. Since then, the WCAG has adopted the 2.1 guidelines and are currently working on a draft of the 2.2 guidelines. Thus, a business seeking to offer itself the greatest protection may be well served by conforming its website to the WCAG 2.1 AA guidelines.<sup>(7)</sup>

**The Bottom Line** – Time is of the essence! Do not wait to receive a demand letter or documents notifying you of a lawsuit. As you are reading this, a person in another state could be looking at your website for accessibility flaws. The last thing your business needs is a lawsuit or threatened lawsuit due to an inaccessible website.