

Amicus Round-up

The NFIB Legal Center continues to impact precedent-setting cases across the country that matter to small business' bottom line through our amicus work. Amicus briefs, also known as "friend-of-the-court" briefs, are important in demonstrating to judges the broader impact a ruling could have on the law and those who must follow it.

In early-October, we filed an amicus brief with the U.S. Supreme Court in *Cummings v. Premier Rehab Keller*. This case asks whether the damages available under Title VI of the Civil Rights Act, and statutes incorporating its remedies, include compensatory damages for emotional distress. NFIB's brief argued that the Court should affirm an appellate court decision that found emotional distress damages are unavailable for violations of Title VI and related statutes.

As Karen Harned mentioned in her column on p. 2, the Legal Center also continues to fight against a provision in the American Rescue Plan Act, which prevents states accepting ARPA funds, from reducing taxes with briefs in district and appeals courts across the country.

Below is a summary of our state supreme court amicus work.

Chan v. HEI (Colorado)

NFIB argued that Colorado law should embrace both general business experience and industry-specific experience in determining whether general partners can actively participate in the business, instead of requiring industry-specific experience.

Patel v. 7-Eleven, Inc. (Massachusetts)

NFIB encouraged the Commonwealth's highest court to conclude Massachusetts' independent contractor law is inapplicable to the franchisee-franchisor relationship. If the law applied, as a practical matter, every franchisee would become an employee of the franchisor.

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.

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Media Mentions

NFIB Small Business Legal Center

August 19, 2021

The Cincinnati Enquirer notes NFIB's opposition to the \$300 bonus unemployment payment and support for Ohio Governor DeWine's decision to end the payments.

🔗 <https://www.cincinnati.com/story/news/politics/2021/08/17/fight-continues-over-300-per-week-covid-19-unemployment-be-nefts/5566432001/>

October 20, 2021

Forbes quotes Karen Harned regarding NFIB's support of state legal challenges to the provision in the American Rescue Plan Act that prevents states from reducing taxes, "ARPA's Tax Mandate prevents states from implementing measures that will foster a healthy business community and promote recovery from COVID-19's economic devastation, which disproportionately harmed certain industries and carried particularly harsh effects for small businesses."

🔗 <https://www.forbes.com/sites/patrickgleason/2021/10/20/bidens-attempt-to-block-state-tax-relief-has-failed/?sh=40b8e2a648e2>

November 4, 2021

CNBC quotes Karen Harned regarding NFIB's opposition to the OSHA vaccine mandate, "NFIB remains opposed to this rule that restricts the freedom of small business owners to decide how best to operate their own businesses and imposes unwarranted burdens on small businesses that further threaten the small business recovery."

🔗 <https://www.cbc.com/2021/11/04/biden-covid-vaccine-mandate-several-business-groups-criticize-rule.html>

November 10-14, 2021

Numerous outlets report on NFIB's lawsuit challenging the OSHA vaccine mandate, including the New York Times, New York Post, Bloomberg Law, CNBC, and The Hill.

🔗 <https://www.nytimes.com/2021/11/11/business/dealbook/dealbook-summit-lessons.html>
🔗 <https://nypost.com/2021/11/11/retail-trucking-groups-sue-biden-admin-over-vaccine-mandate/>
🔗 <https://news.bloomberglaw.com/daily-labor-report/trucking-building-retail-groups-add-to-vaccine-rule-challenges>
🔗 <https://www.cbc.com/2021/11/10/biden-vaccine-mandate-retail-truckers-businesses-sue-to-stop-requirements.html>
🔗 <https://thehill.com/business-a-lobbying/business-a-lobbying/580888-business-groups-sue-to-block-biden-vaccine-or-test>

The Brief

WINTER 2021

NFIB Small Business Legal Center Files Lawsuit to Stop OSHA's Unprecedented COVID-19 Vaccine Mandate

On November 9, 2021, the Legal Center filed a lawsuit challenging the Occupational Safety and Health Administration (OSHA) emergency temporary standard (ETS) which mandates that businesses with 100 or more employees must require workers get the COVID-19 vaccine or undergo weekly testing and wear masks while at work.

NFIB's legal challenge was made before the United States Court of Appeals for the Fifth Circuit. On November 16, it was moved to the U.S. Court of Appeals for the Sixth Circuit to be consolidated with the many other challenges to the rule that were filed in courts across the country. NFIB's lawsuit argues: 1) OSHA was required to use typical notice-and-comment procedures, instead of its claimed emergency exception; 2) OSHA lacks the statutory authority to issue the vaccine mandate; and 3) the Vaccine Mandate will irreparably harm the business community.

"The small business economy is fragile, and owners continue to manage several business challenges regarding staffing and supply chain disruptions," said SBLC Executive

Director Karen Harned. "This mandate only increases those challenges and threatens to cause an enormous financial loss. Ultimately, the mandate restricts the freedom small business owners depend on to run their businesses and is a clear example of administrative overreach."

Just days after NFIB filed its lawsuit, on November 12, the Court of Appeals for the Fifth Circuit permanently stayed the vaccine mandate. The court concluded that the Occupational Safety and Health Act, which gives OSHA its jurisdiction, "was not . . . intended to authorize a workplace safety administration . . . to make sweeping pronouncements on matters of public health affecting every member of society in the profoundest of ways." The court additionally stated that "promulgation [of the vaccine mandate] grossly exceeds OSHA's statutory authority."

At the time of publication, the rule remains stayed until the courts rule on its legality. The mandate was initially intended to go into effect on December 5, 2021, with a vaccine or

test deadline of January 4, 2022. If the rule is allowed to stand, it would remain in effect until May 5, 2022.

Thanks to your generous support, NFIB will continue its fight against OSHA in the Sixth Circuit, and then on to the U.S. Supreme Court. You can keep up with the Legal Center's litigation by going to nfib.com/legal.

Keep up with our work at:
NFIB.com/legal



Fighting For Your Bottom Line

By Karen R. Harned, Executive Director

It has been a tough two years and small business owners across the country have borne the brunt of the economic devastation the pandemic unleashed on America and the world. It is my hope, however, that the NFIB Small Business Legal Center's work made things just a bit better for many, if not most of you.

Taxes and labor make up a significant portion of the costs small business owners incur each year and directly impact your bottom line. On both of those fronts, the Legal Center took on significant legal fights to help prevent those cost drivers from increasing, and - depending on your state - even decreasing.

One such battle concerns a provision that was stealthily tucked in at the last minute to the American Rescue Plan Act passed by Congress and signed into law in March, which prohibits states who received monies from that \$1.9 trillion Act from reducing taxes directly or indirectly on their citizens. But such a provision is illegal a la *NFIB v. Sebelius*, our 2012 challenge to Obamacare. In that decision, the Supreme Court ruled that Congress cannot commandeer states to do their bidding with offers the states in practice can't refuse.

It's clear, following the pandemic, states across the country and their citizens were suffering. Among other things, ARPA monies were critical to getting many state budgets back on track and ensuring unemployment insurance funds were replenished. But several states wanted to give some of that money back to their citizens in the form of tax or fee reductions. That's a matter of state tax policy and the federal government has no business playing in that legislative sandbox. We had wins and losses in these cases throughout the year and the fight continues. But, with our help, as of mid-November, the federal government is prevented from enforcing this provision against the following states: Alabama, Arkansas, Alaska, Florida, Iowa, Kansas, Kentucky, Montana, New Hampshire, Oklahoma, Ohio, South Carolina, South Dakota, Tennessee, Utah, and West Virginia. Ultimately, the U.S. Supreme Court is likely to give all states a final answer.

In addition, in May we celebrated a huge win for Nevada taxpayers, when the Nevada Supreme Court unanimously agreed with NFIB in our coalition challenge to two Senate bills, which raised certain state taxes without the two-thirds majority Nevada's constitution requires. The Nevada Supreme Court unanimously ruled the taxes unconstitutional and invalid, saving the state's taxpayers precious dollars.

Finding labor continues to be a struggle for many small business owners across the country. Unfortunately, the federal government has instituted policies that only exacerbate the problem and the NFIB Small Business Legal Center is fighting for you on both fronts. Congress passed a law at the beginning of the pandemic that provided bonus unemployment insurance payments to Americans out of work. Although well-intentioned, the bonus payments ended up incentivizing many workers to stay at home rather than reenter the workforce. Several governors chose to not accept from the federal government those bonus payments and consequently were sued by workers saying they were illegally denied access to the additional monies. The Legal Center stepped in and successfully defended many of these governors in the courts.

Additionally, when President Biden announced that he was directing OSHA to require all businesses with 100 or more employees to mandate their workers get vaccinated or undergo weekly testing and masking while at work, it was clear this was yet another policy that would only pour gas on the labor shortage fire. As we discuss in more detail on p. 1, the Legal Center immediately sued and quickly helped secure a stay of that rule so that, as of this writing, it is not in effect.

The new year undoubtedly will bring new challenges to you and your business as you continue to work your way back to normal following the pandemic. Thanks to donors like you, the Legal Center is geared up and ready to take on the necessary fights to protect your business and hopefully help your bottom line.

Karen R. Harned

NFIB Small Business Legal Center is Here to Help

Since March 2020, the NFIB Legal Center has remained committed to helping small business owners navigate the challenges of the COVID-19 pandemic. We have conducted over 60 educational webinars, including 27 in 2021. Every two weeks, NFIB experts explore a topic of great importance to small business owners. These bi-weekly webinars are free to attend and an indispensable resource for any owner looking to stay informed about federal financial assistance programs and policies. All the webinars are recorded and can be found on nfib.com/webinars.

"We are committed to continuing our Legal Center webinar series in 2022," said Beth Milito, Senior Executive Counsel, and co-host of the series. "If you have any questions, any thoughts, any subjects you'd like to see covered in a future webinar, please contact us by emailing info@nfib.org," added Beth.

In the fall, the SBLC launched a special four-part Reset and Recovery webinar series that covered operational, tax, and marketing issues faced by small businesses, and included a November 3 webinar with special guest Marty Abo, CPA/ABV/CVA/CFP, on succession and exit planning for small businesses.

In addition to the webinar series, the Legal Center has provided support and guidance on nfib.com to help connect small businesses to resources and funding programs. The Legal Center compiles information to help you maintain operations and access assistance. We are focused on preparation and sustainment, not panic. Go to nfib.com/coronavirus to find resources and tips to get you through the pandemic.

Finally, SBLC staff also responds directly to over 100 inquiries from small businesses every week on a variety of topics, both COVID-19 and non-COVID-19 related. If you have a question or concern, please email info@nfib.org and we will do our best to provide helpful information and resources to get you back on track.

Handle OSHA Inspections with Ease

If your business has 10 or more employees, then an unannounced OSHA inspection is a possibility. NFIB understands being a small business owner often means spending countless hours making sure your business is following federal and state laws.

NFIB is happy to help make compliance a little easier by providing you with this NFIB Small Business Guide to Handling OSHA Inspections. Developed by the NFIB Small Business Legal Center, the guide was written to help you:

- Understand what a standard OSHA inspection will entail
- Learn how you can make it easier on your business



Knowing your rights and responsibilities as an employer can be critical to preventing or reducing fines and penalties.

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