

The WOTUS Headache That Won't Go Away

In case you haven't heard, the WOTUS issue is back with a vengeance. What is WOTUS? WOTUS refers to the phrase "waters of the United States" in the Clean Water Act. The Act gives EPA jurisdiction over "waters of the United States" but fails to define the phrase. Because of this failure, presidential administrations for decades have issued regulations broadening or narrowing the definition of WOTUS. The broader the definition, the more EPA jurisdiction over wetlands on private property.

The Biden Administration is no exception. On January 18th, the EPA and Army Corps of Engineers released their "Revised Definition of 'Waters of the United States'" final rule (WOTUS Rule or Rule). The WOTUS Rule took effect on March 20th and significantly expands EPA's jurisdiction over wetlands on private property by broadening the definition of WOTUS.

Among the many flaws of the Rule, two stand out for small businesses. First, to determine when a wetland is a water of the United States, the Rule heavily relies on the "significant nexus" test. Only one member of the nine-member Supreme Court has adopted this test in recent WOTUS cases. Second, the EPA failed to conduct Congressionally-mandated analyses on how the Rule would impact small businesses.

Currently, there are three separate cases challenging the Biden Administration's new WOTUS Rule. A federal court in Texas has already issued an injunction preventing the EPA from enforcing its WOTUS Rule in both Texas and Idaho. Similar injunctions could come at any moment for additional states or the nation.

The NFIB Small Business Legal Center is currently tracking these cases and plans to engage on the WOTUS issue at the appropriate time. If you or someone you know has had a WOTUS experience or problem, please let us know at 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

12/20/2022

Seafood Source references NFIB's amicus brief filed in an effort to overturn Chevron, a decades-long legal principle that courts have used to allow Congress to pass lawmaking authority to regulatory agencies.

🔗 <https://www.seafoodsource.com/news/supply-trade/fishermen-gaining-widespread-support-asking-us-supreme-court-to-review-at-sea-monitor-case>

02/06/2023

Bloomberg Law mentions NFIB regarding a federal lawsuit questioning the limits on OSHA's authority to issue safety regulations. NFIB supported Allstates Refractory Contractors, LLC of Waterville, Ohio's appeal after a federal judge dismissed the case.

🔗 <https://news.bloomberglaw.com/daily-labor-report/punching-in-state-ags-groups-file-briefs-in-osha-rules-case-28>

02/06/2023

NFIB Small Business Legal Center Executive Director, Beth Milito, joined Andrew Langer as a guest on the *Federal Newswire* Podcast. Listen to their full discussion ranging from current small business issues, Beth's role within the NFIB, and more by clicking the link below.

🔗 <https://www.youtube.com/watch?v=d0g0MhYkd1k>

02/23/2023

The *Financial Times* quotes Beth Milito regarding the FTC's proposed ban on non-compete clauses: "[I]t was 'not at all clear that Congress intended the FTC to have this authority.'"

🔗 <https://www.ft.com/content/6602eda5-70ac-416f-a78b-f29e44af1768>

02/08/2023

Beth Milito published an op-ed in the *National Review* on the fight against regulations for small businesses. She writes, "this mandate should be seen for what it is: anti-small business, anti-growth, and anti-freedom. It's too late to stop the Biden administration from issuing it, but it's not too late for Congress to repeal it, or the Supreme Court to overturn it."

🔗 <https://www.nationalreview.com/2023/02/will-small-businesses-survive-the-latest-regulatory-deluge/>



The Brief

SPRING 2023

NFIB Legal Center Supreme Court 2022-2023 Activity

The NFIB Small Business Legal Center has been extremely active at the U.S. Supreme Court this term—filing 11 amicus briefs. As always, our advocacy has focused on protecting the rights and interests of small businesses. Here is a summary of the Legal Center's Supreme Court docket.

Sackett v. EPA

Issue: When is a wetland a "water of the United States" under the Clean Water Act?

Outcome: Pending. NFIB's brief urges the Court to adopt a strict test and limit EPA jurisdiction.

National Pork Producers v. Ross

Issue: Can California impose pork production regulations on the entire country?

Outcome: Pending. We argue California's law violates the Constitution.

Bittner v. United States

Issue: What constitutes a violation of the Bank Secrecy Act's requirement to report foreign accounts?

Outcome: WIN. Agreeing with our brief, the Supreme Court applied the more lenient interpretation of the Bank Secrecy Act, holding violations are on a per-report, instead of a per-account, basis.

Wilkins v. United States

Issue: Is the Quiet Title Act's statute of limitations jurisdictional?

Outcome: WIN. Agreeing with our brief, the Court held the statute of limitations could be extended in certain situations for property owners.

Glacier NW v. International Brotherhood of Teamsters

Issue: Does federal law preempt (and thus prevent) state tort claims against unions for intentionally destroying an employer's property during a labor strike?

Outcome: Pending. We argue that employers should be allowed to recover from a union for property damage.

Coinbase, Inc. v. Bielski

Issue: Does appealing a denial of a motion to arbitrate automatically halt lower court proceedings?

Outcome: Pending. We argue it does.

Tyler v. Hennepin County

Issue: Can the government take real property to collect a tax debt and keep the excess amount from the sale?

Outcome: Pending. Our amicus argues this violates the Fifth Amendment.

Acheson Hotels LLC v. Laufer

Issue: When does an "ADA tester"

have legal injury to sue?

Outcome: Pending. We argue that simply visiting a website is not enough to sue.

Loper Bright Enterprises, Inc. v. Raimondo

Issue: Can agencies require fishing vessels carry and pay for government enforcement agents?

Outcome: Pending. Our argument is no.

Dakota Finance LLC v. Naturaland Trust

Issue: When does the "diligent prosecution bar" in the Clean Water Act prevent citizen suits?

Outcome: Pending. Private citizens cannot sue if states begin enforcement of a generally similar law.

College of Ozarks v. Biden

Issue: When can regulated entities sue an agency for failing to comply with rulemaking procedures?

Outcome: Pending. Our brief argues that entities can sue whenever an agency skips statutorily-required procedures.

Keep up with our work at:
[NFIB.com/legal](https://www.nfib.com/legal)

Don't forget to check out
our Facebook page.

facebook.com/NFIB.legal

555 12th Street, NW, Suite 1001
Washington, D.C. 20004
(800) 552-NFIB
e-mail: legalcenter@nfib.org



EMPLOYERS HAVE RIGHTS TOO

By Elizabeth Milito, Executive Director, NFIB Small Business Legal Center

The NFIB Small Business Legal Center's mission has always been twofold: to be the voice of small business in the courts and to be the legal resource for small business owners nationwide. In the area of labor law those two components – litigation and education – are critical to protecting and empowering small business owners.

Too often nowadays media, government regulators, and politicians are happy to trash employers and exaggerate the woes of workers. This unbalanced focus has emboldened unions and worker advocates to push for ever-more progressive workplace policies to the detriment of small business. They act as if small business owners haven't been through enough over the last three years. Small businesses around the country are dealing with a crisis of financial hardships, all after a pandemic and state-mandated restrictions and lockdowns. Inflation, labor shortages, supply chain disruptions, and high fuel prices are dragging down Main Streets across the country.

Unfortunately, the negative impact of these one-size-fits-all, extreme workplace policies like an increased overtime rate, reclassification of independent contractors, and new union rights would fall disproportionately on small employers. As we already know, compared to larger corporate employers, small employers are less likely to have the cash reserves or profit margins to plan for and absorb the aggressive increase in labor costs.

The Small Business Legal Center is pushing back. For instance, when the federal government proposed a rule that would ban most employee non-compete agreements, the Legal Center heard from many business owners who had questions and concerns about the scope of the proposal and what it might mean for their day-to-day businesses. After all, non-competes have become a more commonplace strategy for businesses of all types and sizes, and this rule would not only prevent employers from having employees sign new non-competes but would also require them to rescind those currently in place. We are working to stop this unprecedented rule.

The NFIB Small Business Legal Center will continue to be an active force to push back against things like the non-compete proposal and other progressive labor rules. We will also continue to develop and produce helpful advisory materials like our guide, *A Small Business Owner's Rights During a Union Organizing Campaign*, which gives you the dos and don'ts about dealing with unionization. The bottom line is we are here to make sure small business owners understand their rights. We will also work to ensure that the media, government regulators, and politicians understand that employers have rights too. And we are prepared to go to court to enforce those rights.

We look forward to continuing to serve America's entrepreneurs. I would also like to take this opportunity to give a special thanks to you. Without you, our success and productivity would not be possible. On behalf of small business, thank you for your generosity and support.

Elizabeth Milito

CONTACT US



Beth Milito

(202) 406-4443 | elizabeth.milito@nfib.org
Executive Director



Rob Smith

(202) 314-2027 | rob.smith@nfib.org
Staff Attorney



William Klepp

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

Support the
SMALL BUSINESS LEGAL CENTER
with an estate or planned donation.
NFIB.com/sblcgive

Small Business Legal Center Monthly Webinars

Mark your calendars!

Don't miss out on the Legal Center's monthly webinars. The webinars run the first Wednesday of every month at 12 PM ET and provide practical information to help you own, operate, and grow your business.

Upcoming webinars include:

May 3

Scott Horton, Esq.

Tackling HR Compliance for Your Small Business

June 7

Beth Milito, Esq.

Independent Contractor or Employee? How to Tell the Difference.

July 5

Holly Wade

Small Business Essentials: Financing and Marketing

August 2

Jessica Ledingham, Esq.

Don't Leave Money on the Table: Commonly Missed Tax Opportunities

Can't make the live webinar? Don't worry! All webinars are recorded and available for on-demand viewing [here](#).

Read Our Latest Guide

NFIB Guide on Independent Contractors

Determining if your workers are correctly classified as employees or independent contractors will help you avoid legal and tax problems. NFIB's guide can help. Download it today.



DOWNLOAD HERE

It's Not Too Late to Claim the Employee Retention Tax Credit!

The Employee Retention Tax Credit (ERTC or ERC) is a refundable tax credit, created as a part of the CARES Act, available to employers based on wages paid to employees from March 13, 2020, through the first three quarters of 2021. The credit can provide significant refundable payroll credits upwards of \$26,000 per employee.

Small business owners who retained employees during the pandemic can apply for the ERTC if their business experienced a decline in gross receipts (at least 50% decline for 2020 quarter; at least 20% decline for 2021 quarter) compared to the same quarter in 2019; or if their business experienced a full or partial suspension of business operations due to a government order.

While most businesses cannot claim the ERTC for wages paid beyond Q3 2021 (September 31, 2021), recovery startup businesses might be eligible for Q4 2021. The ERTC for businesses that started during the COVID-19 pandemic is capped at a total of \$50,000 per quarter for Q3 and Q4 of 2021. The IRS defines a recovery startup business as an employer that meets each of the following criteria:

- The business began carrying on a trade or business after Feb. 15 of 2020.
- The business has not exceeded \$1,000,000 in average annual gross receipts.
- The business does not meet the normal ERTC eligibility criteria of a full or partial suspension of operations or a decline in gross receipts.

NFIB has held various webinars on the ERTC, including our March 1st *Ask the CPA: Employee Retention Tax Credit Basics and Tax Season Tips* with special guest, Kristi Stone. An on-demand version of this webinar can be found by clicking the link below!

<https://www.NFIB.com/webinars/ask-the-cpa-employee-retention-tax-credit-basics-and-tax-season-tips/>