

FTC NONCOMPETE BAN STRUCK DOWN THANKS TO NFIB ADVOCACY

In August, the Federal Trade Commission's (FTC) rule banning noncompete agreements was struck down in federal district court in the case *Ryan, LLC v. Federal Trade Commission*. The Legal Center mounted an aggressive response to the rule that contributed to its demise.

In April, the FTC issued the controversial rule, reaching into millions of employment contracts and unilaterally altering their terms to render noncompete agreements unenforceable. This would have discouraged businesses from investing in their employees with specialized training and retention bonuses and would have allowed competitors to steal valuable information by poaching employees.

NFIB has stood against the rule from the beginning, submitting [comments](#) when the rule was proposed and opposing it when it was [issued](#). We filed an [amicus brief](#) in the *Ryan* case as well as in [ATS Tree Services, LLC v. Federal Trade Commission](#), supporting challenges to the noncompete ban in both cases. We argued that the FTC's final rule relied on a faulty cost-benefit analysis, and that the rule's fallacious and internally inconsistent reasoning proved that the rule was arbitrary and capricious.

The court in *Ryan* agreed with our arguments, holding that the rule was arbitrary and capricious and an unlawful agency action. The court further blasted the agency for not providing "evidence as to why they chose to impose such a sweeping prohibition – that prohibits entering or enforcing virtually all non-competes – instead of targeting specific, harmful non-competes."

Small business owners can breathe a sigh of relief now that the noncompete ban has been set aside. Thanks to the generous support of our donors, NFIB will continue to advocate for small businesses in the courts against overreaching federal mandates.

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Media
Mentions

April 18, 2024

Reuters

Reuters discussed the Biden administration's independent contractor rule. The article referenced the legal challenge brought by NFIB and other business groups as a coalition. The coalition is quoted in stating that: "DOL overlooks that reclassification will harm many independent contractors and may drive some out of the workforce altogether."

May 16, 2024

Bloomberg Law

Bloomberg Law highlighted the Supreme Court upholding the Consumer Financial Protection Bureau's (CFPB) funding system. Legal Center Executive Director Beth Milito is quoted, saying, "We are disappointed with the court's ruling, which will ultimately leave small businesses with expensive penalties and burdensome inspections at the hands of the CFPB."

May 17, 2024

Small Business Trends

Small Business Trends discussed NFIB's legal challenge to the Federal Trade Commission's (FTC) ban on non-competes. Legal Center Executive Director Beth Milito is quoted, saying, "The FTC's final rule on non-competes is a textbook example of arbitrary rulemaking. The final rule leaves small businesses with vague conditions that make it difficult for owners to correctly comply."

June 29, 2024

NBC News

NBC News discussed the Supreme Court's overturning of *Chevron v. Natural Resources Defense Council*, lifting the requirement for courts to defer to agency interpretations of vague regulatory laws. NFIB is quoted in the article: "[This decision will] level the playing field in court cases between small businesses and administrative agencies."



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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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The Brief

FALL 2024

Major Decisions Ahead for the U.S. Supreme Court's October Term

This fall, the U.S. Supreme Court will hear oral arguments in two major small business cases in which the NFIB Small Business Legal Center is participating by filing amicus ("friend of the court") briefs. The NFIB Legal Center expects these decisions, which are being heard by the Court thanks to our advocacy, to be consequential for NFIB members.

E.M.D. Sales v. Carrera

The Court will hear oral arguments in *E.M.D. Sales, Inc. v. Faustino Sanchez Carrera*, which asks what standard of proof courts should use to determine if an employee is exempt from overtime pay requirements. The Fair Labor Standards Act (FLSA) exempts employers from having to pay overtime to employees with "bona fide executive, administrative, and professional" job duties. The burden of proving that an exemption applies rests with the employer. In most courts, an employer only has to prove that an employee is exempt by a "preponderance of the evidence." The U.S. Court of Appeals for the Fourth Circuit, however, requires

employers to prove the exemption by "clear and convincing evidence"—an extraordinarily high burden of proof. We argue that the Fourth Circuit's standard is unnecessarily high, twists the FLSA, and harms businesses.

The NFIB Legal Center filed two briefs in this case—first, at the certiorari stage, asking the Court to take the case, and second, at the merits stage, where the Court will consider both sides' arguments in full. If our arguments prevail, employers across the country will be able to establish overtime exemptions easily, as most courts have long held.

San Francisco v. Environmental Protection Agency (EPA)

The Court will also hear oral arguments in *City and County of San Francisco v. EPA*, a case that concerns whether EPA and States, in issuing National Pollutant Discharge Elimination System (NPDES) permits under the Clean Water Act (CWA), can impose vague water quality standards that do not specify

numeric discharge limits. We argue that water quality standards must be specific—without clear numbers to rely on, businesses are forced to engage in guess work and will open themselves up to the threat of enforcement and harmful activist lawsuits.

As with *E.M.D. Sales*, the NFIB Legal Center filed briefs at both the certiorari stage and the merits stage. If the Court adopts our position, businesses who are subject to the CWA will have more clarity on how to comply with the law, without having to worry about unintentionally violating water quality standards.

Thanks to your generous support, the NFIB Legal Center looks forward to a successful year in the courts for small businesses when the Supreme Court begins its 2024-2025 term.

You can keep up with all of the Legal Center's work at NFIB.com/legal or reach out to us directly at info@NFIB.org.

Keep up with our work at: NFIB.com/legal
Don't forget to check out our Facebook page.

Facebook.com/NFIB.legal

Small Business Interests Prevail in U.S. Supreme Court as Agency Powers are Curtailed

During the U.S. Supreme Court's 2023-2024 term, which concluded on July 1st, the NFIB Small Business Legal Center was very active. And our work paid off. By the numbers, NFIB participated in 12 cases, representing over 20% of the Court's total cases. NFIB garnered five wins, five losses, and two neutral decisions. But those wins were significant, especially when it comes to reining in the Administrative State.

As you well know, the U.S. Supreme Court is often the final protection for the rights of small business owners. When administrative agencies impose costly and burdensome mandates on small businesses, and the legislative branch refuses to protect small businesses, the Constitution and Supreme Court are the last resort. I am pleased that in many of this term's most consequential cases, the Supreme Court sided with America's small businesses.

The decisions from the U.S. Supreme Court this year will help us reclaim the constitutional system of government established by our founding fathers. This includes robust checks and balances on government power. The Supreme Court in several important decisions – all cases in which NFIB weighed in – will help hold federal agencies to account and will not let them act outside of their constitutional or statutory authority.

The term's marquee decision was *Loper Bright Enterprises v. Raimondo, Secretary of Commerce*, in which the Supreme Court overturned the now infamous 1984 decision in *Chevron v. NRDC*. In that case, the Court ruled that the role of a judge is to essentially rubber-stamp new regulations. *Chevron* required judges to defer to federal agencies when interpreting statutes so long as the statutory language was "ambiguous" and the agency's interpretation was "reasonable." But we all know that lawyers find ambiguity in everything. So, in practice, *Chevron* was a significant contributor to the dramatic growth in the power federal agencies have over all of us and the number of regulations on the books.

NFIB had argued in court filings over the past few years that it was past time for the Supreme Court to reconsider and overturn *Chevron*. The good news is that the Court agreed in *Loper Bright*, concluding that the *Chevron* doctrine conflicted with separation of powers principles, and that the judiciary, not agencies, is the branch of government tasked with "interpret[ing] statutes, no matter the context." This means rather than turning a blind-eye, judges should seriously scrutinize federal

agencies when they claim new and previously unknown regulatory powers.

I am hopeful that the abandonment of *Chevron* will level the playing field in court cases between small businesses and administrative agencies. The decision should also remove significant power from unelected bureaucrats.

While it was a great term at the Supreme Court for Main Street and all Americans, the work of the Legal Center continues. Please know that because of your sustained support we will challenge agency overreach, fight for more government accountability, and advocate for less burdensome regulations.

Thank you for your ongoing and generous support.

By **Beth Milito**, Executive Director,
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THE LEGAL CENTER SUPPORTLINE – TOP THREE INQUIRIES FOR SUMMER 2024

From human resources compliance to healthcare, taxes, loans, and employee relations, small business owners constantly face problems that aren't always easy to solve. The NFIB Small Business Legal Center is here to help.

Top Three Member Inquiries for Summer 2024

1. Small Business Administration (SBA) Economic Injury Disaster Loan (EIDL) Repayment;
2. Beneficial Ownership Information (BOI) Reporting; and
3. Employee and Workplace Management

1. SBA EIDL Repayment

Many of our members have asked about the status of their SBA Economic Injury Disaster Loans (EIDL). As a reminder, since January 1, 2024, the U.S. Treasury Department has assumed the majority of unpaid EIDLs. This transition means that if your EIDL has gone unpaid, there is a chance it has been or soon will be sent to the Treasury for collection. While this may cause concern, there are still steps you can take.

- **Hardship Accommodation:** SBA offers [hardship accommodation plans](#) for businesses that are struggling with repayment. If you are facing financial difficulties, reach out to SBA immediately to inquire about eligibility.
- **Negotiating with the Treasury:** If your unpaid loan has been sent to Treasury, it is critical to get in touch with them as soon as possible to negotiate a payment plan. Proactive communication can prevent further penalties or collection actions.
- **Loan Recalling:** If you believe that your loan was wrongly sent to the Treasury (i.e., you are not behind in repayment), you can request that the loan be recalled to SBA for reprocessing. This can help ensure that any errors are corrected and that you're working with the right agency moving forward.

2. BOI Reporting

Another hot topic this summer was [BOI Reporting](#)

requirements under the Corporate Transparency Act (CTA). We know many of our members are concerned about the potential impact of this reporting rule.

NFIB has taken a firm stance against the CTA by [filing a lawsuit challenging the constitutionality of the statute](#). We will continue to update you on the status of this litigation and appreciate the generous support of our donors who enable us to push back against burdensome regulations.

3. Employee and Workplace Management

Many of our members reached out this summer concerning employee-related issues. These include implementing leave, dress code policies, break time rules, and various other inquiries related to employee management.

Your employees work best when they know what is expected of them, and the best way to ensure this is through a well-written and legally compliant employee handbook. Employee handbooks can provide several advantages to your business.

First, a well-written and legally compliant handbook can keep you out of court. Compiling your policies into a handbook gives you the opportunity to review them closely and make sure they comply with state and federal laws. In addition, having all your policies presented with clear and concise language in a handbook will significantly reduce the potential for misunderstandings with employees in the event a dispute arises. A handbook that complies with the law and speaks clearly will ensure that you are significantly less likely to be sued.

We encourage anyone writing an employee handbook to consult with an attorney licensed in their state to ensure they are following all federal and state laws. In the meantime, you can check out [NFIB's Model Employee Handbook](#) to kickstart your drafting.

WE WANT TO HEAR FROM YOU NFIB Legal Center SupportLine Open for Business!

NFIB's Small Business Legal Center strives to keep our members informed about the most pressing legal and regulatory issues affecting small businesses. Every day, we receive numerous inquiries from our members on a wide spectrum of issues.

Don't hesitate to reach out to us at info@nfib.org or 800-552-NFIB.