

NFIB in the State Courts

Did you know that nearly half of the Small Business Legal Center's work occurs in state courts? While our work in the U.S. Supreme Court and other federal courts might garner more headlines, we share more about three recent state court filings below.

Punxsutawney Hunting Club, Inc. v. Pennsylvania Game Commission

NFIB filed an [amicus brief](#) in the Pennsylvania Supreme Court, challenging game wardens' statutory right of entry onto private property. Pennsylvania currently abides by the "open fields" doctrine, which allows government actors to invade private property without a warrant or probable cause. Our brief argues that Pennsylvania should establish greater protection for property rights in its Constitution by abandoning the "open fields" doctrine.

Ford Motor Company v. Parks

NFIB filed an [amicus brief](#) at the Texas Supreme Court, arguing that Texas's statutory 15-year time bar on product liability claims does not require a receipt proving an exact date of sale. Our brief argues that the court of appeals was wrong to impose such a high standard to prevent a product liability claim. We maintain that such proof is unnecessary so long as a business has some evidence that the sale occurred more than 15 years ago.

Highlander v. Virginia Department of Wildlife Resources

NFIB filed an [amicus brief](#) at Virginia's Court of Appeals challenging state conservation officers seizing and searching an individual's personal property without a warrant. Our brief argues that the Fourth Amendment of the U.S. Constitution prohibits the search and seizure of personal property that occurred in this case.



Media Mentions

February 19, 2024

[Bloomberg Law](#)

Bloomberg Law discussed *Corner Post v. Federal Reserve*, a case in which NFIB filed an amicus brief. The case concerned the statute of limitations for legal challenges to regulations, and the article quoted Executive Director Elizabeth Milito: "A person must have suffered an injury from an agency action to sue and the injury for Corner Post could not have happened before they started business."

March 5, 2024

[PYMNTS](#)

PYMNTS reviewed the Department of Labor's new independent contractor rule that took effect on March 11. PYMNTS referenced NFIB's involvement as a co-plaintiff in a lawsuit brought against the rule.

March 18, 2024

[Washington Times](#)

The Washington Times published an op-ed written by Executive Director Beth Milio. The op-ed challenged the deluge of regulations affecting small businesses from the Biden administration. Milio explained, "Imposing more regulatory costs and paperwork burdens does not open 'doors of opportunity' for small businesses. This aggressive regulatory agenda is a wet blanket for small businesses that don't have compliance officers or lawyers to navigate red tape."

March 26, 2024

[Moody Market](#)

Moody Market discussed an appeal filed by NFIB to the Michigan Supreme Court concerning a 2015 rule that implemented a trigger to lower taxes when state revenue outpaces inflation. The appeal argued that the Michigan Legislature intended for the tax cut to be permanent.



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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

SPRING/SUMMER 2024

NFIB Sues the U.S. Department of Labor in Three New Lawsuits

The U.S. Department of Labor (DOL) has issued three rules that dramatically affect small businesses' relationships with their workers. In response, and with the generous support of donors like you, NFIB has filed lawsuits challenging these rules.

The Overtime Rule

First, DOL's new "Overtime Rule" dramatically changes how the overtime exemption functions. Under the new rule, if an employee makes less than \$55,068, the employer must pay overtime, regardless of the employee's job duties. The new rule will also increase the threshold automatically every three years, so a salary of \$55,068 will not exempt an employee from overtime when the next increase occurs. The rule will force small business owners to choose between reclassifying employees, paying overtime, or giving out unaffordable salary raises.

On May 22, 2024, NFIB sued DOL in a federal court in Texas. Our lawsuit argues that DOL has no legal

authority to issue such a high threshold with automatic updates every three years. NFIB previously sued and stopped a similar rule in 2016.

The Independent Contractor Rule

The second rule, the "Independent Contractor Rule," changes how businesses distinguish between employees and independent contractors. DOL's previous rule gave businesses a simple two-factor test for classifying independent contractors. However, the new rule imposes a complicated six-factor test that is difficult to apply.

If allowed to stand, the Independent Contractor Rule will force small business owners to pay minimum wage and overtime to workers who were previously considered independent contractors. It also makes such workers eligible to start or join union organizing campaigns.

NFIB is challenging the rule in a federal court in Texas, arguing that the new rule is arbitrary and capricious and is based on a

misinterpretation of federal law. We also argue that DOL failed to consider significant costs to small businesses.

The Walkaround Rule

The third rule, the "Walkaround Rule," allows third-party individuals to initiate and then join an Occupational Safety and Health Administration (OSHA) inspection of a private workplace.

The Walkaround Rule violates small business owners' private property rights, leaving them susceptible to harassment from competitors, union representatives, and other parties intending to cause harm.

In our lawsuit filed in a federal district court, we argue that the rule exceeds OSHA's statutory authority and violates federal labor laws and the Administrative Procedure Act.

As always, the NFIB Small Business Legal Center will continue to fight and advocate for small business interests in cases involving labor and employment issues that matter to our members.

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

facebook.com/NFIB.legal



WHO'S COMING TO THE OSHA INSPECTION?

Legal Center Lawsuit Argues New Inspection Rule Creates Unfair Union Advantage

If you are like most small business owners, employees are your most valuable asset. Without productive workers, your business isn't likely to succeed in competing with other businesses, large and small. Recognizing the importance that employees bring to the workplace, NFIB recently filed a lawsuit challenging an assault by the Biden administration on business owners' freedom to manage their employees effectively and flexibly.

Earlier this year, the administration issued a new regulation that overturned established rules on workplace inspections by the Occupational Safety and Health Administration (OSHA). The new regulation, which NFIB opposed, allows labor organizers to enter nonunionized businesses. NFIB targeted this radical change in a federal lawsuit. OSHA plays an important role in protecting against workplace hazards, which is why Congress gave it extraordinary powers. OSHA inspectors can show up to inspect workplaces, find violations, and issue fines. Unfortunately, the Biden administration has politicized this process by inviting unions to join workplace inspections to facilitate union recruitment.

OSHA's walkaround rule puts small businesses at a regulatory disadvantage and poses a direct threat. Small business owners have enough regulatory difficulties dealing with OSHA compliance. They shouldn't have to worry about union representatives unfairly discussing labor issues with their employees. The walkaround rule has nothing to do with worker safety and everything to do with intimidating independent business owners for the benefit of unions.

This is not the first time that big labor has tried this tactic. Under the Obama Administration, OSHA introduced a policy that allowed employees at a nonunionized worksite to authorize a union representative or community organizer to act as the employees' representative for OSHA inspections. In Texas, one NFIB member had organizers from the Service Employees International Union (SEIU) show up four times along with OSHA inspectors. The SEIU agents had no expertise in the company's operations, such as its state-of-the-art cleaning system. NFIB challenged this policy, persuading a Texas District Court Judge to issue a restraining order. Soon after, the Trump Administration's OSHA withdrew the policy.

Now, through the new walkaround rule, OSHA has again tried overturning established labor laws that businesses and workers have relied upon for decades. Absent significant evidence that such a fundamental legal change is necessary, the President and unelected bureaucrats in the Department of Labor should keep the law the same. Only Congress should propose such a sweeping change. That is the constitutional system America's founders envisioned and upon which America's job creators rely.

NFIB's lawsuit aims to stop OSHA's overreach. Regulators must not be allowed to issue sweeping government rules to advance a political agenda. The court must shield small businesses from harmful administrative overreach and protect OSHA's health-and-safety mission from being hijacked by unions. Thanks to your generous support NFIB has the resources to fight back against the Biden administration's union power grab.

Beth Milito
Executive Director, NFIB Small Business Legal Center

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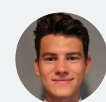
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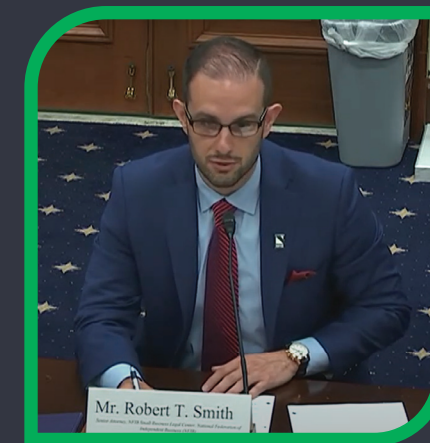
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NFIB Legal Center Regulatory Expert Testifies Before Congress

On May 22, 2024, Rob Smith, Senior Attorney for the NFIB Small Business Legal Center, testified before the U.S. House Committee on Small Business in a hearing titled, "Burdensome Regulations: Examining the Biden Administration's Failure to Consider Small Businesses." The main topic of discussion was the Regulatory Flexibility Act (RFA), a law that requires federal agencies to consider how new regulations will impact small businesses. Unfortunately, agencies routinely ignore the RFA. Smith authored a [White Paper](#) that explored the importance of the RFA, the lack of RFA compliance by

federal agencies, and what Congress can do to reinvigorate the RFA.



Smith testified: *"The RFA was meant to address the disproportionate impact of federal regulations on small businesses. Unfortunately, it is no longer effective in achieving this goal. Administrative agencies have figured out how to*

bypass the law's requirements, take advantage of loopholes, and engage in faulty cost analyses.

"The key to remember about overregulation is that a small business owner does not suffer from each new regulation in a vacuum. Each new regulatory burden compounds and layers on top of the existing regulatory requirements, until the pressure is too much to bear. The reality is that the current burdensome regulatory path is unsustainable, and something has to give.

"Small businesses are looking to this body for help in strengthening the RFA, ensuring agencies comply with the law, and easing the regulatory burden they face. They need relief and they need it fast. Passing the Prove It Act of 2024 would be a good first step."

According to NFIB research, small business owners regularly rank "unreasonable government regulations" as a top concern in operating their businesses. NFIB has consistently supported measures that would address the regulatory burden faced by Main Streets nationwide, such as the [Prove It Act](#), which aims to remedy the loopholes in the RFA and reduce red tape for small businesses.

Read Smith's full testimony [here](#). Watch the hearing [here](#).

Highlights of NFIB's 2024 Webinars

The Legal Center continues to produce webinars on the first Wednesday of each month. All webinars are recorded and available for on-demand viewing.

January 17, 2024

Beneficial Ownership Reporting Is Here: What Small Business Owners Need to Know About the New Reporting Requirements

NFIB held a webinar on the Beneficial Ownership Information (BOI) reporting rule, mandated by the Financial Crimes Enforcement Network (FinCEN). The rule affects a broad spectrum of businesses and requires eligible entities to file their BOI in FinCEN's online business registry. The webinar covered subjects such as:

- Who is—and who isn't—required to report BOI; and
- When, where, and how BOI reports are filed.

February 7, 2024

Ask the CPA! You have tax questions - We have answers!

This webinar featured Micah Fraim, CPA, and was a live Q&A. The webinar answered general small business tax-related concerns and discussed the tax advantages of different business structures.

March 6, 2024

Must Have Employee Policies for Small Businesses - Hiring, Firing, and Staying Compliant

This webinar was presented by NFIB Legal Center Executive Director, Beth Milito. It covered all things human-resource-related, including hiring, firing, employee management, leave, and other essential employment law policies.

April 3, 2024

Tax-Saving Strategies for 2024: Choosing the Right Entity and Hiring Your Kids

The April webinar featured special guest and CPA Jamie Trull. This webinar covered business structure, maximizing deductions, including by hiring your kids, and retirement account basics.

All these webinars can be accessed on demand at nfib.com/webinars.