

The Brief

NEWS FROM THE SMALL BUSINESS LEGAL CENTER

Healthcare Law Update - Are You Ready?

Once a majority of the Supreme Court gave its imprimatur to the healthcare law in a split decision issued June 28, 2012, there was no denying the inevitable. The Patient Protection and Affordable Care Act – or at least major parts of the law – is here to stay. What this means for small business was the topic of a recent must-see NFIB webinar.



2013 | The year of planning and preparation

This year is the year to determine whether your business is large or small. Large is 50 or more full-time equivalent employees. Temporary employees do not get counted towards the employer – they get counted to the temp agency's size. Contract employees will not be counted towards the employee threshold.

When it comes to the large employer mandate, Kevin Kuhlman, Manager of Legislative Affairs at NFIB, warned that employers need to be careful in determining who counts and who doesn't count as an employee. Misclassified contractors will land a business in hot water with the IRS and state agencies.



2014 | Employer mandate and individual mandate effective

This is the year that things kick into high gear. According to Kuhlman, “two of the most important components are the individual mandate and employer penalty, both of which go into effect in 2014.”

Beginning in 2014, all U.S. citizens and legal residents will be required to have “minimum essential coverage” for themselves and dependents or face a penalty. The individual mandate tax penalty begins at \$95 or 1 percent of household income, whichever is greater.

Employers with more than 50 full-time employees (or the equivalent in full and part-time employees discussed below) are considered “large employers” and must provide health insurance for all of their full-time employees. These employers are required to pay at least 60 percent of the costs of health care for their employees. Employers with more than 50 employees who do not offer coverage will be subject to fines. Businesses with fewer than 50 employees are not required to provide health insurance to their employees.

The employer mandate penalties are

based on the number of full-time employees during the preceding calendar year; whether the firm offers coverage to full-time employees; whether coverage is “affordable” and meets “minimum value”; and whether one or more full-time employees qualify for a government subsidy. A full-time employee qualifies for a subsidy if his or her household income is between 138 and 400 percent of the federal poverty level and the employee's share of the self-only portion of the premium exceeds 9.5 percent of their income.

In 2014, health insurance exchanges will be open to individuals and small businesses with up to 100 employees, although states may limit the small employer definition to no more than 50 employees until 2016.

Finally, in 2014 the health insurance premium credit kicks in, which means the federal government will begin subsidizing the purchase of health insurance for individuals with incomes up to 400 percent of the federal poverty level.

Review the archived webinar today at www.nfib.com/webinar to find out what the individual mandate means for your employees and your business and whether you'll be subject to the employer mandate.



By Karen R. Harned, Executive Director

Nobody is Above the Rule of Law

A keystone of America's republic is the principle that we are ruled by law--not men. And the Constitution is the legal blueprint for the rules that govern all of us. No man is above the law and no act of government can stand in conflict with the Constitution.

The NFIB Small Business Legal Center takes this principle very seriously because the Constitution protects our rights. In our work, we strive to ensure that the rule of law is upheld so that small businesses and all Americans know what the rules of the game are. This ensures that America remains a stable and safe place for business owners to invest their time, energy and resources.

As such, it is incumbent on our elected officials to respect the rule of law. In fact, they have an affirmative obligation to do so. Public officials take an oath to support and defend the Constitution of the United States. But following the rule of law often means that government cannot do exactly what it wants.

We have seen the current president struggle with this reality. Time and again, he has used his own "work around" to "get things done" in spite of the Constitution, which he apparently views as a roadblock. But, thanks to our donors, we have been able to call this Administration on its attempts to skirt the Constitution. In the last few years we have filed numerous lawsuits and amicus briefs challenging unconstitutional acts.

A good example of the President overstepping his constitutional authority was in his January 2012 "recess" appointments to the National Labor Relations Board. The Constitution requires that the President must seek "advice and consent" from Congress before making such appointments. But, the President ignored this requirement and appointed his preferred candidates in one of his "work around" ploys.

To justify his actions, the President argued that there was an exception to the requirement that he consult with Congress. He said that the Constitution allows him to appoint Board members when Congress is in "recess." That much is true, but the President was liberally arguing that this exception essentially swallows the rule, so as to allow the President to make appointments at almost any time during the year. Once more, the President was

stretching the Constitution to its breaking point to justify his political goals.

But, in *Noel Canning v. NLRB*, the Court of Appeals for the District of Columbia agreed with the NFIB Small Business Legal Center and others that these so-called "recess" appointments were unconstitutional and void. As a result, over 200 decisions made by this unconstitutionally appointed NLRB have been called into question along with another "recess" appointment that President Obama made to the Consumer Financial Protection Bureau.

In the President's attempt to push the envelope on his authority to make recess appointments, it was reassuring to see the judiciary flex its constitutional muscle to stop this over-reach. Not only did the appeals court find these so-called recess appointments unconstitutional, the decision went back to the original text of the Appointments Clause in the U.S. Constitution. In doing so, the Court found that neither the text nor the history of that provision could support recess appointments that occurred when Congress was in session.

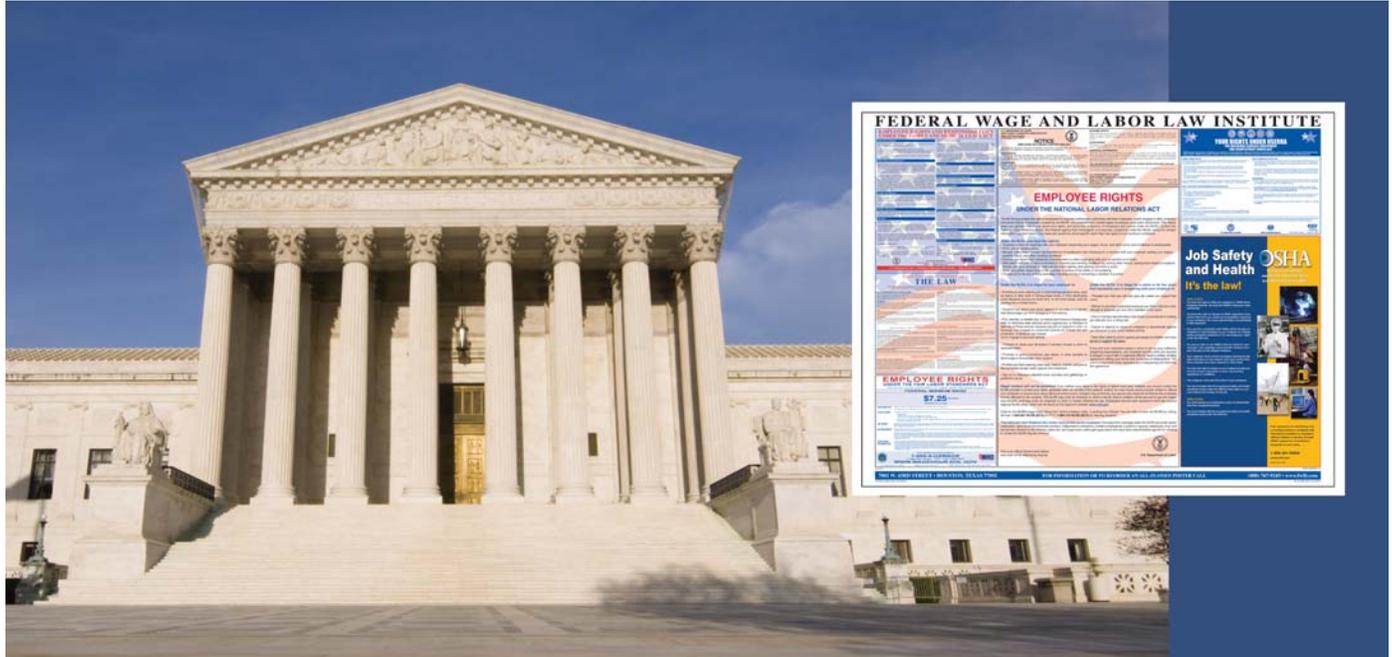
Quoting *INS v. Chadha*, Judge Sentelle said, "the fact that a given law or procedure is efficient, convenient and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. ... [c]onvenience and efficiency are not the primary objectives -- or the hallmarks -- of democratic government."

The NFIB Small Business Legal Center will continue to ensure that all branches of the government uphold the rule of law. No government official is above it. As the *Noel Canning* case likely moves to the U.S. Supreme Court, the NFIB Small Business Legal Center will be there to make the case that the Constitution--not political expedience--should rule the day.

Sincerely,

Karen R. Harned
Executive Director

Reining in a Rogue National Labor Relations Board: NFIB's Poster Rule Challenge



The National Labor Relations Board (NLRB) knew it was on thin ice when it passed a controversial rule requiring business owners to prominently display posters detailing how employees can unionize.

The so-called “Poster Rule” would compel your business to speak on behalf of Big Labor. But thanks to your generous support, the Legal Center, on behalf of small business owners nationwide, struck back and immediately filed a lawsuit to stop the poster rule from taking effect.

Currently, the lawsuit is before the U.S. Court of Appeals, and the good news is that our attorneys made a compelling and well-received argument. So we are cautiously optimistic that we will prevail in striking this rule down. And last spring we succeeded in obtaining an injunction to prevent the NLRB from enforcing the Poster Rule. We anticipate a ruling from the appellate court will come any day and that an appeal to the U.S. Supreme Court is possible.

The bad news is that Poster Rule represents but one of many aggressive actions that the NLRB and other federal agencies have taken on behalf of Big Labor. On a practical level, we know business owners have enough to worry about without another government mandate. However, this case is about a larger principle as well: we want to establish a clear precedent that the NLRB—and other federal actors—are not free to willy-nilly impose mandates on business owners.

The Legal Center’s Poster Rule lawsuit demonstrates that small business owners are prepared to fight back and take their case to the highest court in the land. And thanks to your generous

support, the NFIB Legal center will continue to challenge government agencies that impose unconstitutional regulatory burdens on small business owners.

Check Out the Legal Ease Video Series



Available right now at www.NFIB.com, just click on the NFIB Video Room Tab



5 Tips To Avoid Legal Fallout From Workplace Romance



4 Steps for Handling Termination and Avoiding Lawsuits



4 Hiring Practices To Avoid Discrimination Lawsuits

NFIB Files Amicus Brief in Colorado Taxpayer Bill of Rights Challenge

Voter-enacted spending restrictions nationwide hang in the balance



In a case that could have wide-ranging implications on voter-enacted controls on state taxation, spending and borrowing, the Legal Center recently filed an amicus brief in defense of upholding the Colorado Taxpayer Bill of Rights.

The Taxpayer Bill of Rights, known by the acronym TABOR, requires a public referendum on tax increases and tightly limits spending. Plaintiffs in *Kerr v. Hickenlooper* are challenging the measure on the grounds that it unfairly restricts the legislature from doing its job. In its challenge to the plaintiffs' position, NFIB asserts that overturning TABOR would open the floodgates for litigation against voter-enacted spending controls around the country, and undermine Colorado voters' decision to keep government spending in check.

"Colorado voters enacted the taxpayer bill of rights to restrain their government's out-of-control appetite for spending, and today's difficult economy does not give government the right to untether itself from these restraints," said Karen Harned, Executive Director of NFIB's Small Business Legal Center. "If the court allows TABOR to be overturned, it could open a Pandora's Box for challenges to all sorts of voter-enacted government controls around the country."

Plaintiffs in the case contend that TABOR has limited the state from dealing with the economic recession. But budgetary problems are not unique to Colorado. State and local governments all across the country are dealing with tight budgets. The Legal Center argued in its brief that tough economic conditions cannot justify invalidating voter-approved constitutional amendments.

MEDIA MENTIONS

NFIB Small Business Legal Center

Karen Harned's opinion editorial highlighting the Small Business Legal Center's brief asking the U.S. Supreme Court to hear an important property rights case, can be found at: <http://goo.gl/VNf1O>

NFIB Small Business Legal Center's success in challenging President Obama's "recess" appointments to the National Labor Relations Board was covered by ABC news outlets across the country. <http://goo.gl/nBWVr>

NFIB Small Business Legal Center's Supreme Court win in a case out of Arkansas where the Court found that the government cannot temporarily take your property without compensating you for it was highlighted in that state's papers. <http://goo.gl/xaiH4>

Karen Harned's opinion editorial highlighting the Small Business Legal Center's brief asking the U.S. Supreme Court to stop governments from imposing unconstitutional burdens on landowners, ran in several Florida papers. <http://goo.gl/mfQWM>

The NFIB Small Business Legal Center's work defending Colorado's Taxpayer Bill of Rights in the 10th Circuit Court of Appeals was big news with business journals. <http://goo.gl/99wik>
