

The Brief

NEWS FROM THE SMALL BUSINESS LEGAL CENTER

Small Business in the Supreme Court

October 7, 2013 will mark the start of the Supreme Court's 2013 Term. This year promises to be a most interesting year at the Supreme Court with the Court set to hear several cases in which the NFIB Small Business Legal Center will be participating.

The Supreme Court may not garner headlines as frequently as Congress or the President. But the 2012 landmark decision upholding Obamacare – *NFIB v. Sebelius* – reinforced the Court's undeniable influence. As the highest federal court in the country, its decisions may not be appealed to any other body. As Justice Robert H. Jackson once famously remarked, "We are not final because we are infallible, but we are infallible only because we are final." It is the only court established by the United States Constitution; all other federal courts are created by Congress. The Constitution also provides that Justices "shall hold their Offices during good Behavior"; the term "good behavior" is interpreted to mean life. All this means that the influence of the nine Justices has the potential to extend beyond that of Congress or the President.

The Court's power extends beyond the front-page headline grabbing cases. In fact, studies have shown that

more than 40 percent of the court's cases deal with issues that directly affect the business community. In the upcoming year, the Court has agreed to hear a number of cases that will impact businesses throughout the country, making NFIB's participation in the following two labor cases critically important.

In the most closely watched and hotly contested case of the upcoming term, the Court will review the constitutionality of the President's three "recess appointments" to the National Labor Relations Board in *NLRB v. Noel Canning*. Noel Canning, a family-owned bottling company in Yakima, Washington, challenged an NLRB ruling in favor of the Teamsters Local 760. The business did not think the NLRB's ruling should be upheld because three appointees to the NLRB were not legally appointed members. NFIB joined the fight against the NLRB arguing that the President overstepped his constitutional recess-appointment authority since Congress was not technically in recess at the time of the appointments. In a huge win for small business, the federal appellate court unanimously agreed with NFIB's position.

The high court's review is important for constitutional reasons, because it pertains to the balance of power between the executive branch and the legislative branch. The case is also important to employers. Since the

recess appointments, the NLRB has made hundreds of decisions. A Supreme Court ruling that the President lacked the authority to make these appointments could invalidate all of these NLRB decisions.

In another closely watched labor case, *UNITE HERE Local 355 v. Mulhall*, the Court will determine whether "sweetheart deals" between labor and management are legal. Martin Mulhall worked for Mardi Gras Gaming, a greyhound track. He opposed unionization and challenged his employer's offer to provide the union with "organizing assistance," in exchange for "labor peace." In other words, the union vowed not to strike, protest or picket the company's business if the company would make it easy to unionize the employees. The backroom deal left employees in the cold, and NFIB will argue the deal also violated federal labor law, which prohibits bribery in union organizing.





By Karen R. Harned, Executive Director

Fighting for Your Rights as an Employer

When I describe my work to friends and colleagues, one point I frequently make is the breadth of the small businesses the NFIB Small Business Legal Center represents. Harkening back to the nursery rhyme, I say we represent “the butcher, the baker, the candlestick maker.”

But there’s one thing most of you have in common -- the employee.

As government has increased its regulatory reach over the last several decades, the employee often has been its gate of entry into your business. As a small business owner, the government imposes many rules on you concerning the wages, hours, workplace conditions, and benefits you provide to your employees. In most instances, the initial rules in these areas made sense. Americans deserve safe work conditions and to receive fair pay for the hours they work. But over the years, the federal government -- in the name of the employee -- has moved from protecting basic employee rights to creating a complex legal environment that employees can abuse for personal gain.

The NFIB Small Business Legal Center is committed to ensuring that your rights – as a small business owner, employer, and the engine of economic growth in America – are protected. Just last year, we fought to protect your rights as an employer in 16 cases across the country and before the U.S. Supreme Court. With enforcement up by state and federal government officials, issues relating to the use of independent contractors, worker classification, and workers compensation continue to be a significant part of our caseload. In addition, the trial lawyers increasingly see employment-related claims of alleged discrimination and inadequate pay as a potential “cash cow.”

And the bureaucrats in Washington, D.C., will not let up. As I write this letter, the Department of

Labor announced a new wage and hour rule that will dramatically raise costs for small businesses that offer in-home care to the sick and elderly. Decades ago, Congress enacted a specific exemption in the federal law to help ensure seniors and individuals with disabilities can receive the support they need from the comfort of their own homes. The new regulations announced on September 17, 2013 will drastically change the home care industry to the detriment of small businesses, patient comfort, and worker wages. We will now be working to review the agency’s economic analysis of this misguided rule to determine whether DOL complied with procedural requirements including the Small Business Regulatory Enforcement Fairness Act.

The NFIB Small Business Legal Center knows that you value your employees and see them as extensions of your family. We will continue to take that message to the courtrooms of America, so that you have the freedom you need to hire the best and the brightest for your business.

Sincerely,

Karen R. Harned
Executive Director

**Have a case of government
abuse against small business?**

Call or e-mail the
NFIB Small Business Legal Center
at

1-800-552 NFIB (6342) or
legalcenter@nfib.org.

NFIB Legal Center Continues to Fight for Workable Independent Contracting Rules

It is crucially important for business owners to properly distinguish between independent contractors and employees. This matters immensely since “employees” are entitled to a whole host of rights under federal and state statutes, which are not applicable to “independent contractors.” Unfortunately it is often difficult to determine whether a worker should be classified as an “employee” or an “independent contractor.”

One might think that it should be as easy as drafting a contract to make clear that you are not hiring an employee; however, it is not that simple. The courts generally hold that it doesn’t matter whether you have labeled a worker as an “independent contractor” or not. What matters, for the purposes of employment law, is usually the degree of control you have exercised in managing the worker’s performance. The more you manage his or her work, the more likely a court will be to say that the worker is actually an employee. But, other factors matter as well—like whether the worker owns his or her own equipment, or whether the worker performs services for you at your place of business. Suffice it to say that this area of the law can be pretty confusing for small business owners.

The good news is that the NFIB Legal Center has been working to encourage courts to adopt more workable rules, so that businesses can more easily determine whether it is necessary to treat a worker as an employee or a contractor. For example, we recently filed a brief urging the Supreme Court of New Jersey to make clear that judges cannot convert a service contract between independent businesses into an employment contract. As we argued to the court, such an approach would hurt the small business community because it would discourage established businesses from entering into contracts with smaller companies.

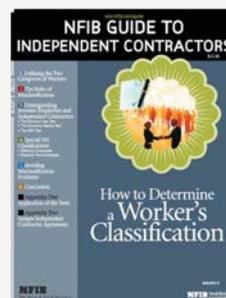
In addition to fighting for common-sense rules in the courts, NFIB Legal Center has developed a helpful guide for businesses seeking to use independent contractors. Check out our free Guide to Independent Contractors online at www.nfib.com/legal-center/legal-guide-series. This is one of a series of useful guides that we have developed to help you understand employment law.

Should You Classify Someone Who Works for Your Small Business as an Employee or Independent Contractor?

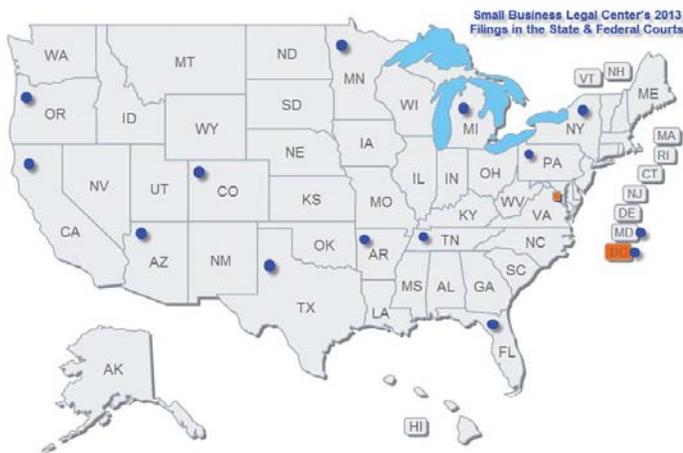
That question can be among the trickiest you’ll face as a small business owner. And arriving at a wrong answer could cost your business thousands. Worker misclassification carries with it costly fines, back taxes, and interest payments.

While there are different tests for determining whether a worker is an employee or an independent contractor, a key factor is whether the worker or the company controls the manner in which the work is performed. Additional considerations that can help distinguish an employee from an independent contractor:

- Employees receive benefits, like insurance and paid time off.
- Independent contractors generally use their own supplies and equipment to perform the work.
- Independent contractors pay their own business and travel expense and taxes.
- Independent Contractors can work for other clients.



For additional information on independent contractor issues, including a sample IC agreement, download a copy of the *NFIB’s Guide to Independent Contractors*.



Did You Know ?

The NFIB Legal Center Files in More Than 40 Cases in State and Federal Court Each Year.

Here are some recent highlights:

Cullum v. Wal-Mart - NFIB Legal Center filed an amicus brief urging the Tennessee Supreme Court to hold that businesses owners should not be held liable for actions taken by intoxicated customers—not unless the business contributed to the customer’s intoxication.

American Beverage Association v. New York City – NFIB Legal Center joined in the challenge to New York City’s draconian ban on large sugary drinks and helped secure another victory for free enterprise.

Hargrove v. Sleepy’s – NFIB Legal Center is asking the New Jersey Supreme Court to give small business owners a safe harbor, so that they can know when it’s permissible to classify a worker as an “independent contractor.”

Blueford v. Safeway – NFIB Legal Center continued in its call for the California Supreme Court to reject a new rule—pronounced in the California Court of Appeal—requiring employers pay an hourly wage to employees for non-productive time. The rule applies even to employees who make more than they would if paid as minimum wage employees.

Bostic v. Georgia Pacific Corp. – NFIB Legal Center asked the Texas Supreme Court to reject a radical theory of liability that would virtually ensures that plaintiffs will always win in toxic tort cases.

MEDIA MENTIONS

NFIB Small Business Legal Center

Associated Press

A sharply-divided Supreme Court on Monday made it more difficult for Americans to sue businesses for discrimination and retaliation, leading a justice to call for Congress to overturn the court's actions.

Read more: <http://goo.gl/bSNT2F>

Daily Caller; by Karen Harned, Executive Director

In the wake of the country’s worst economic downturn since the Great Depression, there are some signs that the economy is recovering — housing prices are up almost 11% from last year and consumer confidence is at a five-year high. Unfortunately, the Obama administration is making mistakes that threaten to stifle the recovery.

One example is its decision to introduce disastrous new regulations on greenhouse gas (GHG) emissions.

President Obama mentioned those proposed regulations in his climate speech on Tuesday.

Read more: <http://goo.gl/ymzG3N>

Orlando Sentinel; by Karen Harned, Executive Director

The U.S. Supreme Court issued a landmark decision last week that vindicates American property owners and stops the government from demanding kickbacks as a condition of the lawful use of private property. As a practical matter, the decision in *Koontz v. St. Johns River Water Management District* is the most important decision in years for small-business landowners and ordinary homeowners.

Read more: <http://goo.gl/WDnSCf>

Las Vegas Review Journal quotes Beth Milito, Sr. Executive Counsel

Immigration is a major topic of discussion for businesses owners, executives and their attorneys these days as lawmakers in Washington debate the merits of a sweeping plan to rewrite the nation’s laws. Those revisions include updated employment verification forms, creating a path to citizenship for millions of undocumented immigrants, and \$46.3 billion toward securing the border with Mexico.

Read more: <http://goo.gl/nam0IT>