EMployment Law Tips For Pa Members

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And more information on these topics is available in the NFIB Small Business Legal Center Legal Guide Series, available for downloading and viewing at NFIB.com/legal.

Not surprisingly as the Obama Administration runs out the clock, the National Labor Relations Board (NLRB) – controlled now by three Obama appointees – remains busy pushing out more pro-labor initiatives in an attempt to empower membership of private-sector unions. But thanks to the generous support of our donors, the NFIB Small Business Legal Center continues to aggressively fight back against NLRB shenanigans. Here’s a rundown of the Legal Center’s current battles against Big Labor and the NLRB.

Court Hears Arguments in Ambush Election Rule Challenge

In January, you may recall, the NFIB Small Business Legal Center filed a lawsuit challenging the NLRB’s new ambush election rule. On April 24, the U.S. District Court in Texas heard oral arguments from NFI’s attorney challenging the validity of the rule. The hearing focused on NFIB’s claims that the new election rule violates the National Labor Relations Act (NLRA) and the Administrative Procedure Act. On June 1, Texas Federal District Court Judge Paul R.Flags, disappointed, upheld the rule in our challenge with the Texas Chapter of the Associated Builders and Contractors. The Legal Center has already filed an appeal in the federal court of appeals.

The new election rule presents significant challenges for business owners and their attorneys. Here at the Legal Center, as we predicted, we’ve heard from panicked business owners facing election petitions under the new rule. The much shorter time in period between the petition and the actual voting makes it extremely difficult for a business owner to find a labor attorney and adequately respond and communicate to employees concerning the benefits of maintaining a non-union status. The NFIB Small Business Legal Center will continue to monitor and provide updates on the devastating impact of the ambush election rule and report on any appeal as it moves through the courts. And we are prepared to take the fight to the Supreme Court if necessary.

Legal Center Joins Lawsuits against NLRB on Micro Units

Last year the NLRB decided that 41 cosmetics and fragrances workers at a single Macy’s department store can vote on whether or not to join a union. The Macy’s case aligned the Board with unions in a battle over how small is too small for a workplace bargaining unit. The decision was a radical shift in NLRA policy that now allows so-called micro-unions to proliferate and fracture the workplace.

When Macy’s decided to appeal the Board’s decision in federal court, the NFIB Small Business Legal Center joined the fight. We argued in our brief that organizing small groups of a store’s employees into multiple collective bargaining units is impractical and will force employers to deal with multiple unions within a single store. A decision in Macy’s is expected later this year.

Legal Center Fights Back Against Joint-Employer Standard

In another critical case, Browning-Ferris Industries, the Board is expected to change the “test” for determining whether two or more businesses are joint employers, and therefore, among other things, liable for the unlawful acts of each other under the NLRA. The NFIB Small Business Legal Center filed a brief arguing that expanding the “joint employer” relationship would dramatically change the relationship between businesses at every level of the supply chain.

For now, the NLRB seems most focused on changing franchises – since July 2014, over three dozen complaints and practice charges have been filed against franchises including McDonald’s, Taco Bell, Subway, Burger King, Panera Bread, and Jack in the Box. But the NLRB’s attack on franchises is just the first step in expanding the reach of the Board’s authority through an expanded joint-employer rule. Next, the NLRB will pursue joint employment in building, manufacturing, janitorial, and transportation industries. This means that small businesses would be jointly responsible for labor and employment violations of all companies with which it contracts.

The Fight is Just Beginning

We know labor issues are important for both small business employers and for their employees. Just as NFIB members are fiercely independent, so too are many of their employees who object to joining a union. Every employee may have different reasons for wanting to join or wanting to reject membership. Some may object to union lobbying efforts; others may see the unions as corrupt. Whatever their reasons may be, we are telling the courts that employees should have the right to choose for themselves whether or not to associate with a union and employers must have the right to communicate with their employees and run their business without interference. Thanks to your continued support, we will continue to block NLRB mischief and ensure that the voice of small business is heard in the courts.

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Support the NFIB Small Business Legal Center by making an estate or planned gift to ensure that the Legal Center remains a steady voice for small business in the nation’s courts. Such gifts include, but are not limited to, bequests by will or living trust, charitable gift annuities, and a designation in a beneficiary account. http://goo.gl/dbJeht

News from the NFIB Small Business Legal Center

For more news from the NFIB Small Business Legal Center, visit the Center’s blog at blog.NFIB.com/legal. Support 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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Are Federal Courts Finally Starting to Check Agency Overreach?

Over the last several years, we have seen legislators, media, and Americans express concern over “executive overreach.” Indeed the NFIB Small Business Legal Center has been on the forefront of fighting overzealous regulation in the courts. And we are having success.

Two years ago we won our challenge to the National Labor Relations Board (NLRB) rule that would have required most business owners to post a notice regarding, among other things, the benefits of joining a union. We successfully argued that the NLRB acted outside its statutory authority. In 2014 we successfully argued at the U.S. Supreme Court that the President cannot declare the Senate in “recess” for purposes of making appointments that he knows would not be approved by the Senate. The Supreme Court also agreed with us that the Environmental Protection Agency (EPA) cannot essentially take “white out” to a statute and rewrite it to read the way the agency prefers.

Although those are important successes, the sad truth is that since a famous case in 1984 (Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.), the law dictates that federal courts give broad deference to administrative agencies to issue new rules and mandates. Not surprisingly, each year the agencies push the envelope of what and how much they can regulate, knowing that it is very hard for a court to tell them “no.” But, at some point, the envelope falls over the edge, and we see courts beginning to push back.

In April, the NFIB Small Business Legal Center was before the District of Columbia Court of Appeals in yet another case against EPA. EPA is trying to substantially change the way electricity in America is regulated. If they succeed, President Obama will fulfill his promise that electricity rates will “necessarily skyrocket” under his energy plan.

What was remarkable about our April hearing was that the Court even heard the case. This was the first time ever that a court has actually entertained a lawsuit challenging an agency’s rule before it goes final. But this is no ordinary rule, since the impact will be felt by every American. More disturbingly, the EPA arguably does not even have the authority to issue the rule in the first place. And that clearly had the court’s attention. In fact, the hearing lasted two hours and the judges had some tough words for the attorney’s representing EPA. Although the court ruled this case as premature, we live to fight in court another day against this costly rule once EPA finalizes it.

The NFIB Small Business Legal Center is preparing its litigation plans against EPA, the Army Corps of Engineers and the Department of Labor, so that we are ready to go to court when they over-step their authority with new rules that could have serious negative impacts on small businesses. We have our work cut out for us. But I am encouraged that, with your support, and judges who are beginning to call agencies out for acting beyond their authority, we will succeed in our legal challenges.

Thank you for being our partner as we fight against executive overreach in the courts. These next two to three years are going to be very busy at the NFIB Small Business Legal Center and we would greatly appreciate any extra resources you can provide to help us in these upcoming fights.

Sincerely,

Karen R. Harned
Executive Director

By Karen R. Harned, Executive Director

Combatting Wage & Hour Balkanization: What NFIB Small Business Legal Center is Doing on the Local Front

It’s happening all over the country. Local governments are enacting living wage ordinances; municipalities are adopting heightened minimum wage laws; and small business owners are worrying about new and multitudinous legal requirements on matters that were once almost exclusively regulated at the state or federal level. But as local officials continue to add burdens on small business, the NFIB Small Business Legal Center is fighting back.

Of course, Big Labor is the problem. Where the unions have failed to force lawmakers to enact minimum wage hikes, or to impose other costly burdens on business at the federal or state level, they have sought to advance their agenda on the local level. Even in states that are effectively run by labor, they have pushed for more and more regulation at the local level. For example, San Jose, California currently imposes a minimum wage of $15.00 per hour, and Los Angeles just approved a $15.00 per hour minimum wage—far in excess of the state’s current $9.00 per hour standard. Likewise, the voters of the city of Seattle recently approved a measure to raise the City’s minimum wage to $15.00 per hour over the next few years—a full $5.53 more than the State of Washington requires.

These issues are rising on the local level throughout the country. For example, Sainte Fe, New Mexico approved a minimum wage hike—raising the City’s minimum wage more than $3.00 over the state’s current level. And Newark, New Jersey recently adopted a paid-sick leave law—imposing requirements on businesses operating in that city that are not required of other New Jersey businesses. Like it or not, similar proposals are on the table in progressive enclaves throughout the nation—from Asheville, North Carolina to Louisville, Kentucky; and from Portland, Maine to New York, New York. And that’s just the tip of the iceberg.

So what can be done to stop further balkanization of labor and employment law standards? One option is to fight these battles on the political front. In fact, that may be your best bet. To be sure, it’s likely an uphill battle to strike these ordinances down in the Courts. But where there are legal avenues to push back, the NFIB Small Business Legal Center is aggressively working to invalidate burdensome, locally imposed mandates.

The challenge is that, generally speaking, regulations governing economic conduct are reviewed in court under a highly deferential standard—meaning that the government has an unfair advantage over businesses in court. But, in some states state law preempts local law, or there may be state constitutional barriers to local governments raising minimum wage above state law. For example, the NFIB Small Business Legal Center recently came to the defense of the small business community in Michigan—to protect an 80 year-old doctrine holding that the Michigan Constitution prohibits local municipalities from regulating on matters of state concern. Our brief argued that this constitutional doctrine has always been understood to preclude cities like Detroit and Lansing from imposing additional labor and employment regulations on Michigan’s small business community.

Meanwhile the Legal Center is actively exploring alternative avenues for challenging measures imposing heightened burdens—above those generally applicable at the state level—on small business. For example, we recently helped secure a major victory for small business farmers in California, in striking down a regime that unconstitutionally imposed heightened legal burdens on select agricultural businesses. The ruling sets a precedent that should give businesses a legal avenue to challenge local regulations that arbitrarily single-out specific businesses for higher minimum wage burdens.

Meanwhile, the NFIB Small Business Legal Center is gearing up to weigh-in on lawsuits challenging Seattle’s minimum wage law on a similar ground—because Seattle’s ordinance arbitrarily imposes more burdensome regulations on small business franchises. We are also planning to file in support of businesses that have raised constitutional concerns with Los Angeles’ recent minimum wage hike.

Meanwhile, we continue to evaluate the constitutionality of local ordinances throughout the nation. If you have questions about the legality of local regulations affecting your business, feel free to reach out to us.

Small Business Challenges EPA Plans to Release Private Information to Activists

A federal court of appeal is poised to decide whether the Environmental Protection Agency (EPA) can release personal information that it has illegally collected on thousands of farmers and ranchers throughout the country. Specifically, EPA proposes to provide environmental activists records listing thousands of personal email addresses, home telephone numbers, GPS coordinates, and information on the size of family farms.

On two separate occasions the federal courts struck down EPA rules that would have required farmers to publically report such information. Yet, as if it was phased, in recent years EPA proposed yet another rule aimed at gathering sensitive information on agricultural businesses. Ultimately, EPA decided not to finalize that rule—likely because the agency knows that it lacks authority to require farmers to publically report anything.

Nonetheless, EPA set forth on a campaign to gather this information through backchannels, working closely with state and local authorities. And, now EPA seeks to go one step further—in proposing to release the information it has collected in response to a Freedom of Information Act request from environmental organizations.

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