NFIB Small Business Legal Center
The Voice of Small Business.

Fall 2017

The Brief

NEWS FROM THE SMALL BUSINESS LEGAL CENTER

GEARING-UP FOR THE SUPREME COURT'S OCTOBER TERM: FOUR CASES TO WATCH

This is shaping-up to be a big year for small business in the Supreme Court. With Neil Gorsuch on the bench, leading legal commentators are now forecasting that the Court will begin, once again, to wade into those difficult controversies that so often break-down along ideological lines. As such, we're doubling-down on our efforts to draw the Court's attention to those issues that we think most important.

The good news is that last term, with only eight justices on the Court, we managed to secure four important (though low-profile) victories for small business—with one non-decision, and only one loss. Coming off such a successful year, there is even greater reason for optimism now. Here is a snap-shot preview of a few pending cases.

Arbitration Agreements

Out the gate, the Court heard arguments in three consolidated cases, which kicked-off the 2017-18 term with a bang. As background, the federal courts of appeal are divided on a hugely important question of labor law. Notwithstanding repeated decisions from the Supreme Court affirming that the Federal Arbitration Act (FAA) means what it says in guaranteeing the right to enter and enforce arbitration agreements, some lower courts have ruled that employers cannot require employees to enter into arbitration agreements that may require waiver of the right to bring a class action lawsuit. But other courts have properly construed the FAA as allowing these sort of arbitration agreements in employment contracts.

While the plaintiffs' bar argues that these arbitration agreements violate the National Labor Relations Act in limiting legal options for employees, we maintain that Congress spoke clearly when enacting the FAA to protect the freedom of contract. Simply put, that there is no basis for denying employer's the right to utilize arbitration—which can be a much less costly, and more efficient, means of resolving employment disputes. But, as ever, the Supreme Court will have the last word here.

Public Employee Unions

As noted in Karen Harned's letter (page 2), the Supreme Court has agreed to hear arguments in *Janus v. American Federation of State, County and Municipal Employees, Council 31*. This may prove the biggest case of the term because the Court is considering overturning a three-decade-old precedent authorizing states to compel public employees to give financial support to public employee unions. We maintain that these regimes violate the First Amendment and should be struck-down.

Overcriminalization of Tax Law

The Supreme Court is also gearing-up to hear arguments in a case that may potentially affect any small business taxpayer. In *Marinello v. United States*, the Court will decide whether federal prosecutors went too far in charging a business owner with obstruction of justice for failing to keep records that were not affirmatively required by law. Shockingly, the government argues that business owners may be prosecuted for doing anything that might make a future Internal Revenue Service audit more difficult. For example, if federal prosecutors allege a "corrupt" motive, a small business owner might be prosecuted for an otherwise legal decision to structure business finances in a way that might make the source of certain income unclear, or for failing to keep receipts. As such, we argue that the Internal Revenue Code's obstruction provisions should be construed more narrowly (and more reasonably), to make a crime only for those acts intended to interfere with a pending legal action or audit.

Clean Water Act Jurisdiction

Additionally, as part of our ongoing efforts to winnow-down Clean Water Act (CWA) regulation, we filed in *NAM v. Department of Defense*. The case was borne out of the National Federation of Independent Business's lawsuit challenging a proposed expansion of CWA jurisdiction, which would have negatively affected many small business landowners. But before the courts can decide the full reach and limitations of the CWA, the Supreme Court must first decide which courts should initially hear our case. We argue that challenges to federal CWA jurisdiction should be heard in local courts, where affected landowners reside, because they best understand conditions on the ground.

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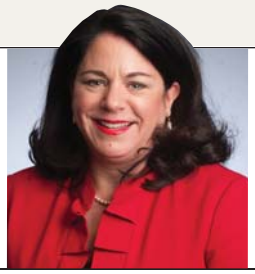

LEGAL CENTER GOES TO BAT FOR THE FIRST AMENDMENT AGAINST PUBLIC EMPLOYEE UNIONS

By Karen R. Harned,
Executive Director

In the fall of 2015 it looked as if the Supreme Court was on the verge of handing down a landmark decision that could have dealt a crippling blow to public unions. In *Friedrichs v. California Teachers Association*, the Court was set to decide whether or not states could compel employees to make financial contributions to a union even when the employee didn't want to join. Friedrichs sought to overturn a 1977 Supreme Court decision -- *Abood v. Detroit Board of Education* -- that allows states to require public employees to pay unions the cost for "representing" them in collective bargaining even when the employee is not a union member.

For decades many scholars, lawyers, businesses and employees have argued *Abood* was wrongly decided. And we believed that the Supreme Court would right the wrong in *Friedrichs*. Unfortunately, with Justice Scalia's unexpected passing, the *Friedrichs* case ended anticlimactically in gridlock with a 4-4 decision. As they say in baseball, "the tie goes to the runner." So, at least at that point, public employee unions were "safe."

Yet, with the Supreme Court back to fielding a full team of nine justices, the NFIB Small Business Legal Center is now optimistic that we can finally overturn *Abood*. We asked the Court to add a couple more games to its public union "series." Specifically, we urged the Court to grant a petition for certiorari in *Janus v. AFSCME*. *Janus*, like *Friedrichs* before it, concerns whether compulsory public employee union fees violate the First Amendment. Again, we think such fees are unconstitutional. And we are truly excited to see that the Court has now agreed to hear arguments in this case.

But the Legal Center likes to "swing for the fences" and we're also asking the Court to take-up another important public employee union case at the same time. *Hill v. SEIU* challenges an Illinois law that forces private sector workers to "affiliate" with public employee unions—even if they are not members, and even if they aren't paying-in to support union activities financially.

By way of background, in *Harris v. Quinn*, the Supreme Court sided with our arguments in repudiating the suggestion that states can simply dub workers to be "public employees" for the purpose of forcing them to pay union dues. Simply put, workers employed by private firms and independent contractors cannot be required to fund union activities. That was a significant victory in 2014.

In the wake of *Harris*, one might have thought that would have ended efforts to force unionization upon non-governmental employees. But, in fact, the *Harris* decision has done little to impede state and local efforts to foist union representation upon homecare and daycare workers. Specifically, Illinois law requires that homecare workers must accept representation from the Service Employees International Union (SEIU) as their exclusive representative for collective bargaining negotiations with the state. Regardless of whether a homecare worker objects to the positions SEIU may lobby for in bargaining with the state, SEIU speaks for them as a matter of state law. The NFIB Small Business Legal Center believes the Illinois law at issue in *Hill* is an example of compelled speech and an indefensible infringement upon the freedom of association under the First Amendment -- a constitutional "foul ball."

Labor unions should not be allowed to coerce unwilling workers to pay for union representation or services. Nor should they be forced to affiliate with a union with which they disagree. Just like the NFIB Small Business Legal Center must demonstrate to you -- our donors and supporters -- our value when we go to bat, unions should have to do the same.

We hope the Court takes this opportunity to overturn *Abood* once and for all. And further, we hope the Court will add the *Hill* case to its docket. Together, these cases present an opportunity to ensure all Americans enjoy their First Amendment rights.

Sincerely,

Karen R. Harned

Karen R. Harned
Executive Director

SMALL BUSINESS LEGAL CENTER CONTINUES FIGHT AGAINST MUNICIPAL LABOR RULES

As a small business owner, you know how hard it is to keep up with the ever-changing landscape of federal and state labor rules and regulations. Unfortunately for employers, municipalities - fueled by labor unions seeking higher wages and more benefits - exacerbate the complexity of employment laws by passing local ordinances and rules that in many instances are not only different from, but more demanding than, state and federal rules.

Over the past year, the NFIB Small Business Legal Center has joined with other industry groups in voicing serious legal concerns over municipal rules that seek to impose an added layer of regulation or tax on already over-burdened small businesses. Municipal-level regulation almost inevitably complicates business for entrepreneurs. For that matter, municipal balkanization of regulatory standards is an especially concerning problem, as it allows dominant municipalities to set regional standards, and hampers the overall business climate while—in many cases—undermining policies set at the state level. In the past few months, the Legal Center challenged two local rules.

Fighting Philadelphia's Ban on Wage and Salary History Inquiries

In Pennsylvania, the Legal Center joined the fight against Philadelphia's ordinance prohibiting employers from making any inquiry into a job applicant's wage or salary history. While this is framed as an effort to eliminate the wage gap between men and women in the workforce, the reality is that there are other (more direct) ways to promote wage equality that would prove much less burdensome to the small business community. The NFIB Legal Center argued in *Chamber of Commerce of Greater Philadelphia v. City of Philadelphia*, that searching-out competent candidates to fill vacancies can prove costly and more challenging if employers cannot quickly determine a competitive wage or salary.

Small business owners want to find the most qualified applicants for the job and pay them fairly for their labor. However, implementing one-size-fits-all bans on questions employers can ask of current and potential employees stifles the flexibility small businesses need to best conduct hiring and set wages. The solution lies in allowing small business owners to craft policies that work best for their business, not the implementation of another regulatory burden.

The ban on inquiries into pay history is of great significance nationwide, since there is good reason to fear that other cities throughout the country will begin modeling their own employment law restrictions on Philadelphia's bad policy. We remain hopeful that the courts will ultimately invalidate Philadelphia's pay history ban and discourage other cities from following suit.

Challenging Miami Beach's Minimum Wage Ordinance

As we've noted before, throughout the country we are seeing a troubling trend with minimum wage laws. Where state lawmakers are unwilling to raise minimum wage requirements, activists in more liberal enclaves are pushing dominant cities to impose heightened burdens on employers. Recently, the NFIB Small Business Legal Center joined the fight to invalidate Miami Beach's minimum wage hike. Under the new ordinance, the citywide minimum wage will be set at $10.31 on January 1, 2018, and increase a dollar a year until 2021. In an amicus brief filed in August 2017, we argued that Florida businesses need a uniform statewide minimum wage, which provides employers the ability to offer higher wages only where it makes good economic and business sense to do so.

Look for updates on the Pennsylvania and Florida lawsuits on NFIB.com/legal. And thanks to your support, the Small Business Legal Center will continue to challenge unconstitutional labor rules and work to stop municipalities from piling on more complicated and unnecessary labor laws.

NEW I-9 FORM REQUIRED SINCE SEPTEMBER 18, 2017

A new version of the Form I-9 has been issued and businesses must use this version effective September 18, 2017. Published by U.S. Citizenship and Immigration Services (USCIS) on July 17, 2017, the new I-9 form has a revision date (shown on the bottom of the form) of 07/17/17.

There is no small business exception for the Form I-9. While an independent contractor does not need to complete a Form I-9, all employers must complete and retain a Form I-9 for every person they hire for employment.

Employers need not complete the new Form I-9 for all existing employees, the new form is needed only for new hires.

Switch to New Form Now

Employers should immediately download and start using the new form and recycle any blank November 2016 or older versions.

Failure to comply by the September 18, 2017, deadline can result in significant fines. The Department of Justice announced increases in fines for Form I-9 violations last year, which range from $216 to $2,126 per form.

Businesses with questions can contact the NFIB Small Business Legal Center at (800) NFIB-NOW or visit https://www.uscis.gov/i-9.

MEDIA MENTIONS
NFIB Small Business Legal Center

August 7, 2017 – Executive Director, Karen R. Harned, was quoted in a Daily Beast article discussing a decision by a federal court of appeals that rejected a plaintiff's claim that would have significantly increased liability for small businesses under the Americans with Disabilities Act. "It's good to see that they're not trying to push a theory that has already been rejected by other courts," she said, citing the fact that some circuit courts have rejected similar lawsuits.
https://goo.gl/qknqFF

July 25, 2017 – The Business Times reported on the Small Business Legal Center's fight to have the Colorado Supreme Court review the constitutionality of the state's business filing fees.
https://goo.gl/msTtqn

July 11, 2017 – On Smart Talk in Harrisburg, PA, Beth Milito, Senior Executive Counsel with the Small Business Legal Center, discussed the likely impact of a Pennsylvania Supreme Court ruling on PA workers' compensation rates. Click here to listen:
https://goo.gl/NhKWYE

Beth was also quoted in a Pittsburgh Post Gazette article about the same case.
https://goo.gl/oi4kAd

WHAT ARE YOUR OPTIONS IF A LABOR UNION OR PROTEST GROUP SHUTS DOWN YOUR BUSINESS WITH RIOT-LIKE PROTESTS?

The Maryland high court recently ruled in *United Food and Commercial Workers International Union. v. Wal-Mart Stores, Inc.* that business owners can sue in state court for nuisance and trespass.

The case took shape after a labor union group charged into a Wal-Mart. The group was described as a flash mob, which flooded into the store and blocked customers from checking out. The protesters created as much noise and distraction as possible by sounding bells and horns in the store. A few of the protesters even went beyond customer areas into storage rooms and a manager meeting. The invasion effectively shut down operations at the store.

Wal-Mart brought a civil suit against the group. Since the group was a labor union, they sought to have the suit decided by the National Labor Relations Board (NLRB) rather than the state court system. The case was appealed all the way to the Maryland Court of Appeals, which ruled that nuisance and trespass cases could be heard in state court and did not have to be heard by the NLRB. The NLRB is an independent federal agency that hears disputes relating to unions, labor law, and collective bargaining.

This is a win for property rights and business owners. Flash mobs and protesters can temporarily cripple a business; Maryland's ruling is a small step in legally fighting against unwanted invasions. The Maryland courts rightly realized that businesses are focused on inviting customers, not protests. When protesters invade a business owner's property, then the business has the right to present his case in court.