

# The Brief

NEWS FROM THE SMALL BUSINESS LEGAL CENTER

## THE NFIB SMALL BUSINESS LEGAL CENTER DECLARES VICTORY OVER CONTROVERSIAL “UNION WALK AROUND RULE”



On April 27, 2017, the NFIB Small Business Legal Center announced victory in a lawsuit filed against the Occupational Safety and Health Administration last fall. NFIB’s lawsuit argued that OSHA violated the law in announcing a controversial rule back in 2013. The “Union Walk Around Rule” was created outside the normal rulemaking process and allowed union representatives to accompany OSHA inspectors when inspecting non-unionized companies.

In response to NFIB’s lawsuit, OSHA voluntarily withdrew the 2013 OSHA interpretation letter that changed more than 35 years of policy by allowing non-collectively bargained workers to designate a non-employee to act as a personal representative during an OSHA inspection.

NFIB, which was represented by the Pacific Legal Foundation, challenged the OSHA interpretation letter in the U.S. District Court for the Northern District of

Texas. NFIB’s lawsuit alleged that OSHA’s interpretation letter was essentially a rule within the meaning of the Administrative Procedure Act and should have been subject to standard notice and comment rulemaking. NFIB further argued that the OSHA interpretation letter violated the OSH Act by allowing non-employees to accompany a compliance officer during an inspection.

Small businesses were impacted by the walkaround rule. For example, one NFIB member received visits from labor representatives on four separate occasions as part of OSHA inspections, with the intrusions ending only after the business owner shed light on the harassment on national television.

Because a typical NFIB member “employs 10 people and reports gross sales of about \$500,000 a year,” the lawsuit argued that union representatives have “a strong incentive to submit

complaints to OSHA to trigger additional inspections and thereby provide the union representatives with access” to NFIB members’ nonunionized employees.

OSHA originally defended the lawsuit and unsuccessfully sought to dismiss the APA claim. On April 25, 2017, however, OSHA sent a management memorandum to all regional administrators notifying them that the February 21, 2013, interpretive letter was being withdrawn and guidance consistent with the letter would be removed from the OSHA field operations guide.

“The new Department of Labor memorandum is a clear win for small businesses,” said Karen Harned, executive director of the NFIB Small Business Legal Center. “The 2013 memo gave unions a pathway to intimidate small business owners. Congress never intended that OSHA should open the door to unionization efforts. The Obama administration was on thin legal ground with their order, and we applaud the Trump administration for properly recognizing the rights of small business owners.”

DOL’s new memorandum not only disavows the Union Walk Around Rule, but instructs OSHA officials to revise a field manual used by OSHA inspectors. With the Trump Administration’s decision to rescind the controversial rule and to eliminate all references within agency manuals and guidance, NFIB agreed to dismiss its lawsuit.



## JUDGE GORSUCH’S COMMITMENT TO THE CONSTITUTION AND RULE OF LAW ARE GOOD FOR SMALL BUSINESS

By Karen R. Harned,  
Executive Director

One of President Trump’s biggest accomplishments in the early days of his presidency was the appointment and confirmation of Neil Gorsuch to serve as an Associate Justice on the United States Supreme Court. NFIB was proud to support Justice Gorsuch’s nomination and I was honored to testify on his behalf.

As I explained to the Senate Judiciary Committee in testimony I delivered on March 23, NFIB understands first-hand the importance one justice can have on the ability of small businesses to own, operate, and grow their business. After all, one justice made all the difference in our historic challenge to the Affordable Care Act – *NFIB v. Sebelius* – with the Court ruling 5-4 that the individual mandate in the law was a permissible tax under the U.S. Constitution.

NFIB takes seriously its obligation to ensure that any new Supreme Court nominee both applies the actual text of the law and the original meaning of that text at the time it became law, rather than changing it to fit the judge’s personal views and preferences.

After conducting an extensive review of Judge Gorsuch’s record, the NFIB Small Business Legal Center was encouraged by three qualities Judge Gorsuch has brought to the bench: (1) his opinions are clear and often provide bright-line rules; (2) he has a deep respect for the separation of powers, and (3) he has shown a willingness to tackle the difficult legal issues of our day head on.

In my testimony, I pointed out that small business owners, like you, want – and need -- certainty. You need bright-line, easy to understand legal standards. If small businesses don’t know what is expected -- what the rules of the game are -- they may be hesitant to undertake actions that otherwise would help their business grow. Judge Gorsuch takes seriously his obligation to provide that clarity whenever possible.

Judge Gorsuch also has demonstrated that he truly respects, and seeks to protect, the separation of powers among branches of government. This is important because NFIB is concerned about what we see as the rising tide of regulation promulgated by un-elected bureaucrats. And that trend over the past thirty years contravenes the fundamental principle that only



Congress—as the elected and politically accountable legislative branch—should be able to enact and change statutory law.

For small business, the problem of overregulation has been further exacerbated by the broad deference federal courts give to executive agencies in their interpretations of statutes passed by Congress. This judicial deference to executive agencies, known as *Chevron* deference, has led to a breakdown in our constitutional system of checks and balances. Therefore, NFIB welcomed Judge Gorsuch’s concurring opinion last year in *Gutierrez-Brizuela v. Lynch*, encouraging the Supreme Court to revisit the *Chevron* doctrine.

The NFIB Small Business Legal Center is optimistic that Justice Gorsuch will have a positive impact on the Supreme Court for small businesses and all Americans. We look forward to making our case before him on issues important to you and we are confident he will give small business a fair hearing.

Thank you for your generous support of our work. To keep up with our work in the Supreme Court, as well as federal and state courts around the country, go to: [NFIB.com/legal](http://NFIB.com/legal).

Sincerely,

Karen R. Harned  
Executive Director

## SBLC ON THE FRONT LINES IN NATIONWIDE PROPERTY RIGHTS FIGHT



Violet Dock Port Inc. v. St. Bernard Parish case

The NFIB Small Business Legal Center is constantly working to protect property rights because those protections are vital for a free and prosperous society and especially important for small business owners. In the past few months, the SBLC has filed amicus briefs in several important cases pending in courts throughout the country.

In the Supreme Court, the SBLC is urging the Court to take-up three different cases—all raising

questions under the Fifth Amendment’s constitutional protections for property owners. First, in *616 Croft LLC v. City of West Hollywood*, we’re asking the Court to resolve a long-standing question, which has divided the lower courts for 30 years, as to whether local government can enforce an ordinance requiring landowners to dedicate private property to public use as a condition of obtaining a building permit. Our brief calls such conditions extortionate if the government cannot prove that the conditions are necessary to mitigate public harm.

Second, in *Bay Point Properties v. Mississippi*, we’re asking the Supreme Court to overturn a Mississippi Supreme Court decision that allowed the state highway authority to under-compensate a landowner for property being taken for a new public park.

Finally, we’re asking the Supreme Court to reverse a problematic decision of the Federal Circuit, which protects government entities from lawsuits for property damage caused by government-induced flooding. In *St. Bernard Parish v. Army Corps of Engineers*, we argue that the government must pay for property damage when proven that the government caused a physical invasion of private property—regardless of how brief that invasion might have been.

In state courts, we are also following several important cases. One especially troublesome case is *Violet Dock Port Inc. v. St. Bernard Parish*, which is currently pending in the Louisiana Supreme Court. Here, a public port authority sought to use eminent domain to take private facilities, owned by a small business, but for the purpose of handing the property over to a competitor—in an unseemly arrangement wherein the port authority stood to generate revenue. This case may ultimately present an opportunity for the U.S. Supreme Court to reconsider the infamous *Kelo v. New London* case.

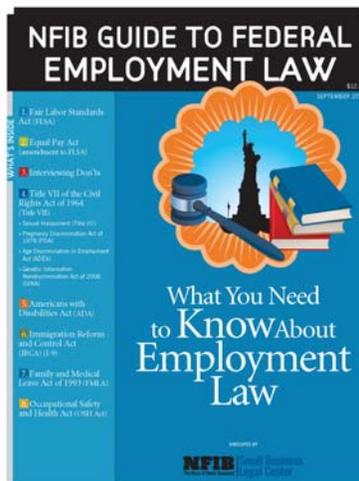
Finally, in the Minnesota Supreme Court, we’ve joined a case challenging the constitutionality of a statute that authorizes the State

to seize bank accounts and claim interest on monies held in those accounts for the state treasury. In *Hall v. Minnesota*, the State defends the scheme because it only applies to bank accounts that have been “inactive” for a statutorily proscribed three-year period. We argue that the government cannot simply enact a law defining property rights out of existence without violating the Takings Clause.

To keep up with all our work defending property rights visit [NFIB.com/legal](http://NFIB.com/legal).

## SEEING THROUGH THE HAZE OF MEDICAL MARIJUANA LAWS:

### HOW MARIJUANA LEGALIZATION IMPACTS A DRUG-FREE WORKPLACE



The rapid expansion of medical marijuana laws – and more recently recreational marijuana laws - has created a workplace dilemma. Since 1996, twenty-nine states and the District of Columbia have enacted medical marijuana laws. Businesses that operate in these states must decide under what circumstances they can discipline an employee who fails a drug test or admits to marijuana use in violation of a drug-free workplace policy.

Off-duty and on-duty use of marijuana by employees should concern employers. Prolonged exposure to marijuana decreases cognitive ability and it’s the reason why the U.S. Department of Transportation says it is “unacceptable for any safety-sensitive employee subject to drug testing under DOT’s regulations to use marijuana.” It’s also the reason that businesses with federal and state contracts, generally, must maintain a drug-free workplace.

The good news for businesses - so far courts have sided with employers when employees sue because of discipline related to medical marijuana usage. The bottom line: employees who use marijuana take some risks and employers can take steps to prevent its use.

### Spell Out Your Zero Tolerance Policy

The biggest takeaway from court rulings: businesses must explicitly spell out marijuana policies. If those policies state that your company has zero tolerance for marijuana use, that should be sufficient. But to make it clear to employees, explicitly state:

- The company prohibits marijuana possession and use at work; and
- The company prohibits employees from reporting to work impaired or under the influence of marijuana.

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“Acme Company does not permit the possession, distribution or use of illegal substances (including medical and recreational marijuana).”

### To Test or Not to Test?

Your workplace drug policy is where you'll want to include your company's drug test policy. Don't wait until you have an intoxicated employee standing in your office to decide you want to run a drug test. In some states, advanced notice must be provided. Drug testing policy options include:

- No testing
- Reasonable suspicion/post-accident testing
- Random testing

### Free Help is Available

NFIB Model Employee Handbook for Small Business - Available [NFIB.com/legal](https://www.nfib.com/legal)

U.S. Department of Transportation Office of Drug & Alcohol Policy – Available at <https://www.transportation.gov/odapc>

*\*\*This article is for informational purposes only and does not provide legal advice.*

## NFIB SMALL BUSINESS CENTER IS NOW AN AMAZON SMILE CHARITY!



Amazon donates 0.5% of the price of your eligible purchases to NFIB Small Business Legal Center when you shop at [smile.amazon.com](https://smile.amazon.com). This donation will allow the Legal Center to continue to fight for the rights of small businesses around the nation.

Our unique charity link is:

<https://smile.amazon.com/ch/62-1570449>

## MEDIA MENTIONS

### NFIB Small Business Legal Center

**February 13, 2017** – The Washington Examiner reported NFIB victory in controversial “Union Walk Around Rule” lawsuit filed against the Occupational Safety and Health Administration (OSHA) last fall.

<https://goo.gl/u5EZOX>.

**March 2, 2017** – The Denver Post reported The Colorado Court of Appeals overturned a Denver District Court ruling that allowed the state to spend business filing fees on state and local elections and other programs not directly tied to business. NFIB argued in court that the filing fees are taxes because they pay for non-business-related functions and must be voter-approved under the 1992 Taxpayer's Bill of Rights.

<https://goo.gl/V08xQm>

**March 23, 2017** – The Guardian reported Executive Director Karen Harned testified before the Senate Judiciary Committee to support Judge Neil Gorsuch's confirmation to the United States Supreme Court. Harned, in her testimony, applauded Judge Gorsuch's record of applying the law as it is written.

<https://goo.gl/wUCGyY>

### 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 retirement plan or life insurance policy.



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