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NFIB® Legal Foundation **Update**

FALL 2005

A SPECIAL REPORT ON THE LEGAL ISSUES FACING SMALL BUSINESS

NFIB Legal Foundation Challenges New ADA Rules

Lawsuit claims government did not consider impact on small business

IN JULY, THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL Foundation filed suit in U.S. District Court against the U.S. Architectural and Transportation Barriers Compliance Board (Access Board) asking the court to require the Access Board to comply with the Regulatory Flexibility Act.

The NFIB Legal Foundation claims that in issuing new Americans with Disabilities Act guidelines in July 2004, the Access Board did not comply with the RFA. A regulatory flexibility analysis, required by the RFA, calls for agencies to consider regulatory alternatives that would minimize the economic impact on small businesses without compromising the intent of the statute.

The new ADA guidelines would require extensive and expensive remodeling in many businesses since they change many of the accessibility standards that have been in place since 1991. For instance, the new guidelines require that employee work areas provide access to people with disabilities and increase the number of entrances that must be accessible to people with disabilities.

The suit claims that the Access Board failed to conduct a regulatory flexibility analysis based on its conclusion that the new ADA guidelines will only add a maximum 0.5 percent to the total cost of new and altered facilities. When drawing this conclusion, the

Access Board did not consider any cost data about projects costing less than \$100,000.

“The types of alterations the Access Board didn’t consider are exactly the types of alterations small businesses are most likely to make, those costing less than \$100,000,” said Karen Harned, executive director of NFIB’s Legal Foundation. “NFIB fully supports the RFA, and is asking that the law be followed so that small businesses will be able to comply with new guidelines without facing unbearable costs.”

The Access Board’s analysis was based on an examination of only four types of facilities: office buildings, hotels, hospitals and nursing homes, and federal, state and government housing. Small businesses such as those NFIB typically represents include restaurants, retailers, drycleaners, professional and other service providers, day care centers, motels, recreational facilities and health clubs. These businesses were not included in the analysis.

This lawsuit is the third suit the Legal Foundation has initiated based on the federal government’s failure to comply with the RFA. Cases are also pending against the Environmental Protection Agency and the U.S. Army Corps of Engineers.

“This case is about making sure small *continued on page 3*

77% of NFIB members who say that the revised ADA guidelines for new building construction should not be extended to existing buildings, according to a recent *Member Ballot*.

THE NFIB LEGAL FOUNDATION, a 501(c)(3), public interest law firm, is the legal arm of NFIB. The Foundation is designed to protect the rights of America’s small-business owners by providing advisory material on legal issues and by ensuring that the voice of small business is heard in the nation’s courts. 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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Let the Hunt Begin

CASE COULD OPEN HUNTING SEASON ON SMALL-BUSINESS OWNERS



By *Karen R. Harned*
Executive Director,
NFIB Legal Foundation

BEING A SMALL-BUSINESS OWNER can feel a little like a deer in autumn—walking cautiously, constantly wondering where the next arrow or bullet is coming from. The weapon in this hunt, of course, is not the bow or rifle. Rather, it is the frivolous lawsuit.

The California Supreme Court has the opportunity to help small businesses ward off potential malicious lawsuits, helping to save money and grow the state's economy. However, it could also leave businesses with little recourse to fight such lawsuits—giving free reign to trial lawyers out to make an easy buck and score a trophy above the mantle at home.

The state's small-business economy may be seriously impacted depending on a decision in the case, *Siebel v. Middlesteadt*. At question is the standard to which victims of lawsuits must prove that a lawsuit filed against them was malicious.

Currently, that standard is a favorable determination in a civil trial. This means that if a person is sued, but emerges victorious in a civil case, that defendant can then file a malicious lawsuit claim against the plaintiff and his or her attorney. The benefit of this standard is that it can deter original lawsuits from ever being filed in court.

The appellate court agreed that this standard should persist. However, an appeal of that decision was filed and the California Supreme Court will have the final say.

Changing this standard would only act to encourage more frivolous litigation. This poses a major threat to small businesses—often prime targets for frivolous lawsuits because these entities cannot afford to defend themselves in a trial. Instead, most small businesses choose to reach a settlement to make the problem go away. Easy victories for trial lawyers would only broaden the bull's eye on the back of small-business owners.

The impact on the state's economy would be devastating. According to the U.S. Small Business Administration's most recent information, California small businesses employed

nearly 7 million workers in 2002—over half of the state's non-farm private workforce. And in 2003, small businesses generated \$137.5 billion in income.

More suits would drastically reduce employment, tax revenues, and the availability of goods and services. It would also strike fear into future entrepreneurs—sending themselves, their ideas, and their future status as employers beyond the state's borders.

The state Supreme Court must understand the importance of its decision and the potential impact it will have on California's economy. By reaffirming the current standard, it can allow small businesses to continue to have a fair fight in combating malicious lawsuits.

If it does not, then California small-business owners must prepare for open season on their livelihoods and those of their employees.

Easy victories for trial lawyers would only broaden the bull's eye on the back of small-business owners.

-Karen R. Harned
Executive Director, NFIB Legal Foundation

Unfair Municipal Contracts Squeeze Out Small Business

NFIB LEGAL FOUNDATION TAKES ON LABOR UNIONS, PLAs

THE CASE: The NFIB Legal Foundation recently filed an *amicus* brief challenging a Milwaukee County ordinance that requires certain employers to sign project labor agreements with unions seeking to organize their employees. The case is currently pending with the U.S. Court of Appeals for the Seventh Circuit.

BACKGROUND: PLAs are contracts negotiated between governments and a group of labor unions for contracted services. These agreements are widely used by the public sector in order to lock in the price of a job before it starts.

Under the Milwaukee County ordinance, contractors that provide county-funded care to elderly or disabled persons must provide the appropriate union with employees' names, addresses and telephone numbers and give the

union reasonable access to the workplace for the purpose of providing union information. The law requires that any disputes arising under the agreement must be arbitrated. Lastly, the county has the right to terminate contracts with contractors who refuse to sign a labor agreement or are found by an arbitrator to have violated one.

THE CHALLENGE: However, PLAs often slam the door in the face of small businesses. In order to compete for a job covered by a PLA, a bidder must sign the agreement and comply with its terms. By doing this, open-shop contractors—often small businesses—bid knowing that if they are the successful low bidder, they must agree to have their employees represented by the union for the duration of the project and pay union representation fees and into union pension funds.

The resulting costs can cripple small businesses. Therefore, most small firms never bid on jobs governed by PLAs.

Governments tend to believe that these agreements save money, ensure timely completion of work and that local labor is used in the project. However, by limiting competition on bids, the price of a job actually increases and there are many instances where jobs were not completed on time. Also, many unions bring in employees from outside the local area—thus squashing the theory that PLAs help boost local employment.

THE BOTTOM LINE: What matters to NFIB members is that PLAs squeeze out small businesses. The NFIB Legal Foundation entered this case to help ensure that Main Street has the opportunity to compete fairly for local government contracts.

NFIB Legal Foundation Scores Victory for Small Business in U.S. Court of Appeals

Court respects RFA challenge and instructs District Court to hear case against the Army Corps

THE NFIB LEGAL FOUNDATION celebrated yet another victory following a U.S. Court of Appeals decision to enforce the Regulatory Flexibility Act of 1980. The decision requires the District Court for the District of Columbia to hear NFIB's RFA challenge against the U.S. Army Corps of Engineers' permitting regime and could have a tremendous impact on federal agencies. Many agencies have insisted that their permitting activities are not regulatory and therefore exempt from the RFA, an argument the court explicitly rejected for nationwide permits issued under the Clean Water Act.

The Court of Appeals reiterated that the RFA "requires an agency to evaluate the adverse economic effects" of its actions before it takes them. The Corps issued the new permitting scheme without complying with those procedures, claiming its broad permits were not regulatory.

In 2000, the U.S. Army Corps of Engineers eliminated Nationwide Permit 26, a streamlined permitting process that expedited permit application and review for small building and development projects with only minimal impact on wetlands. This was a significant blow to small businesses, as they now face waiting times averaging more than 100 days before they know whether they can pursue their projects—forcing small-business owners to spend more time, money and energy to obtain permits. Soon after, the NFIB Legal Foundation filed its first-ever lawsuit, challenging the Corps' refusal to consider how this additional red tape would tie the hands of small business.

A U.S. District Court Judge for the District of Columbia ruled

Congress passed the RFA to protect small-business owners at the beginning of the regulatory process.

-Elizabeth Gaudio,
Senior Attorney, NFIB Legal Foundation

against small business by dismissing the RFA challenge after finding that the Corps' issuance of permits did not constitute a "final agency action" subject to judicial review under the Administrative Procedure Act and the RFA. NFIB's Legal Foundation appealed the decision and the appeals court concluded that NFIB's claim was justified and rejected arguments by the U.S. Army Corps and an environmental group about why the RFA should not apply to the new permit process.

According to Elizabeth Gaudio, senior attorney, NFIB Legal Foundation, the lawsuit was filed to preserve the integrity of the RFA.

"Congress passed the RFA to protect small-business owners at the beginning of the regulatory process," said Gaudio. "Congress said to government agencies, 'Do your homework, find out if what you propose will hurt small business and, if it does, look for alternatives that are less burdensome.' Congress wanted agencies to make that decision before imposing new regulatory requirements—not after the damage is done."

The Truth About OSHA Posters

OSHA POSTERS AND PUBLICATIONS: FREE FOR THE ASKING

Advertisements suggesting that OSHA workplace posters must be purchased from private companies may be misleading employers. OSHA reminds employers that official posters such as the OSHA Workplace Poster are available free for the asking. Posters, and most publications, are available at no cost to anyone who asks simply by visiting the publications page on the agency's Web site (www.osha.gov) or by calling the publications office at (202) 693-1888.

NFIB Legal Foundation Challenges New ADA Rules

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business can comply with any new ADA guidelines. We're asking the court to order the Access Board to conduct a regulatory flexibility analysis so that non-burdensome alternatives can be identified for small business to comply with the new regulations," Harned said.

The NFIB Legal Foundation initiated this lawsuit because of the potential devastating impact the guidelines could have on small business. NFIB members have long voiced their displeasure with the burden the ADA places on their business. In the March NFIB *Member Ballot*, 77 percent of members said that the revised ADA guidelines for new building construction should not be extended to existing buildings.

The Legal Foundation thanks its charter members, whose generous support enables the Legal Foundation to challenge rules and laws detrimental to small businesses.