

The Brief

WINTER 2019

What to Expect from the U.S. Supreme Court in the 2018-19 Term

The NFIB Small Business Legal Center had already filed several friend-of-the-court briefs when the United States Supreme Court began its term in October. And the Court has since continued adding to its docket. Here is a run-down of the Legal Center's work in the Court so far this term, and what you can expect in the next few months.

A Win Out of the Gate

In November, the United States Supreme Court unanimously decided *Weyerhaeuser Co. v. U.S. Fish & Wildlife Services*. The decision held that, under the Endangered Species Act (ESA), the U.S. Fish & Wildlife Service (FWS) must consider the economic impact to the community before imposing critical habitat designations. This was a win for homebuilders, farmers, and landowners across the country.

The decision in *Weyerhaeuser* gave small business landowners a voice, and an opportunity to contest critical habitat designations. This is important because critical habitat designations impose tremendous red tape on property owners, triggering regulation that makes it exceedingly difficult to use affected lands. Moreover, *Weyerhaeuser* was a win for small business landowners because the Court held that

government could impose critical habitat designations only if the property truly supports an endangered species. As a result, the Court prohibited the FWS from more expansive critical habitat designations than necessary.

A Promising Sign in Key Property Rights Case

In another case of importance to small business landowners, the Court recently reheard arguments in *Knick v. Township of Scott*. Here we argued that owners should be allowed to pursue compensation in federal court against state and local authorities when they've imposed such onerous regulation as to effectively take private property in violation of the Fifth Amendment. The rehearing is a very positive sign because it means that Justice Brett Kavanaugh will take part in the decision and will likely provide the decisive vote.

Limiting Liability for Manufactures

In *Air Liquid Systems v. DeVries*, we urged the Supreme Court to reign-in the plaintiff's bar, which is casting an ever-widening net for potential defendants in asbestos lawsuits. The Legal Center argued that it is inappropriate to sue businesses that neither manufactured nor

installed asbestos. This could be an influential decision regarding the scope of liability for manufacturers.

Reconsidering Agency Deference

In December the Supreme Court agreed to hear arguments in *Kisor v. Wilkie*. The case raised a vital question that we've been asking the Court to take for several years - whether judges must defer to an agency's interpretation of ambiguous regulation or not. Considering the vast implications that this decision will have for all sorts of regulatory issues affecting small business, this is shaping-up to be the most important case of the 2018-19 term. We plan to argue that this form of agency deference has contributed greatly to the growth of the administrative state and fundamentally violates the separation of powers.

Several Petitions to Watch

In addition, we've asked the Court to decide an Equal Pay Act case to clarify that businesses may continue to base compensation on an employee's wage and salary history. We also urged review in other cases raising important questions for the small business community. To keep up with all our work in the courts, visit NFIB.com/legal.



EPA Responds to Deregulatory Pressure from the Legal Center with new WOTUS Proposal

By Karen R. Harned,
Executive Director

After two years in office, President Trump continues to keep his promise of reducing unnecessarily burdensome regulation. As we look back on 2018, we see it is not business as usual in Washington, D.C. Instead of growing the federal bureaucracy, we are seeing fewer rules and a net reduction in regulatory costs and paperwork. According to the American Action Forum, as of December 15, 2018 the Trump Administration had issued a total of 303 new regulations with a net *reduction* of \$13.8 in regulatory costs and over 10 million *fewer* hours of paperwork. Now compare those numbers to 2016 -- the last year of the Obama Administration -- when 412 new rules were issued imposing \$164.2 million new costs on the American economy and with added burdens of nearly 121 million hours of compliance paperwork. For small business, the 180 degree turn in regulation coming out of Washington is long overdue.

Fighting overburdensome regulation has been the clarion call for the NFIB Small Business Legal Center. We played a pivotal role in prosecuting numerous lawsuits against burdensome regulations issued under the Obama Administration. And we are continuing our legal efforts in some of those cases still to this day. But the tide may be turning soon in these cases as well. The Trump Administration continues to reevaluate controversial Obama-era rules.



EPA Acting Administrator Wheeler and other officials at WOTUS ceremony

I recently attended an event at the Environmental Protection Agency (EPA) during which the EPA and Army Corps of Engineers (Army Corps) officially proposed a rule to rescind the 2015 "Waters of the U.S." (WOTUS) rule that we had challenged in court. The proposal issued on December 11 represents a great step forward because it provides a clearer and more understandable definition of "waters of the United States" that should be easier for small businesses to understand and follow.

What is and is not land over which the EPA and the Army Corps have regulatory jurisdiction for purposes of wetland permitting under the Clean Water Act has been a debate that has raged on for decades. President

Obama's EPA worked to solve the problem by claiming that when it came to where water travels, even during a few days or weeks of the year due to heavy rainfall, there are precious few parts of the country containing truly intrastate wetlands subject only to state regulation. The Obama-era WOTUS rule issued in June 2015 has significantly harmed many small businesses, who, in many cases have been prevented from doing anything with their property, which often is their biggest asset. Under President Trump, EPA first issued a rule to delay the effective date of the Obama WOTUS rule, but a number of lawsuits challenging that delay has resulted in small businesses in 22 states having to comply with the Obama WOTUS rule.

The proposal issued by President Trump's EPA and the Army Corps of Engineers seeks to constitutionally rebalance the definition of "waters of the U.S." so that states, not the federal government, have primary regulatory authority over intrastate wetlands. According to EPA Acting Administrator Andrew Wheeler, for the first time EPA is "clearly defining the difference between federally protected waterways and state protected waterways. The simpler and clearer definition of what is and is not a water of the U.S. would help landowners understand whether a project on their property will require a federal permit or not, without spending thousands of dollars on engineering and legal professionals."

It appears many of the concerns small business had with the Obama WOTUS rule are addressed in this proposal. That said, the Legal Center is carefully reviewing the proposal and will be assisting NFIB as it prepares comments to submit to the agency about it. Because many environmental activists desperately want to protect the Obama Administration's 2015 WOTUS rule, we also need small businesses like you to contact EPA.

EPA's WOTUS proposed rule is a great example of how -- through litigation -- the NFIB Small Business Legal Center can pressure government agencies to change policies that harm small business. Thank you for continuing to support the NFIB's Small Business Legal Center as the voice of small business in our nation's courts.

Karen R. Harned

NFIB Small Business Legal Center Continues to Engage in State and Local Legal Battles

As loyal supporters, you know all too well how our legal fights have increasingly moved from federal to state courts across the country—with the goal of establishing good case law for the small business community. Although our work in federal courts tends to garner more attention, stopping burdensome state and local mandates is just as important for small businesses.

Here is a sampling of our most recent work on issues of state and local law:

- **Wage & Hour Law** – While we are always engaged on federal questions of wage and hour law, we are also fighting to keep state and local regulators at bay. For example, we've consistently opposed municipal minimum wage ordinances, and we've continued that fight with our recent filing in *City of Miami Beach v. Florida Retail Federation*. Likewise, in Pennsylvania we recently filed in *Chevalier v. GNC*, advocating for a more workable interpretation of state law concerning fluctuating workweek schedules.

- **Workers Compensation** – We recently filed in Washington in *Weaver v. City of Everett*, arguing that workers compensation claimants should not be allowed to contest conclusions of law that were definitively decided in previous proceedings. We told the Washington Supreme Court that claimants should not get a second-bite at the apple when they've already lost in a prior filing.

- **Personal Injury Liability** – Employers are generally liable for injuries their employees cause when on the clock. But, in Mississippi, we recently had to file to protect employers from liability for off-duty accidents in *Mar-Jac Poultry v. Love*. Meanwhile, in *Wal-Mart v. Forfar*, we urged the Colorado Supreme Court to limit recovery for plaintiffs who have already had their medical expenses covered by Medicare—arguing that defendant businesses should not be required to pay for medical expenses that are improperly billed by a healthcare provider.

- **Hiring Restrictions** – The Legal Center has joined in a lawsuit, *Philadelphia Chamber of Commerce v. City of Philadelphia*, challenging a Philadelphia ordinance that prohibits employers from asking applicants about prior salary history. We've argued in our brief that that employers are within their constitutional rights to ask a candidate about his or her salary history. The ordinance puts "a stranglehold on small business owners trying to determine what constitutes a competitive offer in a very tight job market," Karen Harned, NFIB Small Business Legal Center Executive Director said. "There are less harmful ways to address pay equality without hurting small city businesses, such as encouraging employers to perform audits to determine if employees are fairly compensated for equal work."

NFIB Legal Center Challenges Zoning Laws that Forcibly Relocate Small Business



While we routinely hear from small business owners with various zoning issues, we are most alarmed when local authorities force a company into a choice between closing shop or moving to a new site. Fortunately, some states hold this sort of regulation unconstitutional. For example, in 2013 we helped convince the Minnesota Supreme Court that it would violate the state constitution to allow a city to "revoke" the right of a commercial campground to continue lawful operations. But in other states the case law is stacked against small business owners.

Take the story of Hinga Mbogo who started his own auto shop in Dallas. After purchasing his property, and after years of operating on the site, he was told that he had to relocate his business because of a newly enacted ordinance. Sometimes zoning codes will allow for "grandfather rights," whereby previously established uses are allowed to continue. But in this case the City was intent on eliminating auto repair businesses in this area. So, Mr. Mbogo was forced to choose between closing the business he had built from the ground up or moving to another site.

But small businesses cannot easily pick-up and continue their business elsewhere. Studies show that many small businesses close when displaced by government action and/or they suffer lost profits. When you've been operating in a specific location for years, you have an established customer base that is often lost (or much reduced) when forced to move—and that is assuming that you can find a comparable site to continue at an affordable price point.

The time has come for the Texas Supreme Court to overturn its past decisions and to, once and for all, make clear that small business owners have a constitutionally protected right to operate their business as they have in the past.

3 New Year's Resolutions for Small Businesses

1. Review Document Retention Policy

The new year brings another round of figuring out which documents to throw away and which ones to keep. A document retention policy (DRP) can help streamline the process. A DRP provides for the systematic review, retention, and destruction of documents received or created in the course of business. A DRP will identify documents that need to be maintained, contain guidelines for how long certain documents should be kept, and save your company valuable computer and physical storage space. In addition, a well-crafted DRP that is followed by your employees may assist your company in the event of litigation. For more information, we recommend viewing our Document Retention Policy Guide.

2. Workplace Policy Update

This past year gave employers several reasons to review their employee handbooks. The #MeToo movement thrust sexual harassment and gender discrimination into the spotlight, making it even more important that employers have adequate complaint and investigation procedures. On a positive note for employers, the National Labor Relations Board (NLRB) relaxed its standard for analyzing whether a workplace rule violates employee rights. As a result, this is a good time for employers to reconsider some of their policies regarding workplace behavior. For ideas on what to put in your company's employee handbook, we recommend taking a look at our Employee Handbook Guide.

3. Consider Outsourcing

A new year is the perfect time to try out new ideas. Smaller businesses may want to consider using a service to outsource their HR or payroll needs. According to a recent survey, the average HR professional spends 11 hours a week processing payroll, 4.9 hours processing employee benefits, and an additional 1.8 hours managing time off. Many employers make mistakes on their payroll, which adds up to additional expenses. Currently, there are several options that businesses can choose from when considering outsourcing, ranging from bare bones software-based services to full-service HR consultants.

Media Mentions

NFIB SMALL BUSINESS LEGAL CENTER

November 2018 – Executive Director Karen R. Harned's article on the Trump Administration's deregulatory effort and the positive impact on small business was published in the Environmental Law Institute's November-December journal. <https://www.eli.org/the-environmental-forum/waiting-see-if-promises-made-are-kept>

October 5, 2018 – The NFIB Legal Center's lawsuit challenging Philadelphia's ordinance prohibiting employers from inquiring about an applicant's salary history was covered by the National Law Journal, Law 360. <https://www.law360.com/employment/articles/1089872/chamber-biz-groups-say-cos-can-base-pay-on-past-salary>

The Philadelphia Inquirer also reported on the litigation and quoted Ms. Harned. <http://www2.philly.com/philly/business/salary-philadelphia-chamber-commerce-20181204.html>

June 28, 2018 – Small Business owners were warned about the risks of signing a confession of judgment in an article that quoted Elizabeth Milito, Senior Executive Counsel. <https://www.lendingtree.com/business/coj-confession-of-judgement>

December 7, 2018 – Ms. Milito's tips on holiday office parties were picked up by a number of media outlets including the Business Journals. <https://www.csbj.com/2018/12/07/lawyers-limit-alcohol-consumption-at-office-holiday-parties>

September 6, 2018 – Harrisburg ABC27 interviewed Ms. Milito after she testified in September 2018, in opposition to a package of employment law bills introduced in the Pennsylvania legislature. <https://www.abc27.com/news/local/harrisburg/pa-lawmakers-hold-hearing-on-sexual-misconduct-bills/1423822353>

1201 F Street NW, Suite 200, Washington, D.C. 20004 | (800) 552-NFIB | e-mail: legalcenter@nfib.org

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.