

TESTIMONY BEFORE THE UNITED STATES CONGRESS
ON BEHALF OF THE

NATIONAL FEDERATION OF INDEPENDENT BUSINESS



Statement for the Record of Elizabeth Milito, Esq.

NFIB Small Business Legal Center

Before the

Senate Committee on Health, Education, Labor and Pensions

Hearing on *"Paid Leave for Working Families: Examining Access, Options, and Impacts"*

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Thank you to Chair Murray and Ranking Member Burr for holding this hearing and inviting me to speak today. I also want to thank the committee members and staff who are attending today.

Introduction

My name is Elizabeth Milito, and I work in the National Federation of Independent Business's Small Business Legal Center. NFIB is a member-driven organization that represents about 300,000 small and independent businesses. NFIB members define our neighborhoods, fill our communities with character, create local jobs, and homegrown economic opportunity for small businesses owners and their employees alike: local hardware stores, independent restaurants, florists and barbers, plumbers, paper companies, roofers, landscapers and mechanics, fitness and retail boutiques. These are NFIB members.

Small businesses employ nearly half the country's private sector workforce.¹ When small businesses succeed, communities succeed. A strong, vibrant small business eco-system supports local tax bases, governments, and schools. It is estimated that 67 cents of every dollar spent at a local small business is reinvested into the community.² I trust you all recognize and value the importance of small businesses in your states.

I describe our membership and the importance small business has on our economy to illustrate one of the key points of my testimony and what I think often gets lost in the public policy discussions in Washington, D.C., when it comes to labor and business issues: there is no such thing as a "one-size-fits-all" policy that works for every business or every industry.

Consider the varied types of small businesses you frequent – pizza parlor, auto shop, drycleaner, hair salon – some have employees that are strictly full-time, others strictly part-time or hourly. Some have a combination of both. Perhaps others are seasonal employers. Small businesses face complex issues that are unique to them, and when solutions to perceived problems are put in place by government, policymakers too often paint business with a broad brush and fail to consider the unique structure of Main Street employers.

¹ *Frequently Asked Questions*, Office of Advocacy, U.S. Small Business Administration (October 2020), available at [Frequently Asked Questions About Small Business, 2020 \(sba.gov\)](https://www.sba.gov/frequently-asked-questions).

² SCORE (November 2019), available at [Infographic: How Do Americans Support Small Businesses? | SCORE](https://www.score.org/infographic-how-do-americans-support-small-businesses?_ga=2.111111111.111111111.111111111-111111111-111111111).

I am mindful of the well-meaning sentiments behind leave mandates and sympathetic to those who have suffered the hardships that might lead to proposing leave mandates. NFIB believes, however, that inflexible and costly leave mandates inadvertently affect the livelihood of many and should be considered in the context of the impact on this country's economic environment and the flexibility many employees receive from their employers in difficult situations.

Small business owners can and do offer support to employees in their lives away from work, whether it is for their own care or to care for a parent, child, or other family member, or to incentivize an employee to get vaccinated, but they must have flexibility in creating a policy that works for both the employees and the business. Time-off for sick and family issues is currently worked out in small businesses across the country every day without government intervention. Mandates, whether paid or unpaid, drive up costs and force businesses to cut jobs.

NFIB has long opposed inflexible or mandated leave requirements for a variety of reasons. But today, I would like to focus on three concerns of NFIB and its members: (1) small businesses' fight to survive during the COVID-19 pandemic highlighted problems with well-intentioned mandates; (2) flexibility, not mandates, is the key to making small businesses employers of choice in our communities; (3) leave proposals generally impose inordinate complexity and costs on small businesses.

Small Business Concerns About Mandated Leave Policies

1. Small Businesses Fight for Survival During COVID-19: Problems with Well-Intentioned Mandates

In February 2020, employment rates were at historic highs and the coronavirus was still novel. Within four months, COVID-19 had economically devastated our country. It hit hardest the small businesses that are both critical to our economy's growth and vulnerable to disasters.

Whether it was a winery in Oregon, a theater in San Diego, a coffee shop in Boston, a restaurant in Michigan, a summer camp in Virginia or a hotel in New Jersey, coronavirus was devastating. According to a Harvard Business Review study, the vast majority of small businesses had less than two months of cash on hand to deal with the pandemic's economic shocks. The median business with monthly expenses

over \$10,000 generally did not even have enough cash to cover two weeks of their spending. As a result, the outbreak left few, if any, small businesses unscathed.³ Furthermore, the policy responses did not always work out as planned. As of September 2020, Yelp had estimated that 66,000 small businesses will never reopen, and in the food-service industry alone, 110,000 businesses,⁴ or 17% of all U.S. restaurants, have closed, according to a survey from the National Restaurant Association.⁵ The Federal Reserve more recently reported that the pandemic resulted in a business closure rate about one-quarter to one-third above normal with “130,000 excess firm exits.”⁶ In short, the small business half of the economy was significantly damaged by the COVID-19 pandemic.

The NFIB Research Center has conducted a series of surveys over the last 14 months assessing the impact the pandemic has had on small business owners. These surveys have shown that many small businesses are still struggling to survive as economic conditions and business restrictions remain serious since the national emergency declaration concerning the COVID-19 outbreak.⁷ Owners continue to adjust business operations with 12% of small business owners reporting that they will have to close their doors if current economic conditions do not improve over the next six months. As the small business half of the economy emerges from the public health crisis, it is critically important that small firms have a solid foundation from which to operate and invest in their business. Relief efforts by the Administration and Congress have allowed many to remain afloat, but there is still work ahead.

The best path for small businesses to recover is to get as many Americans vaccinated as possible, and quickly, so Main Street can fully reopen. In the

³ *A Way Forward for Small Businesses*, Harvard Business Review (April 13, 2020), [A Way Forward for Small Businesses \(hbr.org\)](https://hbr.org)

⁴ *Yelp Economic Impact Report* (September 2020), available at [Yelp: Local Economic Impact Report \(yelpconomicaverage.com\)](https://yelp.com/economic-coverage)

⁵ National Restaurant Association press release *Restaurant Industry in Free Fall; 10,000 Close in Three Months* | National Restaurant Association (December 2020).

⁶ *Business Exit During the COVID-19 Pandemic: Non-Traditional Measures in Historical Context*, The Federal Reserve (April 2021) (“Taken together along with some prudent guesswork, our sector-level results suggest economywide excess establishment exit—that is, exit above and beyond pre-pandemic rates—was likely below 200,000 establishments during the first year of the pandemic, implying an exit rate about one-quarter to one-third above normal.”), available at [Business Exit During the COVID-19 Pandemic: Non-Traditional Measures in Historical Context \(federalreserve.gov\)](https://www.federalreserve.gov/econres/bankers/20210401-business-exit-during-the-covid-19-pandemic-non-traditional-measures-in-historical-context).

⁷ *NFIB Covid Small Business Survey 17* (April 23-28, 2021), available at [Covid-19-17-Questionnaire.pdf \(nfib.com\)](https://www.nfib.com/covid-19-17-questionnaire).

meantime, some small businesses may continue to need economic assistance in the form of grants, such as the recently opened Restaurant Revitalization Fund, or tax incentives, such as the Employee Retention Tax Credit, to survive. The Paycheck Protection Program (PPP) was extremely popular with small business owners with 73% of NFIB members receiving a PPP loan in 2020.⁸ Outside of some initial implementation and funding concerns, the PPP was very effective in helping small employers maintain payroll as well paying for other eligible expenses that were critical in business operations.

But there have also been COVID-19 related programs that have made life more difficult for small business owners. The paid sick and family leave mandate enacted within the Families First Coronavirus Response Act, and specifically targeted at small business owners, was challenging for many small business owners. Nearly half of small employers have had employees take COVID-19 related sick leave or family leave, however, only 41% of those have claimed the available tax credit to reimburse those expenses.⁹ The terms and conditions of the mandate are complicated, and the credit is difficult to claim for many small employers who have to navigate both programs themselves. Moreover, the IRS continues to experience delays in processing employer reimbursement for FFCRA leave.¹⁰

The effects of the COVID-19 pandemic are ongoing. While some businesses have largely recovered from the initial decline, others continue to lag.¹¹ Whether business closures become permanent, will depend in part on policy responses. At a time when small businesses are confronted with the worst pandemic in more than 100 years, Congress should not saddle them with a costly new mandate that will further damage the fragile economic recovery.

2. Small Businesses and Employee Benefits: Flexibility Makes Small Businesses Employers of Choice in Our Communities

The term employer of choice is often associated with big corporations that have access to Cadillac employee benefit programs and seemingly endless resources to throw around, but the reality is that it does not have to be that complex or

⁸ [Covid-19-17-Questionnaire.pdf \(nfib.com\)](#).

⁹ *NFIB Covid Small Business Survey 17* (April 23-28, 2021), available at [Covid-19-17-Questionnaire.pdf \(nfib.com\)](#)

¹⁰ [IRS Statement about Form 7200 Payments | Internal Revenue Service](#).

¹¹ *The Effects of COVID-19 Pandemic on Small Businesses*, U.S. Small Business Administration (March 2021), available at [The Effects of the COVID-19 Pandemic on Small Businesses \(sba.gov\)](#).

challenging. Small businesses have demonstrated time and again that being an “employer of choice” means becoming an employer that potential and existing employees want to work for. Small businesses do this by offering competitive compensation and investing in employees and their communities.

Unfortunately, however, mandated leave proposals often envision a one-size-fits-all mandate that would handicap businesses’ ability to attract workers at a critical time. Across the nation, small business owners are seeing a growth in sales but are stunted by not having enough workers. Finding qualified employees remains the biggest challenge for small businesses and is slowing economic growth. Owners are raising compensation, offering bonuses and benefits to attract the right employees.

The NFIB Small Business Optimism Index rose to 99.8 in April, an increase of 1.6 points from March.¹² The Optimism Index has increased 4.8 points over the past three months since January but a record 44% of owners reported job openings they could not be filled.¹³ Finding qualified workers is the number-one-cited problem for small business owners, surpassing taxes and regulations.¹⁴

One of the primary ways in which small businesses attract and retain talented workers is by providing innovative benefits like flexible leave policies, designed specifically to fit the needs of their employees and their businesses. The majority of small business owners already include paid leave in their compensation package. According to an NFIB national small business poll, a majority of small business owners indicated that they already provide flexible leave. Most small employers (73%) offer paid time off (PTO) to the majority of their full-time employees, and 67% of them offer two weeks or more of leave.¹⁵ The number of days offered is dependent on an employee’s length of service in 76% of small businesses offering the benefit.¹⁶

Most small business owners work hard to ensure compliance with employment and labor laws in a workplace that treats employees fairly, but their informal and unstructured nature and more limited financial resources require greater flexibility in creating policies and solutions. Indeed, small businesses are leaders in flexible working arrangements, a key benefit for many of their employees.

¹² Small Business Economics Trends | NFIB (April 2021)

¹³ Jobs Report and Jobs Data from the NFIB Small Business Research Center | NFIB (April 2021)

¹⁴ SBET-Apr-2021.pdf (nfib.com) (April 2021).

¹⁵ *NFIB National Small Business Poll, Employee Compensation and Small Business* (2016), available at http://www.411sbfacts.com/files/NFIB_SBP_Emp-Compensation2017_v2.pdf.

¹⁶ *Id.*

Studies have shown that small businesses are more likely to allow employees to change starting and quitting times, work some regular paid hours at home occasionally, have control over when to take breaks, return to work gradually after childbirth or adoption, and take time off during the workday to attend to caregiving or other family or personal needs without loss of pay.¹⁷ Flexible work arrangements like these directly correlate with increased employee satisfaction.¹⁸

During times of emergencies like now, flexibility is even more important than ever before. NFIB is monitoring the current situation and working to support our members.¹⁹ We have been providing them with the Center for Disease Control and Prevention's (CDC's) guidance to prevent workplace exposure, which includes the recommendation that employers maintain flexible policies to allow employees to stay home to care for themselves or a sick family member.²⁰ Employers must be prepared for emergencies, as CDC advises, but employers cannot be saddled with more mandates and costs. A better solution is to reduce regulations and lower taxes so that employers can weather storms and adopt flexible policies.

In summary, expanding leave mandates has two results that impact flexibility in the workplace. Mandating uniform leave policies for all employers cuts off an avenue through which small business owners can shine through unique programs that benefit their businesses, their customers, their employees, and ultimately their communities. In addition, leave mandates increase costs for small employers, which almost always limits the flexibility of small businesses to provide benefits that many employees already enjoy.

3. Small Businesses and Mandated Leave: The Complexity of Compliance and Unforeseen, Unintended, and Hidden Costs

¹⁷ *Workplace Flexibility: Information and Options for Small Business*, U.S. Department of Labor Women's Bureau (2015), available at https://www.dol.gov/wb/WorkplaceFlexibility_508_FINAL.pdf.

¹⁸ *Workplace Flexibility Survey – Strategic Use of Flexible Work Arrangements*, Society for Human Resource Management (2014), available at [https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/pages/2014-workplace-flexibility-survey-strategic-use-of-flexible-work-arrangements-\(fwas\).aspx](https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/pages/2014-workplace-flexibility-survey-strategic-use-of-flexible-work-arrangements-(fwas).aspx).

¹⁹ <https://www.nfib.com/content/legal-compliance/healthcare/how-small-business-can-prepare-for-coronavirus/>.

²⁰ <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>.

Small businesses depend on predictability to stay competitive. Mandated leave policies, however, further complicate compliance with workforce laws for employers and raise costs on businesses. Mandated leave is not a free benefit for employees; mandated leave comes with a cost that businesses will have to shoulder and will eventually be absorbed by the employer, employees, and customers. In a small business with a finite number of resources, this translates into less money available for wage increases, health insurance, and hiring additional employees.

Small businesses, which are the backbone of our economy, are especially vulnerable to the impact of labor mandates. Small firms typically have few administrative staff members and little human resources experience or regular access to legal counsel. Only about 12% of small businesses have a human resources professional or dedicated employee who handles personnel matters.²¹ In the vast majority of small businesses, all “HR” matters are handled by the business owner or an employee who handles back office and administrative tasks. This means that the recordkeeping and reporting requirements mandated by leave proposals will fall more times than not on the business owner. About 50% do payroll in-house.²² Adding a federal leave mandate to existing state and local labor and employment law requirements would complicate an already difficult legal and regulatory environment for small businesses and would expose these businesses to legal challenges.

Understanding and complying with the complexity of a new mandate is expensive, both in terms of time and money. According to the Small Business Administration, workplace compliance costs small businesses 36% more per employee than it costs large businesses.²³ Some will argue or propose that the solution would be to exempt businesses with x number of employees as an attempt to protect small employers. There are a few problems here as well. One would be that it could discourage growth, hiring, and economic expansion, which is not an outcome our country can afford.

²¹ *NFIB National Small Business Poll Business Structure* (2004), available at [http://www.411sbfacts.com/files/bizstructurepoll\[1\].pdf](http://www.411sbfacts.com/files/bizstructurepoll[1].pdf).

²² *NFIB National Small Business Poll Tax Complexity and the IRS* (2017), available at [NFIB: The Voice of Small Business - National Small Business Poll \(411sbfacts.com\)](http://www.411sbfacts.com/files/NFIB-The-Voice-of-Small-Business-National-Small-Business-Poll-411sbfacts.com.pdf)

²³ *The Impact of Regulatory Costs on Small Firms*, SBA Office of Advocacy (2010), available at [https://www.sba.gov/sites/default/files/The%20Impact%20of%20Regulatory%20Costs%20on%20Small%20Firms%20\(Full\).pdf](http://www.sba.gov/sites/default/files/The%20Impact%20of%20Regulatory%20Costs%20on%20Small%20Firms%20(Full).pdf).

Additionally, whether an employer is subject to the paid leave mandate or subject to the unpaid leave mandate, leave laws often impose onerous recordkeeping requirements with which small businesses would need to comply, including new leave tracking, notification, documentation, and reporting requirements. Records would need to be maintained to demonstrate compliance. *The Family and Medical Leave Act of 1993* (FMLA) exempts small employers, those who employ fewer than 50 employees located within 75 miles of a worksite. We encourage you to consider the impact any mandated leave proposals may have on small businesses, just as Congress did in 1993 when it chose to exclude the smallest employers from the FMLA.

NFIB is a member-driven organization. Through NFIB's ballot process, members dictate NFIB's positions on federal and state policy matters. And NFIB members have consistently opposed federal and state leave mandates for good reason. The leave mandates impose new costs on U.S. employers that would lead to reduced profitability, lost sales and production, and lost jobs. In 2015, NFIB's Research Center conducted a study to determine the economic impact of the *Healthy Families Act*. Assuming passage and implementation of then-H.R. 932 in 2016, the BSIM forecast that the sick leave mandate could result in 430,000 jobs lost over a ten-year period.²⁴ The cumulative real output lost during this period was estimated to be \$652 billion.²⁵ Job losses at small firms would have accounted for 58% of all jobs lost, and small firms would bear 50% of lost output.²⁶

Ultimately companies and employees should be the ones negotiating their leave plans. Many small businesses pride themselves in their benefits and position themselves accordingly as "family-friendly." In a competitive labor market, flexible leave policies are often a benefit that small businesses use to stand out and attract workers. But leave mandates curtail flexibility in two ways. First, mandating uniform leave policies for all employers cuts off an avenue through which small business owners can shine through unique programs that benefit their businesses, their customers, and their employees. In addition, as discussed above, leave mandates increase costs for small employers, which almost always limits the flexibility of small businesses to provide benefits that many employees already enjoy.

²⁴ *The Economic Impact of H.R. 932 and Mandatory Paid Sick Leave on U.S. Small Businesses*, NFIB Research Foundation (2016), available at <https://www.remi.com/wp-content/uploads/2017/10/320-NFIB-Mandatory-Paid-Sick-Leave.pdf>.

²⁵ *Id.*

²⁶ *Id.*

A federal mandated leave program will further complicate the patchwork quilt of labor laws that are problematic and confusing for employers. In recent years, leave laws have passed in a number of states. Some of these state initiatives were funded via payroll deductions, only to later be modified to be strictly employer funded. Many enacted paid leave mandates additionally incorporate private right of action language, which opens small employers up to an increased threat of litigation. Nearly all require some form of recordkeeping and notice provisions. All leave mandates – paid or unpaid – impose new responsibilities on already overburdened small business owners.

Consider these comments from current NFIB members facing new state leave mandates: *"With liability and workers compensation costs going up every year...we cannot take another mandate that raises the cost of doing business. My liability rates went up 22%!"* or *"This increase in payroll costs would force us to raise our prices, decrease existing benefits, or reduce raises. This will hurt our employees; the very workers a paid leave mandate would seek to protect."*

As the economy recovers from COVID-19's economic fallout, NFIB recommends that Congress adopt the principle of "do no harm." Proposals such as those to more than double the federal minimum wage to \$15 per hour, impose paid leave mandates, and create new federal enforcement actions on small businesses will make it even harder for Main Street to recover. Making it more expensive to operate a business will only serve to hamper the ability of small firms to survive the pandemic.

Conclusion

Small business owners get the changing dynamics in the workplace – they are parents and caregivers, too – and they want to do all they can to attract and retain the best employees. But when it comes to benefits, flexibility is key for small businesses. Mandated leave laws represent a significant challenge for small business owners since mandates are generally anything but flexible, simple to comply with, and affordable.

Unlike larger businesses, small firms do not have cash reserves or profit margins to absorb the increase in labor costs. Now is not the time to saddle small businesses with a costly new mandate that will further damage the fragile economic recovery.

On behalf of all the small-business owners of the NFIB, thank you for focusing on this important issue and inviting me to appear before the committee. I would be happy to answer questions.