Week of March 4, 2024

This month we expect to see more Congressional action in opposing the Department of Labor's "joint employer" standard, yet another round of negotiations to avert a government shutdown, and a more focused effort in the Senate to move the NAED supported House passed tax bill forward, which includes restoring business provisions like bonus depreciation, the business interest expense, and R&D tax credit. NAED has set our 2024 legislative priorities which focus on tax permanence, maintaining new energy efficiency credits, and pushing back against harmful regulations. As national campaigns heat up, Congress continues to legislate from crisis to crisis as they barely averted another government shutdown. Below are a few current issues we are tracking out of Washington, DC.

Government Shutdown Averted Again

It is like déjà vu all over again as Congress continues to fund the government through a series of continuing resolutions (CRs). With a slim two vote majority in the House, Speaker Johnson has been having a tough go at building consensus in the caucus after succeeding ousted Speaker Kevin McCarthy. Last week, Johnson was able to negotiate the passage of six funding bills, passed under suspension of the rules, to help avoid a shutdown of the government. The new CR runs through the last week in March, setting up yet another round of negotiations next month. Congress typically attempts to attach "policy riders" and other bills to government funding, but even getting agreements for short-term extensions has been painstaking given the wide gulf between the parties on issues like the border and foreign aid. House Republicans want to see tougher laws and more funding for the border in exchange for any future deals. Stay tuned for more shutdown drama in our next update.

New Independent Contractor Standards

This month, the Department of Labor issued its final rule, "Employee or Independent Contractor Classification Under the Fair Labor Standards Act," which will be finalized on March 11. If your distribution business employs independent contractors, be sure to talk to your tax professionals about more stringent requirements. The new rule returns the non-exhaustive six factor test to determine whether a worker should be classified as an employee (and therefore eligible for overtime and additional benefits) or an independent contractor. The six factors are:

1. Opportunity for Profit or Loss Depending on Managerial Skill
2. Investments by the Worker and the Potential Employer
3. The Degree of Permanence of the Work Relationship
4. The Nature and Degree of Control
5. The Extent to Which the Work Performed is an Integral Part of the Potential Employer's Business
6. Skill and Initiative

Determining Independent contractor classification was already a challenge for employers before the issuance of this rule which serves to make things even murkier for business owners. NAED has joined a coalition urging Congress to fight back. You can read the NAED supported coalition response supporting Congressional efforts to nullify the rule here.

Joint Employer Standard Faces Opposition

In mid-February, Senators Joe Manchin (D-WV) and Mike Braun (R-IN), penned a bipartisan letter requesting the NLRB delay the implementation of the new Joint Employer rule. The Sens. Manchin/Braun letter read in part:

"This rule places significant burdens on small businesses, particularly those who are a part of the franchise business model. Complying with its complex and ambiguous standards will require costly legal consultations, operational adjustments, and administrative changes."

NAED has been active in opposing the rule at every turn and supported a successful House resolution on January 10th to nullify the rule. You can read the letter supporting the effort here.

Take Action! The Senate will vote this week on a similar resolution to nullify the joint employer rule. You can take action to encourage Senate consideration of this resolution through our partners at the Coalition to Save Local Businesses here.

Walkaround Rule Adds to Barrage of Proposed and Finalized DOL Regulations

On February 9th, OSHA sent its worker walkaround rule to OIRA for final approval. On February 12th, House Education and Workforce Chairwoman Virginia Foxx (R-VA) penned a letter to DOL Acting Secretary Su, requesting detailed information about the rationale behind OSHA's proposed "walkaround rule." The letter reads in part:

"The proposed Walkaround Rule puts politics first by promoting Big Labor's interests, interferes in labor-management relations, increases costs, puts union bosses ahead of workers, and overturns longstanding regulations. By pushing a rule without an adequate foundation, OSHA is working against its mandate to ensure safe and healthy conditions for workers by creating an atmosphere of uncertainty and by weakening an already effective walkaround rule for political gain… DOL is using its rulemaking power to benefit Big Labor."

The proposed rule allows third parties, including labor unions and community organizers, to accompany OSHA inspectors during facility inspections, provided they are "reasonably necessary" to assist with the inspection. The rule risks inspections moving from their intended purpose of workplace safety into opportunities for parties to campaign against employers. It allows third parties potentially looking to harm an employer onto the premises. NAED is working with our coalition and industry partners to push back on these rules.

Senate Republicans Look for Path Forward on Tax Bill

NAED is supporting Congressional efforts to restore small business tax and expensing provisions which have been phasing out over the past several years. A House bill to address these issues passed earlier this year and is now awaiting action in the Senate. The bill includes addressing bonus depreciation (Section 168(k) which phased down from 100% to 80% in 2023. Beginning on January 1 of this year, the provision has phased down to 60% and is scheduled to phase out completely by 2027. In exchange for renewing provisions like bonus depreciation, the small business interest expense (Section 163(j), and the Research and Development tax credit (Section 174), Democrats have proposed an expanded and partially refundable Child Tax Credit. Senate tax writers led by Senate Finance Committee ranking member Crapo are now undertaking more serious negotiations to address concerns with the legislation. NAED is pushing the Senate to move now on this bill and tax-writers are apparently eyeing future government funding deals as a possible vehicle for passage.

NAED Sets 2024 Legislative Priorities

NAED is continuing this year to focus on issues important to our membership, including expiring small business tax relief, energy efficiency tax credits, and fighting back against labor regulations.

The 2017 Tax Cuts and Jobs Act created a new 20% small business tax deduction, increased the estate tax threshold, lowered marginal tax rates across the board, improved expensing rules for commercial buildings, and more. This bill was passed through a process called budget reconciliation, which allows the Senate to pass tax bills with 51 votes instead of the 60 votes typically required to pass tax legislation. That process puts budget restrictions on any changes that lower tax revenue outside a ten-year budget “window”. As that window continues to close, some equipment expensing changes have begun to phase out and Congress will face another “fiscal cliff” situation next December when most of the small business cuts benefiting NAED members will expire. NAED is supporting legislation to lock in important provisions on the estate tax and the Section 199A 20% small business deduction.

The 2022 Inflation Reduction Act (IRA) contained helpful tax and rebate incentives for commercial building owners and homeowners. NAED supports maintaining the IRA passed tax credits which provide incentives for homeowners and commercial building owners to upgrade or replace electrical equipment. When Congress undertakes another major tax reform effort in 2025, many of these energy tax credits could be back on the table for political horse-trading. NAED is pushing to extend current small business tax relief while keeping these important tax incentives in place. These include the Section 25C Energy Efficient Home Improvement Credit which provides up to 30% back on of the purchase and installation cost of qualifying home upgrades; the Section 45L Credits for Qualifying New Builds which allows eligible contractors a tax credit of up to $5,000 per home that they construct or substantially rehabilitate to sell; and the Section 179D Commercial Buildings Tax Deduction which allows commercial building owners to deduct upgrades or new energy efficient equipment.

NAED supports changes that protect members from unionization, frivolous lawsuits, and maintain balance in labor laws. NAED works together with a number of small business associations and coalitions to fight back against regulatory and legislative overreach in labor policy. This year NAED will continue to oppose the NLRB Joint Employer standard and oppose the PRO Act which would eliminate NAED businesses’ ability to challenge union misconduct during elections and greatly expand the NLRB's power to foist union representation on employers without an election.

Lastly, NAED will continue to protect the LIFO accounting method. Over the past several years, members of both parties have contemplating using LIFO repeal as a "pay-for" on several tax related bills. If repealed, companies using LIFO would be forced to report their reserves as income, resulting in a massive incremental tax liability. NAED supports keeping the LIFO accounting method fully intact and opposes any efforts to tax LIFO reserves.

Political and Elections Update

Senate Minority Leader Mitch McConnell has announced he will retire after serving out his term and will step down as Leader in November. Leader McConnell has been an institution of Washington, DC and played a key role in shaping the current Republican party. "I am no longer the young man sitting in the back hoping colleagues would remember my name" McConnell remarked on his age of 82, "..it is time for the next generation of leadership." Three Johns – Senators John Cornyn, John Thune, and John Barrasso will now face off for the top spot. More in our next issue regarding the latest on that race. Former President Trump bested Secretary Nikki Haley in her home state of South Carolina and looks to be in a strong position heading into "super Tuesday" on March 5th. While Secretary Haley out-performed expected polling, it is still difficult to see a path to victory for her, especially after President Trump notches key primary wins this week. President Joe Biden seems poised to secure the Democratic nomination again as he locks in key primary wins relatively unopposed.

Please stay tuned as NAED continues to keep you updated on the latest policy news during this exciting election year!