



1201 F St NW #200
Washington, D.C. 20004

1-800-552-5342
NFIB.com

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Mr. William McGeveran
Reporter, ULC Collection and Use of Personally Identifiable Data Committee
Mondale Hall
229 19th Ave., South
Minneapolis, MN 55455
Via Email: mcgeveran@umn.edu

Dear Mr. McGervran,

My name is Karen Harned and I serve as Executive Director of the NFIB Small Business Legal Center – a post I have held for 18 years. The NFIB Small Business Legal Center serves for the voice of the millions of small businesses across the country in our nation's courts and as a legal resource for small business owners nationwide.

As a new observer to the ULC Collection and Use of Personally Identifiable Data Committee, this letter provides my initial, priority concerns with the current draft language. On behalf of America's small business owners, I respectfully request the Committee consider ways to address the concerns I outline below.

Eliminate Current, Cumbersome, One-Size-Fits-All Structure: The Committee draft requires businesses develop a new privacy-related administrative structure complete with a "data controller" and "data processor" and imposes new recordkeeping requirements on businesses in the form of a "data privacy assessment."

Since January 2009, "government regulations and red tape" have been listed as among the top-three problems for small business owners, according to the NFIB Research Center's monthly Small Business Economic Trends survey.¹ Within the small business

¹*Small Business Economic Trends*, NFIB Research Center (Jan., 2018), 18, available online at <https://www.nfib.com/assets/SBET-January-2018-1.pdf> (last visited March 1, 2018).

problem clusters identified by the NFIB's Small Business Problems and Priorities report, "regulations" rank second only behind taxes.²

In a Small Business Poll on regulations, NFIB found that almost half of small businesses surveyed viewed regulation as a "very serious" (25 percent) or "somewhat serious" (24 percent) problem.³ NFIB's survey was taken at the end of 2016, and, at that time, 51 percent of small business owners reported an increase in the number of regulations impacting their business over the last three years.⁴

Compliance costs, difficulty understanding regulatory requirements, and extra paperwork are the key drivers of the regulatory burdens on small business.⁵ Understanding how to comply with regulations is a bigger problem for those firms with one to nine employees, since 72 percent of small business owners in that cohort try to figure out how to comply themselves, as opposed to assigning that responsibility to someone else.⁶

NFIB's research also shows that it's the volume of regulations that poses the largest problem for 55 percent of small employers, as compared to 37 percent who are most troubled by a few specific regulations.⁷

When it comes to regulations, small businesses bear a disproportionate amount of the regulatory burden.⁸ This is not surprising since it's the small business owner, not one of a team of "compliance officers" who is charged with understanding new regulations, filling out required paperwork, and ensuring the business complies with new federal, state, and local mandates.

When it comes to the "Collection and Use of Personally Identifiable Data Act" for many businesses with 50 or fewer employees, it will be the small business owner who will have to find out about the Act and try to come up with a compliance program to implement it for her business. It will be the small business owner who will serve as the "data controller," and "data processor." And it will be the small business owner who prepares the "data privacy assessment" and assures that it is properly filed with the State Attorney General and kept for ten years. Importantly, in most cases, the small

² Holly Wade, *Small Business Problems and Priorities*, NFIB Research Foundation, 17, (August, 2016), available online at <https://www.nfib.com/assets/NFIB-Problems-and-Priorities-2016.pdf> (last visited March 1, 2018).

³ Holly Wade, *Regulations*, Vol. 13, Issue 3, 2017, 6, available online at <http://411sbfacts.com/files/Regulations%202017.pdf> (last visited March 1, 2018).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at 10.

⁷ *Id.* at 9.

⁸ Babson, *The State of Small Business in America 2016*; Crain, Nicole V. and Crain, W. Mark, *The Cost of Federal Regulation to the U.S. Economy, Manufacturing and Small Business*, (September 10, 2014), available online at <http://www.nam.org/Data-and-Reports/Cost-of-Federal-Regulations/Federal-Regulation-Full-Study.pdf> (last visited March 1, 2018).

business owner is likely to have little, if any, prior exposure to, or understanding of the myriad of data privacy issues raised by this proposed legislation.

I strongly recommend the Committee revisit the current one-size-fits-all structure envisioned in the Act. Specifically, I recommend that the Act:

- (1) not apply to businesses deemed “small” as defined by the Small Business Administration; and⁹
- (2) create a safe harbor that allows all other businesses significant flexibility in developing a privacy plan based on a general set of straight-forward privacy principles.

Eliminate Private Right of Action: I strongly recommend the Committee delete Section 20, which provides for private enforcement of the Act. In my experience representing small business for 18 years and helping small business owners navigate state and federal laws that provide for a private right of action, this enforcement mechanism inures primarily to the benefit of plaintiff’s lawyers.

For laws with a private right of action it is common for a plaintiff, or his attorney, to travel from business to business, looking for violations of a law. In such cases, the plaintiff generally is not as concerned with correcting the problem as he or she is in extracting a settlement from the small business owner. In many instances the plaintiff’s attorney will initiate the claim, not with a lawsuit, but with a “demand” letter. In my experience, plaintiffs and their attorneys find “demand” letters particularly attractive when they can file a claim against a small business owner for violating a state or federal statute that has a private right of action.

The scenario works as follows: an attorney will send a one and a half to two-page letter alleging the small business violated a statute. The letter states that the business owner has an “opportunity” to make the whole case go away by paying a settlement fee up front. Time frames for paying the settlement fee are typically given. In some cases, there may even be an “escalation” clause, which raises the price the business must pay to settle the claim as time passes. So, a business might be able to settle for a mere \$2,500 within 15 days, but if it waits 30 days, the settlement price “escalates” to \$5,000. Legal action is deemed imminent if payment is not received.

⁹ <https://www.sba.gov/document/support--table-size-standards>

In California, attorneys have been known to rake in several million dollars a year fleecing small business owners with these schemes. One particular attorney, Harpreet Brar, received hundreds of settlements of \$1,000 or more from “mom and pop” stores throughout the state after suing them for minor violations of the state business code.¹⁰ Mr. Brar sued many of these businesses for allegedly collecting “point-of-sale” device fees from his wife without proper disclosure signs.

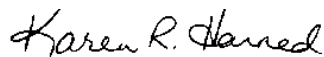
Ann Kinner, who owns Seabreeze Books & Charts in Point Loma, CA is one such business owner targeted by frivolous litigation. Kinner’s store has been sued twice for ADA violations. She went to court, fought, and won both lawsuits. But the defense cost her \$10,000, money she could have used to hire a new employee. Kinner knows many businesses in her town subjected to identical claims. And most business owners, according to her, get the demand letter and fold because they cannot afford to hire a lawyer and defend the business. In Kinner’s words, “the only people who win in these cases are the lawyers.”

As proposed, a small business owner could unknowingly be in technical violation of the Act opening him up to the kind of lawsuit abuse I articulate above. As a result, I strongly recommend the draft Act be revised to remove the private right of action.

Admittedly, I have other concerns with this draft legislation and its impact on small business. However, as a new member to the Committee, I wanted to focus my comments on the issues I think are of most concern to small business. I look forward to providing additional feedback in the meetings to follow.

Thank you for your consideration of these comments.

Best regards,



Karen Harned
Executive Director
NFIB Small Business Legal Center

¹⁰ http://www.californiawagelaw.com/wage_law/2006/02/harbreteet_brar_g.html.