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US

Volume 41 | Issue 49 | July 11, 2018

Supreme Court Nixes Mandatory Public Union Fees

In a significant setback for public-sector unions, the Supreme Court held on June 27 that requiring public employees who are not members of a union to pay so-called “agency” or “fair share” fees as a condition of employment violates their First Amendment free speech rights. It also ruled that a public employer cannot deduct such fees from a worker’s paycheck without the worker’s affirmative consent, making opt-out arrangements unlawful. Public employers that collect agency fees or other payments to a public-sector union via payroll deductions should review their practices in light of their collective bargaining agreements and the Court’s ruling.

Background

Under the Supreme Court’s 1977 landmark decision in *Abood v*. *Detroit Board of Education*, public employees who do not join the union that represents their bargaining unit can be compelled to contribute to the cost of collective bargaining but cannot be required to pay for the union’s political or ideological activities that they oppose. In non-right-to-work states like California, public employee unions must notify nonmembers of the chargeable (related to collective bargaining) and nonchargeable (unrelated to collective bargaining) portions of the so-called “agency” or “fair share” fee, and give them the opportunity to affirmatively opt out of the nonchargeable portion each year. However, the unions do not have to refund the fee.

In *Friedrichs v. California Teachers Association et al.*, nonunion teachers from several California school districts challenged the constitutionality of both the state law authorizing teachers’ unions to charge agency fees to nonmembers and the opt-out requirement. They argued that requiring them to financially support an agency shop arrangement violated their rights to free speech and association under the First and 14th Amendments. The district court rejected the challenge, holding that it was bound by *Abood*. The U.S. Court of Appeals for the 9th Circuit affirmed.

The Supreme Court agreed to consider the case, giving the justices an opportunity to change the *status quo.* Although Court observers had anticipated a 5 to 4 decision overruling *Abood*, the sudden death of Justice Antonin Scalia intervened. Two years ago, a deadlocked Supreme Court left standing the 9th Circuit ruling that allows public-sector unions to collect union agency or fair share fees from

nonmembers, as long as the fees do not include portions for political activities. The Court's one-sentence decision set no precedent, but it left intact the ability of California public employee unions to collect compulsory union fees from nonmembers. (See our March 30, 2016 *FYI Alert*.)

Supreme Court Outlaws Mandatory Agency Fees

In a 5 to 4 decision on June 27, the Supreme Court ruled in *Janus v. AFSCME* that states and public-sector unions may not require "nonconsenting" government employees to pay agency or fair share fees. It held that mandatory public-sector union fees violate the First Amendment since all bargaining by a public-sector union can be considered political activity, concluding that "this arrangement violates the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern."

Illinois Law Challenged

Illinois law allows state and local government employees to unionize, and prohibits government employees represented by a union to be represented by any other agent or negotiate directly with their employer. As the exclusive bargaining representative, the union must provide fair representation for both members and nonmembers in union-represented bargaining units. Nonmembers may be required to pay an agency fee to cover the costs associated with collective bargaining and contract administration, but not for "union expenditures 'related to the election or support of any candidate for political office.'" The state automatically deducts fees from worker paychecks if the collective bargaining agreement contains an agency fee provision.

Mark Janus, an Illinois state employee, chose not to join the public-sector union that represented his unit (American Federation of State, County, and Municipal Employees, Council 31) because he objected to many of its public policy and collective bargaining positions. Janus challenged the constitutionality of the state law that required nonunion public employees to pay agency shop fees. Relying on *Abood*, the district court dismissed his suit, and the 7th Circuit affirmed. The Supreme Court agreed to hear the case.

Supreme Court Weighs In

Overruling *Abood*, the Court concluded that public employees who choose not to join a union cannot be compelled to contribute financially to it. Finding that public unions' activities are by nature political, the Court held that requiring public employees who do not want to belong to the union to pay agency fees is unconstitutional under the First Amendment because it impinges on their free speech rights. Further, the majority said that agency fees or any payments to a public union cannot be deducted from a worker's paycheck without the worker's affirmative consent, making clear that opt-out arrangements will not pass muster going forward.

Deeming *Abood* poorly reasoned, the Court dismissed that decision's two primary justifications for agency fees — to promote labor peace and to address the problem of "free riders." Noting that large numbers of public employees are represented by unions but are not forced to pay such fees in right-to-work states, the Court concluded that labor stability could be obtained through much less restrictive means. The Court found that "avoiding free riders is not a compelling interest" that trumps First Amendment free speech rights, and that arguably burdensome activities could be handled through less restrictive means, such as requiring nonmembers to pay for representation during grievance proceedings.

Potential Impact

Post-*Janus*, collective bargaining agreement provisions that require public employees to join a union or pay union dues or agency fees as a condition of employment are no longer permissible. States like California and New York

that have large public-sector unions will likely see the biggest impact from this decision. While not entirely clear how quickly public employers and unions will implement the decision, it seems likely that government employees who object to paying agency fees will look to stop payroll withholdings as soon as possible.

Because existing union revenue streams will be affected and may become unsustainable as some public employees stop paying agency fees, union efforts to recruit or reconnect with dues-paying members are likely to ramp up in the near term. With potentially fewer resources available, unions may have to decrease budgets and staff, scale back political lobbying, and reduce their financial role in state and local elections. Longer term, public unions may seek to limit, through lawsuits or state legislation, the services they have to provide nonmembers.

In anticipation of "an adverse ruling" in the *Janus* decision, New York Governor Andrew Cuomo signed legislation to increase access to and protect union membership in the state. It provides dues-paying union members in public-sector workplaces with certain benefits not available to nonmembers and requires public employers to provide unions with information like a new employee's name, address, and work location. Other states, including California and New Jersey, have enacted legislation that guarantees unions the right to speak to new public employees and access to their personal contact information. In the first state action taken in response to the *Janus* decision, Governor Cuomo signed an Executive Order on June 27 generally prohibiting state entities from disclosing personal contact information for state employees except to a union that is, or is seeking to be, the bargaining representative for a unit of public employees, saying that New York State "will not subject public sector workers to the abuse of their personal information as part of a campaign to harass and intimidate workers for any reason, including engaging in union activities or looking to unionize."

> **Comment.** According to the state comptroller's office (Payroll Bulletin Number: 1660), New York will discontinue agency shop fee deductions from employees paid by the state payroll system. Payroll deductions will cease beginning July 11 for administrators and July 19 for rank-and-file workers.

While the *Janus* decision directly impacts only public-sector employers, it may have some effect on the private sector. Emboldened by the decision, right-to-work advocates may increase their efforts to eliminate compulsory union membership and/or agency fees, and additional states might enact right-to-work laws. Similarly, unions whose membership is heavily public sector may seek to expand efforts in the private sector.

In Closing

This decision represents a sea change in the labor law landscape, effectively making every state a right-to-work state for public employees. The longer-term practical impact on public-sector union membership and funding remains to be seen. Public employers that collect agency fees or other payments to a public-sector union via payroll deductions should immediately review their practices in light of their collective bargaining agreements and the Supreme Court's ruling.

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