CLIENT ALERT: Janus Decision on Agency Fees Roils Public Sector Union Landscape – By Keith H. McCown

On the final day of the 2017-2018 term, the Supreme Court issued *Janus v. AFSCME Council 31.* This closely-watched dispute involved a public employee in a unionized job who opposed being compelled to pay an "agency fee" to his union – basically union dues, but reduced by an amount attributable to purely political union activities. The Supreme Court held that compelling a public sector employee even to pay "agency fees" violates the First Amendment guarantee of freedom of speech, because the employee is forced to subsidize political activity with which the employee may not agree.

Union Security Clauses, Closed Shops, Open Shops, and Free Riders

Many employers, both private and even more often in the public sector, have negotiated a "union security clause" into their collective bargaining agreements. A union security clause requires employees to join or at least to pay union dues as a condition of remaining employed. This negotiated arrangement creates what is sometimes called a "union shop" or more colorfully a "closed shop" – simply put, if you do not pay your union dues, you will not have a job. Almost always in a "closed shop," the employer also agrees to a "dues checkoff" provision, by which dues are deducted from employee paychecks and the employer submits those collected dues to the union.

A union is legally required to represent all bargaining unit employees, even in an "open shop." An "open shop" has no union security clause and employees are free to join or not join the union, and therefore obviously free to choose whether to pay dues. It's human nature that a sizeable number of "open shop" employees will opt not to join the union to avoid the dues payment, because they receive the union's services anyway. So unions strongly desire union security clauses and dues checkoff, creating a "closed shop" where all employees in the bargaining unit are compelled to pay for the union's representation, with no "free riders."

Unions' Uses of Dues Money and "Agency Fee" Arrangements

Unions use dues money in many ways, including support for political candidates and ideological causes. Various court decisions require unions with "closed shops" to offer employees a reduced payment of less-than-full dues, trimming out a portion that is designated for purely political or ideological union activities. This still leaves a mandatory employee payment tied to the union's specific efforts on behalf of the employees, such as the cost of collective bargaining, processing grievances, and the like.

In the public sector, the term "agency fee," sometimes called a "fair share" fee by unions, has commonly been used for the still-mandatory payment correlating specifically to the union's representation of the bargaining unit. In *Janus*, the employee claimed that virtually all of his public sector union's activities were political or ideological in nature, because even the union's efforts

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directly on behalf of the bargaining unit involved, for example, pushing for more public expenditures to fund higher wages and more expensive benefits. Thus, he argued, even his reduced agency fee payment was a compelled contribution to political activity. The Supreme Court agreed.

The *Janus* Decision

In *Janus*, the Court held that forcing public sector employees – at the risk of losing their jobs – to pay an agency fee subsidizing their union's bargaining positions on matters of public interest, like public spending, amounts to the government compelling people to endorse ideas and political positions that they may find objectionable. Longstanding Supreme Court precedent has held that the government compelling a person to endorse certain speech is as much a free speech violation as the government denying a person the right to speak.

The *Janus* decision itself is far more complex than this summary. Comprised of over 80 pages, the Court discusses standing to sue, standards of judicial review, whether to overrule precedent, and whether the issues were governed by one set of First Amendment cases or another. Law school classes can sort through those issues.

For public sector employers, the impact of *Janus* is clear: state and public sector unions can no longer compel the payment of agency fees from non-consenting employees. But this leads to many practical questions immediately facing public sector employers.

Immediate Questions and Answers For Public Sector Employers After *Janus*

1. When is the *Janus* decision effective?

Now.

2. Which types of employers are affected by the *Janus* decision?

States and their political subdivisions, including cities, towns and state agencies.

3. Is every public sector employer affected by *Janus*?

Yes. The ruling applies to all public sector employers, but the federal government as an employer, and 28 states (known as "right to work" states) do not allow union security clauses in any collective bargaining agreements (private or public sector). Union security clauses in public sector contracts create the compelled payments that the Supreme Court has now disallowed. So this ruling really affects public sector employers in the other 22 states where union security clauses are still allowed (the non-"right to work" states) – mid-east and northeast states starting at Ohio, eastward to Maryland, and moving up through New England (including Massachusetts); west coast states including Hawaii and Alaska, plus Illinois, Minnesota, Montana, Colorado and New Mexico.

4. Are private sector employers affected by *Janus*?

No. The constitutional right to freedom of speech is only implicated when the government is involved. Janus's lawsuit alleged a First Amendment violation by the state of Illinois acting in combination with the union. The First Amendment right to free speech formed the basis for the Court to strike down compelled agency fee paying.

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5. Should a public sector employer immediately stop withholding agency fee payments from employee paychecks?

Janus is immediately effective as the law of the land, and the safe position is to stop agency fee payments immediately. There might be some leeway to delay implementation, but the risk is an employee bringing a lawsuit alleging a First Amendment violation. Some large public sector unions have already notified employers to stop withholding agency fees, to blunt the accumulation of potential damages in a possible new lawsuit.

6. Why would there be any reason for an employer to delay implementing *Janus*?

An employer still has an obligation to notify the union how it intends to comply with the Court's order, and to bargain upon request about the effects or the impact of obeying the Court's order. So employers can halt agency fee payments immediately, and still offer to bargain with the union about these effects. Employers and unions could also take the temporary risk of a First Amendment lawsuit and meet before making any changes, with the understanding that the union cannot prevent changes that are compelled by *Janus*, but may offer more insight about how best to implement those changes.

7. What subjects could be covered by effects or impact bargaining?

Some obvious subjects for effects bargaining include re-wording any offending language in the union security clause; the actual mechanics of how to stop withholding agency fees, because there are likely to be banking and payroll technicalities involved; and whether there should be any individualized notice provided to agency fee-paying employees about halting their payments. Unions may ask an employer to delay implementing *Janus* until they have had an opportunity to meet with agency fee employees to discuss why the employee should still voluntarily support the union with an agency fee.

8. Can employees still agree to have agency fees deducted?

That is possible, and perhaps could be another subject of the effects bargaining. The Supreme Court held that employees have a First Amendment right not to have agency fees collected from their pay *without their consent*. Going forward, this means employees have to "opt in," and affirmatively assent to paying an agency fee. Even if they signed some previous consent form or fee deduction card, that was under different circumstances and without the guidance that the Court has now provided. Before an employee can again be subject to agency fee deductions from pay, the employee must unambiguously waive the First Amendment right to avoid this payment. According to the Court, a waiver of First Amendment rights must be "freely given and shown by clear and compelling evidence." Essentially, that means any employee still desiring to pay an agency fee must sign a new authorization document for that purpose, affirmatively and clearly requesting agency fee deductions and acknowledging that this is a waiver of a First Amendment right.

9. Is there any effect on full dues-paying employees?

Possibly. Unlike agency fee payers, who have demonstrated that they do not want to pay the portion of dues attributable to political and ideological union efforts, full dues payers are presumed to have

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no objection to the political and ideological activity. But as the Court warned, waivers of First Amendment rights must be "freely given and shown by clear and compelling evidence" – not presumption. There may be instances where even full dues payers now claim that they wish to assert their First Amendment rights not to support the union's political positions, and that they should be relieved of any obligation to pay dues. This, in turn, may implicate legal complications about whether, and when, employees can revoke their dues deduction authorizations.

10. Is *Janus* the last word on the issue of withholding agency fees?

No. There will surely be complications in the process of public sector employers and unions disengaging from decades of practice involving compulsory agency fees. The National Right to Work Legal Defense Foundation has been sponsoring other lawsuits similar to *Janus,* and is seeking to recover damages based on agency fees that were already paid under compulsory contract provisions. Some states like New York, anticipating the blow to public sector union funding that the *Janus* decision could represent, have enacted laws designed to facilitate public sector union organizing, and to limit the ability of employees to revoke existing dues deduction authorizations. Other states are now likely to follow suit, including Massachusetts. The *Janus* decision is only the beginning.

11. Is Janus a fatal blow to public sector unions?

Hardly, despite the politicized public discourse about the case. Without question *Janus* reduces a source of funding for public sector unions. It can vary from union to union, but in many cases the percentage of agency fee payers is quite low. *Janus* may encourage more people to seek agency fee status, but with union-friendly state legislators considering ways to counteract *Janus* by strengthening union power, unions with only a few agency fee payers may end up better off in the long run, despite some limited impact on finances.

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