



Friedrichs v. California Teachers Association A Preview For 2016 Bargaining

Publication

2.10.16

Todd Lyon's article "Friedrichs v. California Teachers Association A Preview For 2016 Bargaining" was featured in *NPELRA Connections* February 2016 newsletter.

On January 11, 2016, the Supreme Court heard oral argument in *Friedrichs v. California Teachers Association*, a case involving the constitutionality of "fair share" union dues. The facts of this case are familiar to public employers: once a union becomes the exclusive bargaining representative, the union may establish an "agency shop" arrangement, under which the union requires employees to either join the union or pay the equivalent of dues to cover their "fair share" of the costs of representation. Under a previous decision called *Abood v. Detroit Board of Education*, the Supreme Court held that the First Amendment prohibits unions from compelling nonmembers to support political activities of the union, but unions may require nonmembers to pay for costs associated with being the exclusive bargaining representative, such as negotiating and contract administration. To comply with this requirement, unions must send notices to all nonmembers which break down the chargeable and nonchargeable portion of the fee. In *Friedrichs*, to avoid paying the nonchargeable portion of the fee, nonmembers had to affirmatively opt out each year.

The petitioners in *Friedrichs* challenged this practice, asserting that any mandatory "fair share" dues violate the First Amendment. Specifically, the petitioners have asked the Supreme Court to address the following questions: First, do public sector agency shop arrangements violate the First Amendment's protections for freedom of speech and assembly? Second, does the First Amendment prohibit the practice of requiring public employees to affirmatively opt out of subsidizing nonchargeable speech rather than to affirmatively consent?

After the Supreme Court heard oral argument on these issues, commentators tend to agree that mandatory fair share dues are on the constitutional chopping block. This begs the question – what, if anything, should public employers be concerned about going into 2016 bargaining sessions?

In the article, Todd provides employers with some key issues to consider:

- Union security – agency shop provisions may soon be unconstitutional. However, this is still a mandatory subject of bargaining. Public employers will want to consider whether to propose changes to or tentatively agree to union security pending the *Friedrichs* decision. If public

employers do choose to propose or tentatively agree to union security provisions, those provisions may become unlawful, which could trigger contract disputes.

- Dues deductions – depending on the contract language, union dues provisions may become unconstitutional.
- Severability – unconstitutional union security or union dues provisions may be struck out of a contract, depending on the language of a severability clause.
- Indemnification – the association may be liable for costs of litigation resulting from the Friedrichs decision, depending on the language of an indemnity clause.

Right now, it is impossible to gauge how far-reaching the impact of Friedrichs may be. Todd advises employers to prepare in advance by speaking to their labor lawyer, who can help identify key issues specific to their contract and bargaining relations.