# Supreme Court Allows Unions to Use Members' Dues to Finance Litigation Outside of the Bargaining Unit

DECISION APPLIES ONLY TO PUBLIC SECTOR UNIONS

Insights
1.22.09

Today the Supreme Court issued its decision in *Locke v. Karass* determining the ability of unions representing public sector employees to collect litigation costs as part of a compulsory "agency fee" authorized under state law, even if the litigation does not directly involve the local bargaining unit. Addressing a split among the Circuit Courts of Appeal on this issue, the Court refined a test previously set forth in *Lehnert v. Ferris Faculty Ass'n,* used for determining the propriety of including items in compulsory "agency fees" paid by nonunion members of a bargaining unit.

The impact of *Locke v. Karass* will depend on whether the issue arises in a "right-to-work" state (states which do not allow compulsory unionization nor require compulsory union dues or "agency fees" for nonunion members of a bargaining unit) or in a non right-to-work state, which allows compulsory unionization or "agency shops."

**Background**
The Maine State Employees Association (MSEA), exclusive bargaining agent for certain state workers, collects compulsory "agency fees" from non-members in the bargaining unit. Some of these fees are transferred to the Service Employees International Union (SEIU), MSEA's national affiliate. MSEA included in its calculation of chargeable expenditures costs of litigation incurred by itself and by the SEIU, which it believed were germane to collective bargaining.

Consequently, nonmembers in the bargaining unit involuntarily contributed to some litigation not specifically undertaken for their own bargaining unit. This category of expenditures included salaries of SEIU's lawyers, and other costs of providing legal services to bargaining units throughout the country. Costs of litigation unrelated to collective bargaining, however, were not included in the service fees assessed to MSEA's nonmembers.

The U.S. Court of Appeals for the 1st Circuit, affirming a federal district court, held MSEA may lawfully charge nonmembers for this "extra-unit litigation" if the litigation is germane to the union's collective bargaining duties.

In *Lehnert v. Ferris Faculty Ass'n*, a four-member plurality of the Court held that the First Amendment prohibits the use of dissenters' union fees for extra-unit litigation in the public sector.

While *Lehnert* did not approve the charge for extra-unit litigation, as the Court split into three factions on that issue, it did generally approve the use of pooling arrangements between local union and national affiliates for activities germane to collective bargaining and therefore chargeable to nonmembers in an agency fee.

The lack of a standard on extra unit litigation expenses in *Lehnert,* has created a conflict among the Circuits with respect to the issue of whether the litigation costs incurred by the national affiliate could be germane to the local union's collective-bargaining responsibilities.

Because the Supreme Court has dealt with this analysis on a constitutional basis the question presented to the Court was whether a State may constitutionally condition continued public employment on the payment of agency fees for purposes of financing litigation outside of a nonunion employee's bargaining unit? The decision in this case will only affect States that do not have a "right-to-work law." In "right-to-work" States such fees would not be able to be involuntarily collected, as they would be viewed as compulsory unionization.

**Court's Decision**

The Court determined that costs of extra-unit litigation are chargeable provided the litigation meets relevant standards enunciated in *Lehnert.* A local union may require a nonmember to pay a share of the local's contribution to a national union's litigation expenses if: 1) the subject matter of the national litigation bears an appropriate relation to collective bargaining, and 2) the arrangement is "reciprocal" â€“ that is, the local's payment to the national affiliate is for "services that may ultimately inure to the benefit of the members of the local union by virtue of their membership in the parent organization."

The Court saw no significant reason to treat litigation activities and expenses differently from other national expenditures which have previously been found to be chargeable to nonmembers by the Court.

The Court did not deal with the meaning of reciprocity since it was not in dispute in this case. A concurring opinion by Justice Alito, joined by Chief Justice Roberts and Justice Scalia, also makes this point indicating the issue of reciprocity in the payment of extra-unit litigation expenses will be an area of future litigation.

**Conclusion**

*Locke v. Karass* is a very narrow decision. The petitioners argued for a blanket prohibition of charges for extra-unit litigation. The Court unanimously rejected that position and essentially authorized the charging of an agency fee for extra-unit litigation under the specified standard. Whether that standard is met in future cases will depend in large measure to the meaning ascribed to "reciprocity."

The impact of this case will not be felt in right-to-work states which generally prohibit the payment of compulsory union dues or agency fees.

of compulsory union dues or agency fees.

To discuss whether the case has an impact in your particular situation, contact any Fisher Phillips attorney.

---

*This Supreme Court Alert provides highlights of a specific new decision. It is not intended to be, and should not be construed as, legal advice for any factual situation.*