SCOTUS Appears Ready To Deal Devastating Blow To Public Unions

Insights
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In a move that must have labor unions across the country trembling with fear, the Supreme Court today announced that it will once again take up the issue of whether public sector agency shop fee arrangements are prohibited by the First Amendment. If the Court rules as expected and strikes down these common arrangements, it would be a big blow to the influence that labor has across the country (*Janus v. American Federation of State, County, and Municipal Employees, Council 31*).

Brief Background

"Agency shop" fees are those mandatory fees collected by unions from public sector employees. Under state laws permitting these arrangements, those employees who choose not to join a union are compelled to pay a service fee to finance union collective bargaining, contract administration, or grievance adjustment expenditures. While such workers are protected under the First Amendment from being compelled to contribute to union political activities they oppose, the fees that are collected still provide a large source of revenue for public sector unions. The infamous 1977 case of *Abood v. Detroit Board of Education* ensured that state laws permitting mandatory payments are legal.

Seeing a number of encouraging signs in other Supreme Court decisions over the past decade, opponents of these mandatory fees challenged the system in 2016 with the case of *Friedrichs v. California Teachers Association*. With five conservative Supreme Court Justices on the bench seemingly ready to strike down *Abood* and hand them a victory, it seemed that public sector unions were about to be dealt a crippling blow. In fact, during the January 2016 oral argument, the Court's questioning suggested that the five-Justice conservative bloc was leaning towards striking down public sector agency shop arrangements on First Amendment grounds. Specifically, there was continued focus on whether compelling association through fair share fees was constitutionally justified.

But all of that changed with Justice Antonin Scalia's death in February 2016. Shortly thereafter in March 2016, the Court issued a one-sentence per curiam decision in the *Friedrichs* case upholding agency shop fee statutes by a deadlocked 4-4 vote, simply stating: "The judgment is affirmed by an equally divided Court." Public sector employees would be stuck paying mandatory agency shop fees for the foreseeable future, and unions would continue to receive a steady funding stream.

The *Janus* Case Could Change All That

The case now teed up for SCOTUS review actually has its origins in 2015, when Illinois Governor Bruce Rauner brought a legal action in federal court contending that the agency shop fees paid by Illinois state employees were unconstitutional. Mark Janus, a child support specialist for the Illinois Department of Healthcare and Family Services who is forced to pay $44 a month to the American Federation of State, County and Municipal Employees (AFSCME) union, joined the suit as a plaintiff.

Although a judge soon dismissed Rauner's lawsuit because he was not forced to pay the fees himself, Janus's legal challenge continued and wound its way all the way up to the Supreme Court. Today, the Court accepted the case for review and will soon hear arguments in the case. A decision could be expected in early 2018.

How Might This Decision Impact Employers?
If the Court can muster a majority of votes to disturb the valuable revenue stream enjoyed by public sector unions in agency shop states, many public sector unions will have to take significant steps to survive, including possible reduction-in-force and operational restructuring plans. But the decision could have more widespread implications down the road. Public sector unions may find it difficult to fund a variety of worker advocacy positions they currently support, including the development and backing of statutory and regulatory initiatives across the country.

What Do We Do Now?
At this point, no response or follow-up action is required from public sector employers. In fact, public sector employers would be wise to not comment to union leaders or speak publicly regarding today's action. Any statements could be misconstrued and used against you if you are currently in negotiations or dealing with some level of union unrest. Instead, employers are cautioned to have patience and wait for this case to play out to a final conclusion before making any moves.

This case is just one of several high-profile Supreme Court labor and employment cases to be heard this term. Others include:

- ***Lewis v. Epic Systems Corp.*** – The Court will decide whether mandatory class and collective action waivers are permissible, allowing employers to avoid costly litigation in favor of individual arbitration proceedings.
- ***Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*** – The Court will determine whether Colorado's public accommodations law requires the owner of Masterpiece Cakeshop, Ltd. to "create expression" – make a cake for a same-sex wedding – causing what the bakers believe would a violation of their free speech and free exercise rights under the First Amendment.
- ***Encino Motorcars, LLC v. Navarro*** – The Court will once again determine whether an automobile dealership's service advisors are exempt from the Fair Labor Standards Act's overtime requirements.
- ***Trump v. International Refugee Assistance Project*** – The Court could examine the merits of President Trump's Executive Order No. 13780, "Protecting the Nation from Foreign Terrorist

President Trump's Executive Order No. 13780, "Protecting the Nation from Foreign Terrorist Entry Into the United States," and issue a definitive ruling upholding the executive order, striking it down, or finding a compromise, although the case has been taken off the oral argument calendar given the third version of the travel ban now in place.

- ***Hamer v. Neighborhood Housing Services of Chicago*** – At issue is whether federal appellate rules permit a lower court to extend appeals court deadlines in an employment discrimination setting.
- ***Artis v. District of Columbia*** – The SCOTUS will decide whether a tolling provision suspends the statute of limitations clock on a state whistleblower claim while the claim is pending and for 30 days after the claim is dismissed, or whether the tolling provision merely provides 30 days beyond the dismissal for the plaintiff to refile.
- ***Digital Realty Trust v. Somers*** – The decision in this case will resolve whether the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 protects whistleblowers who have not reported alleged misconduct to the U.S. Securities and Exchange Commission (SEC).

As always, Fisher Phillips will issue same-day summaries of each case, explaining the decision in plain English, putting the case in context, and exploring the possible impact on employers. If you want to ensure you receive our Supreme Court Alerts, subscribe to our service here or contact your regular Fisher Phillips attorney.

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