SCOTUS Hands Significant Defeat To Both Public Sector Unions And National Labor Movement

Insights
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In a 5-4 decision on the final day of the 2017-2018 term, the U.S. Supreme Court ruled today that the First Amendment prohibits public sector entities from collecting fees from non-union members. This decision is a significant blow to public sector labor organizations across the country, which rely on these fair share fee arrangements as a significant source of revenue.

But this decision will have an impact far beyond public employers. By severely weakening the ability of public sector unions to raise funds, it could also signal an end to the continued assault on all employers—both public and private—through union-sponsored legislation at both the state and local level (*Janus v. AFSCME, Council 31)*.

"Fair Share" Fees, Explained
"Fair share" fees—sometimes known as "agency shop" fees—are paid by those public sector employees who choose not to belong to a union but are still covered by a collective bargaining agreement. Unions justify these fees as a way to eliminate "free riders."

In practice, employees who choose not to join a union are nevertheless compelled to pay mandatory fees to finance the union's efforts to collective bargaining, administer the collective bargaining agreement, arbitrate grievances, and otherwise "represent" employees. The infamous 1977 Supreme Court case, *Abood v. Detroit Board of Education,* ensured the legality of state laws requiring such payments in the public sector.

Third Time's The Charm? A Brief Review Of Recent Efforts To Overturn *Abood*
Over the last five years, three significant cases have come to the Court involving the constitutionality of "agency fees," each asking whether *Abood* should be overruled on First Amendment grounds. The first, 2014's *Harris v. Quinn*, involved home health aides in the state of Illinois. Although the Court issued a 5-4 decision striking down mandatory fair share fees, the ruling only extended to the particular class of employees at issue. The silver lining, however, was that the Court's opinion signaled a willingness to reconsider *Abood* on a much broader scale should a test case arise. With five sitting conservative Supreme Court Justices, such a case would potentially end agency shop fees altogether.

Two years later, in *Friedrichs v. California Teachers Association*, a group of California public school teachers brought just such a case. During the January 2016 oral arguments, all indications pointed

towards the Court issuing a final blow for these arrangements, as the Court's questioning focused on the constitutional justification—or lack thereof—of compelled payments to a labor organization. However, Justice Antonin Scalia's death in February 2016 quashed the hopes of the challengers. Instead, in March 2016, the Court issued a terse, one-sentence *per curiam* decision upholding agency fee statutes by a 4-4 vote.

But once Neil Gorsuch was confirmed as the ninth Supreme Court Justice in early 2017, opponents of fair share arrangements sought another opportunity to bring the matter before the Court. They soon located what they hoped would be the vehicle for the final demise of agency shop fees: *Janus v. AFSCME*.

Worker Challenges $44 Per Month Union Payment

The case had its inception back in 2015, when Illinois governor Bruce Rauner filed a federal lawsuit to halt unions' collection of fair share fees from Illinois public employees. While the case was pending before the district court, plaintiff Mark Janus filed a motion to join the case. A child support specialist for the Illinois Department of Healthcare and Family Services, Janus is forced to pay $44 a month in agency shop fees to the American Federation of State, County and Municipal Employees (AFSCME) union. Like Governor Rauner, Janus argued that requiring him to pay fair share fees violated his First Amendment rights.

Although the district court dismissed Governor Rauner's complaint because he personally did not have to pay the fees, it substituted Janus as a plaintiff. On appeal, the 7th Circuit Court of Appeals rejected his argument, explaining it, like the district court, lacked the power to overrule *Abood*. However, the one court with such power—the U.S. Supreme Court—granted review of the case in September 2017 and oral arguments were held on February 26, 2018.

The Court Rules That "Extracting" Agency Fees Is Unconstitutional, Overturning *Abood*

In the 5-4 decision authored by Justice Alito, the Court ruled that requiring bargaining unit employees to pay agency fees to a union violated the First Amendment. In so doing, the Court concluded that *Abood* must be overruled, as it had "erred in concluding otherwise." The Court found that legal and factual developments since its issuance in 1977 "have 'eroded' the decision's 'underpinnings' and left it an outlier among the Court's First Amendment cases."

The Court expressed serious concerns regarding the compulsory nature of agency fees, noting "compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command." Compelling employees to "subsidize the speech of other private speakers raises similar First Amendment concerns."

The Court has created "levels of scrutiny" to be applied in First Amendment cases. In earlier cases involving agency fees, the Court had applied an "exacting scrutiny" standard, which is less demanding than "strict scrutiny". Under "exacting scrutiny", the "compelled subsidy must serve a compelling state interest that cannot be achieved through means significantly less than restrictive of associational freedoms."

associational freedoms.

The two justifications offered in *Abood*—"labor peace" and "free riders"—failed to satisfy this more permissive standard. The Court observed that in 28 states which prohibit agency fees and the federal government, millions of public sector employees are represented by unions that effectively serve as the exclusive bargaining representative of all employee regardless of membership status. Moreover, concerns regarding "free riders" fail to support the restrictive imposition of agency fees. Indeed, the Court noted that it has previously ruled that "free-rider arguments…are generally insufficient to overcome First Amendment objections."

In the end, the Court ruled the First Amendment prohibited both states and public sector unions from extracting agency fees from "nonconsenting" employees. As of today, such fees must not be deducted unless the employee "affirmatively consents to pay." The Court ruled that such agreements to pay act as waivers to their First Amendment rights, and therefore must be freely given and shown by "clear and compelling" evidence.

In Illinois, no such affirmative consent occurs, as fees are automatically deducted from employees' paychecks if a public sector collective bargaining agreement contains an agency fee provision and the union certifies the amount of the fee. The Court therefore reversed and remanded the case to the 7th Circuit for reconsideration in the absence of *Abood*.

What This Means For Employers: The Beginning Of The End For Union Influence?

As an initial matter, public sector unions in agency shop states will immediately lose a valuable revenue stream, effectively crippling many of their efforts. All of the state laws permitting public sector unions to require nonmembers to contribute to their coffers are struck down and no longer enforceable. In a post-*Janus* world, unions will now need to both maintain and grow their membership to survive, but will have much smaller bank accounts to get the job done. This will be an uphill battle for them.

Janus will impact not only unions' representational activities, but their role in the political arena. Many recent pro-worker ballot initiatives and legislation—including minimum wage increases and expansive paid sick leave—were developed, lobbied for, and funded by organized labor. The budget for such causes has now been slashed dramatically.

Public sector unions are a major financial backer for progressive causes and candidates, which has an especially marked impact on local and state elections. Given the seemingly inevitable financial devastation that this decision will bring, it now seems unlikely they will be able to continue to play such a prominent role in these efforts in the future.

Expect to see unions reacting strongly to this decision as they struggle for survival and relevance. Some state legislatures may seek to pass new laws aiming to boost union membership by giving public sector union members time off from their jobs to recruit new members, or requiring all workers to attend orientation sessions with union representatives to increase access to potential new members. We could also see new state laws allowing public sector unions to charge nonmembers for services provided by the union (such as aid during disciplinary processes, or

nonmembers for services provided by the union (such as aid during disciplinary processes, or representation at an arbitration proceeding). Any such efforts would almost certainly be challenged by the same opponents who led the successful effort to win today's case, so stay tuned for further developments.

For more information, visit our website at www.fisherphillips.com, or contact any member of our Labor Relations Practice Group or your Fisher Phillips attorney.

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