THE RECORDER

October 23, 2017

# U.S. Supreme Court to Reconsider Whether Employees May Be Forced to Pay Fair Share Fees to Unions

*Public sector employees may no longer have to make financial contributions to their unions.*

By **Charles S. Birenbaum, Jamie R. Adams and Brenda L. Rosales** October 23, 2017

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Public sector employees may no longer have to make financial contributions to their unions. This term, the issue before the U.S. Supreme Court in *Janus v. AFSCME* is whether public-sector "agency shop" arrangements should be invalidated under the First Amendment. Agency shop arrangements require employees who are not members of a union to pay "agency fees" or "fair share fees," which are a proportionate share of the costs of union representation. Fair share fees may not to be used by unions to further political purposes. Forty years ago, the *Abood* Court held that such agency shop clauses were valid insofar as the service charge is used to finance the union's expenditures for collective bargaining, contract administration, and grievance adjustment.

*Janus v. AFSCME* seeks to overturn *Abood*. In 2015, Illinois Governor Bruce Rauner initiated the lawsuit in U.S. District Court for the Northern District of Illinois. Governor Rauner challenged an Illinois statute that allows unions representing public employees to collect dues from their members and fair share fees from non-member employees. Governor Rauner claimed that the statute violated the First Amendment by compelling employees who disapprove of the union to contribute financially to it.

The district court dismissed Governor Rauner's lawsuit for lack of standing, but permitted two public employees, Mark Janus and Brian Trygg, to intervene. On review, the Seventh Circuit Court of Appeals dismissed the employees' claims on procedural grounds: Trygg's claim was dismissed, because he had already challenged the requirement that he pay the union fair share fees before the Illinois Labor

Relations Board and the Illinois Appellate Court. Janus's claim was dismissed because neither the district court nor the court of appeals could overrule *Abood*. Granting Janus' petition for writ of certiorari on September 28, 2017, the U.S. Supreme Court agreed to reconsider whether *Abood* should be overruled.

The U.S. Supreme Court revisited *Abood* just last year in *Friedrichs v. California Teachers Ass'n*. Justice Antonin Scalia's unexpected death resulted in an equally divided Court. As a result, the principles in *Abood* were reaffirmed without further examination by the Court.

It is anticipated that the U.S. Supreme Court, with newly appointed Justice Neil Gorsuch replacing Justice Scalia, will overrule *Abood*. Justice Gorsuch is known for his strict constructionist interpretation of constitutional issues. If the Court reaches the merits, it is likely to find that First Amendment issues prevail over any state interest in preventing employees from benefitting from union-negotiated wages and benefits without paying their fair share. The Court will likely find that contributing money to an organization is a form of speech. Under this rationale, States that require employees to pay fees to a labor organization are violating the employees' First Amendment rights to freedom of speech – here, the freedom to refrain from providing money to a union.

The Court's holding in *Janus* may have implications in the private sector. It is unlikely that the Court's holding in *Janus* will carve out an exception for private sector employees. The Court made it clear in *Abood* that the First Amendment rights of public sector employees are "no more weightier" than the First Amendment rights of private sector employees. This Court may keep in line with that reasoning and in dicta state that under the First Amendment no employee, whether employed in the public or private sector, may be required to pay money to an organization that does not align with his or her beliefs.

The Court's holding in *Janus* may also impact other state and federal laws regarding union membership and payment of union fees. Currently, under U.S. Supreme Court precedent established in *Communications Workers of America v. Beck*, religious or philosophical objectors may opt out of full union membership, but must remain "financial core" members owing certain union fees. Under *Janus,* employees would no longer have an obligation to pay union dues under the First Amendment, excusing the obligation to pay fair share fees. Thus, religious and philosophical objectors would not have to become financial core members.

In addition, there are currently 28 states that have right-to-work laws: those laws guarantee that no person can be compelled, as a condition of employment, to join or not join, nor to pay dues, to a union. In these states, employees may already choose not to become members or pay dues, without the need to object on religious or philosophical grounds. However, if *Janus* overrules *Abood*, membership issues would generally remain a matter for state regulation, while dues issues would be controlled by federal law. Every state would effectively turn into a right-to-work state with respect to the payment of union dues. Thus, in states without right-to-work laws, employees would not be required to pay union dues or fees but may still be required to join a union if their labor contract provides for mandatory union membership (except when employees object on religious or philosophical grounds).

The outcome of *Janus* could have a material impact on labor relations in the United States, from how unions represent bargaining unit employees to how unions and management interact at and away from the bargaining table. Unions may face tough financial times, because they may no longer have the financial means to represent all bargaining unit employees. Unions may be faced with a situation in which they are required to represent *all* bargaining unit employees irrespective of whether they pay fees. In the private sector, a duty of fair representation prohibits a union from discriminating between members of a bargaining unit. This may cause Unions to challenge current law, and seek to represent only dues-paying union members.

If the Court overrules *Abood*, it may also impact the level of employee participation in unions in the foreseeable future. According to the U.S. Department of Labor, only 6.4 percent of private-sector employees belonged to a union in 2016, while 34.4 percent of public-sector employees belonged to a union during that same timeframe. The unions have counterbalanced declining membership levels in the private sector with organizing in the public sector. The overruling of *Abood* may drive union membership numbers to an all-time low in both the public and private sectors. Unions could argue for new legislation to balance the scales, for example, card check legislation. Unions could also support federal legislation to

address the impacts of *Janus*, but short of a reversal by the Court, the constitutional issue will pose an obstacle. In the meantime, unions will need to demonstrate to employees that collective bargaining, contract administration, and grievance adjustments are valuable services that benefit employees, and that employees should continue to pay non-mandatory dues and fees to ensure that those services will continue to be provided.

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