

Supreme Court Decimates Public Sector Fair Share Fees—Union Dues Unaffected

On June 27, 2018, the U.S. Supreme Court delivered labor law's most anticipated and dreaded decision of the term, Janus v. AFSCME. Originally a case filed by Illinois Governor Bruce Rauner, state employee Mark Janus took up the case after the Governor was dismissed for lack of standing. The case challenged the requirement of non-union members to pay fair share fees on First Amendment grounds. After having spent years inviting such a case and laying the groundwork for his decision in dicta, Justice Alito delivered the opinion of the court finding the fees unconstitutional and requiring that employees opt-in, not opt-out of paying those fees. In deciding for Janus, Alito and the majority overturned over 40 years of precedent under the Abood v. Detroit Board of Education, 431 U.S. 209 (1976). Justice Kagan, joined by Justices Ginsburg, Breyer and Sotomayor dissenting, penned a strong main dissent.

A short synopsis of Alito's opinion for the Court: Alito began with the premise that the First Amendment bars a state from requiring its residents to "sign a document expressing support for a particular set of positions on controversial public issues", and requiring someone to pay for speech by someone else also raises First Amendment concerns. The "labor peace" and "free rider" arguments that underscored the Court's opinion in Abood, Alito found unpersuasive and insufficient as ground to restrict employees' free speech rights. Alito pointed to the federal government and right to work states, where he said there is no evidence of the "pandemonium" that the Abood Court imagined. Having concluded that fair share fees violate the First Amendment, the Court then moved on to overturning Abood. The decision found that Abood was poorly reasoned because it relied on a different line of First Amendment questions and was too permissive in its review standard. It also had proven to be unworkable, in that it is so hard to distinguish what nonmembers can and cannot be required to pay for. The Court also noted that Abood was decided in a different legal and economic environment, with public spending having skyrocketed thus possibly giving collective bargaining a greater weight than it might have previously had. The Court further noted that unions and public employers have relied on Abood and the constitutionality of fair share fees is not enough reason to keep Abood. Alito acknowledged that the decision, "may cause unions to experience unpleasant transition costs in the short term, and may require unions to make adjustments in order to attract and retain members." But, he found that this did not outweigh the "many billions of dollars" that have been taken from non-members for public-sector unions.

While the decision is viewed as a significant blow to public sector unionism, there are some important takeaways for the brave new post-Janus world that you should be aware of. First, Janus only effects fair share fees. It does not alter any of the other rights or obligations regarding public sector unions and collective bargaining. Employees are still allowed to join organize and join unions, employers are still obligated to bargain with unions and existing collective bargaining agreements remain in effect. Employees who wish to continue to pay fair share fees must sign a new form affirmatively opting for the fair share deduction. Furthermore, Janus does not require that employees sign new membership cards. Some unions have decided to have employees resign cards that make a stronger statement regarding their belief in and support of the union. However, Janus does not require that a union have all of its members resign for their membership to be valid, nor does it require that employers obtain First Amendment waivers from dues paying members. Again, Janus only effects fair share paying non-members.

Similarly, the decision only impacts the deduction and remittance of fair share fees, not union membership dues. Employers should continue to deduct membership fees per any contractual provision, and, to reiterate, no

First Amendment waiver or new membership card must be presented for those membership dues deductions to continue. However, any fair share fees collected and/or distributed after Janus should not be retained by the Union. Even if the fair share fees were collected before, or were collected to cover a period before the decision, but were not actually paid to the union until a date after the decision, such fair share fees should be returned to the employer for remittance to the non-member. If for some reason that is not possible, the money should be placed in an escrow account until a system to remit the money to the non-member has been established. The decision became effective immediately, so any fair share fee money that the Union accepts after the decision was issued is illegal.

Of concern post-Janus is the right-to-work organizations' continued efforts in light of the decision to undermine public sector unionism. It has been reported that groups had door knocking campaigns already in place for the day after the decision in order to convince California teachers to leave the union. An important issue to keep an eye out regarding your members and their information is any FOIA requests that come in from these groups requesting members' information. As Attorney General Lisa Madigan noted in her press release, dated July 20, 2018, what information a public employer can release is governed by the state FOIA Act. Employees' home addresses, home telephone numbers, personal cell phone numbers and personal email addresses are protected from disclosure to third parties as private information. The Union, however, is entitled to names and addresses of members.

Also of importance is notifying your state and international organization should any former fair share fee members file a lawsuit against the union regarding the deduction of fair share fees. It is expected that there is future legal action planned by right to work groups, including possible litigation around past fair share fee deductions in order to obtain rebates.

On a final note, Mark Janus retired from his state of Illinois job on Friday, July 20. He is leaving to work for the Illinois Policy Institute, a conservative think-tank group. His fellow state workers threw a retirement party for him, complete with cake. It was a union members' only party, so Mr. Janus was not able to attend.

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