

The US Supreme Court decided on June 27, 2018 that public sector unions may no longer collect so-called “fair share” fees from non-members. The decision will have broad implications for public sector unions and employers.

Fair share fees are charged to individuals who fall within a bargaining unit, but choose not to join the union. Typically, employers deduct the fees directly from employee paychecks and pay the money over to the union. Fair share fees may only be used for activities “germane” to collective bargaining. The Court’s decision prohibits employers from continuing to withhold fair share fees. Individuals who do not join their unions will no longer have to pay for representation.

In the case before the Court this year, *Janus v. American Federation of State, County and Municipal Employees, Council 31*, the employee argued that the fair share fees violated his First Amendment right to free association – basically his right to choose not to have anything to do with the union. AFSCME, on the other hand, argued that doing away with fair share fees would allow people to free ride on the union’s services. All bargaining unit members are still entitled to the protections of the union contract, even if they are not union members. Thus, if people are not paying dues to the union, they are getting those protections for free.

Janus asked the Court to overturn its 1977 decision in *Abood v. Detroit Board of Education*, where the Court upheld fair share fees in the public sector. In recent years, the Court has backed away from that position, placing increasing limits on union rights. The Court considered this issue in 2016 in *Friedrichs v. California Teachers Association*, but deadlocked 4-4.

Now, in *Janus*, a 5-justice majority has said fair share fees violate the First Amendment. “Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning,” the majority wrote. “Compelling a person to subsidize the speech of other private speakers raises similar First Amendment concerns.” The majority found that neither the promotion of “labor peace” nor the concern that non-members would “free ride” on union work were sufficient concerns to justify requiring public employees to pay fair share fees.

Short-term Impact

The immediate impact of the Court’s decision is still being evaluated and may depend upon specific language in your collective bargaining agreement. You will need to get an updated list of members from your union(s), consistent with your collective bargaining agreement. Some collective bargaining agreements only allow individuals to opt in or out of membership once during the term of the contract. Check your agreement or consult with counsel regarding those opt-in/opt-out rules.

Long-term Impact

In the long term, *Janus* could have a significant impact on public sector unions. In many unions, individuals may now choose not to join the union to avoid the cost of membership while still benefiting from the protections the unions provide. While the Court has now settled the individuals’ First Amendment concerns, the unions may be the next to bring a constitutional challenge.

It is likely unions will bring challenges to their duty to represent individuals who do not pay for their services. This could also be a First Amendment claim –the argument that the government is forcing unions to associate with individuals who refuse to contribute to their cause. The next question for the Court could be whether unions really do have a duty to represent everyone in the bargaining unit, even if those individuals are not paying dues.

We have already seen some limited movement by unions toward eliminating non-dues-paying individuals from the bargaining unit entirely, though it is not clear the State Employment Relations Board (SERB) will sign off on those types of changes to contracts’ representation clauses. If SERB does approve those types of changes, public employers could be facing a situation where some employees fall under the union contract, while others, performing the same duties, can individually negotiate their terms and conditions of employment.

Next Steps

Review your contract(s) for provisions addressing what happens if one section of the contract is contrary to law. This decision could trigger that severability provision regarding any fair share deduction language. Consult with counsel regarding any questions on this issue.

Review your contract(s) for procedures addressing how and when you may cease collecting union dues and fair share fees as the Court has indicated, "Neither an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay." Consult with counsel regarding the implications of that statement and appropriate procedures for ceasing collection of dues if necessary.

Contact the presidents and labor relations consultants for each of your unions to discuss the impact of Janus on the fair share fees from non-members' paychecks.

Ensure each of your unions provides you with an updated membership list as required in your collective bargaining agreement and that deductions going forward from that point are consistent with the updated list.

Check your contract(s) for indications of how often employees may make the decision to enter or exit the union. Again, consult with counsel if you have any questions.

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