Janus v. AFSCME: SCOTUS Rejects Mandatory Agency Fees For Public Sector Employees

by Lisa M. Pooley & Patrick M. Glenn

In a significant decision for all public agencies, yesterday the U.S. Supreme Court ruled in a 5-4 decision that the First Amendment prohibits public employees from being compelled to pay what are known as "agency fees" when they choose not to join their union. *Janus v. AFSCME,* No. 16-1466 (June 27, 2018).

In so holding, the Court overruled its 1977 decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). In *Abood*, the Court held that requiring nonmembers to pay an agency fee advanced the state interests of promoting "labor peace" and avoiding free riders and thus did not run afoul of the First Amendment. Under *Abood*, unions could charge nonmembers a fee for union expenditures attributable to those activities "germane" to the union's collective bargaining activities. Unions were not allowed to charge nonmembers for the union's political and ideological efforts.

Yesterday, the Court overturned *Abood* and held that such agency fee arrangements violate the First Amendment. The Court found that requiring payments to unions that negotiate with public agencies impermissibly compels workers to "subsidize the speech of . . private speakers." The Court found that *Abood*'s line between charges for political vs. nonpolitical union activities "has proved impossible to draw with precision." For example, in *Janus*, nonmembes were required to pay for unspecified "[l]obbying expenses" and for "services that may ultimately inure to the benefit of the members of the local bargaining unit." The Court found that such a formulation was "unworkable" as it was "broad enough to encompass just about anything that the union might choose to do."

The Court also held that the justifications for agency fees set forth in *Abood* do not survive the "exacting scrutiny" required for infringements upon First Amendment rights. The Court noted that unions effectively represent millions of public employees in jurisdictions that do not permit agency fees. The Court reasoned that "labor peace could be achieved 'through means significantly less restrictive of associational freedoms' than the assessment of agency fees." Further, the Court held that "avoiding free riders is not a compelling state interest" to overcome First Amendment objections. The Court left open the possibility that unions could charge individual nonmembers to pay for representation in

disciplinary grievance proceedings.

Employer Take Away

The Court effectively has invalidated any state law or collective bargaining provision that authorizes agency shop arrangements requiring represented employees to pay an agency fee to the union as a condition of continued employment. In California, the Meyers Milias Brown Act ("MMBA"), Government Code § 3502.5, allows agency shop agreements. As a result, virtually every collective bargaining agreement with public agencies in California provides for agency fee deductions for represented employees. Therefore, we recommend the following next steps for California public employers:

1. Immediately develop a plan to discontinue paycheck deductions for agency fees;
2. Compile an accurate list of all agency fee payers in your agency;
3. Develop a plan to adjust the fee payment to the Union;
4. Review your collective bargaining agreements for any agency fee or wage deduction arrangement, including the mechanics of fee deduction such as timing, amount, and frequency;
5. If you are contacted by a Union to bargain over the impact of *Janus*, we recommend that you contact your labor counsel to evaluate whether your contracts may require effects bargaining; and
6. Exercise care in communicating with employees about *Janus* and its effects on public employees. Yesterday, Governor Jerry Brown signed SB 866, a fast-tracked budget trailer that requires public employers to engage in a meet and confer process with unions regarding any "mass communication" to employees or applicants concerning their rights to join/support or refrain from joining/supporting their union. Under the Meyers Milias Brown Act (Government Code sections 3500 et seq.), California public employers may not deter or discourage public employees from becoming or remaining members of a Union. Public employee unions are on high alert for any perceived unfair labor practices by public employers in the wake of the *Janus* decision. It is appropriate to inform agency fee payers that there will be a change in their paychecks because of the Supreme Court's ruling in *Janus*, (e.g. through a payroll stuffer). However, avoid informing all employees that if employees choose to leave the union, they will no longer be required to pay an agency fee. Such a communication could put the employer at risk for an unfair labor practice claim.

If you have any questions, please contact your Hanson Bridgett attorney.

For more information, please contact:

Lisa M. Pooley, Partner
415-995-5051
lpooley@hansonbridgett.com

Patrick M. Glenn, Partner
415-995-5047
pglenn@hansonbridgett.com