THE PUBLIC SECTOR

Abood: in memoriam

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Now that the U.S. Supreme Court has decided *Janus v. AFSCME et al.* by a 5-4 margin, one of the most heavily anticipated labor law issues in decades is settled. The Court's 1977 decision in *Abood v. Detroit Board of Education* has been reversed and deemed wrongly decided. Agency shop—a public-sector labor law fixture for more than 40 years—is now unconstitutional and, in the view of the Supreme Court majority, always has been.

Background

Agency shop's basic purpose is to require nonmembers to pay a fee to the union that represents them in collective bargaining. Fees may, and often do, fund activities that nonmembers oppose, which implicates their rights of free speech and freedom of association. Nevertheless, the Supreme Court upheld the constitutionality of agency shop in *Abood* because of the importance of public-sector collective bargaining. As a result, nonmembers could be required to help subsidize union activities and could be barred from being "free riders" who benefit from representation without paying toward its costs.

The Court discarded that reasoning in *Janus,* concluding that *Abood* was wrongly decided. Writing for the majority, Justice Samuel Alito said that it is constitutionally offensive for nonmembers to be compelled to subsidize a union whose positions and activities are offensive to them, and that isn't outweighed by either the importance of public-sector bargaining or the interest in avoiding "free riders."

The Court derided *Abood*'s characterization of nonmembers who prefer not to contribute as "free riders," observing that a nonmember who declines to pay an agency fee "is not a free rider on a bus headed for a destination that he wishes to reach but is more like a person *shanghaied* for an unwanted voyage." Leaving no doubt on this point, the Court added a pithy quote from the writings of Thomas Jefferson: "To compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical."

Effect of Janus

With the Court's repudiation of *Abood,* public-sector unions and public employers can no longer be parties to mandatory agency shop arrangements. Unions will now need to convince bargaining unit employees that the benefits of being dues-paying members outweigh the burden of having dues deducted from their paychecks. Otherwise, employees who benefit from the fruits of union representation will be able to decline to pay for it unless they choose to join a union, pay dues, and be subjected to the strictures of a union's constitution and bylaws.

In a vehement dissent, Justice Elena Kagan maintained that *Abood* defined a workable system relied on by 20 states and thousands of collective bargaining agreements covering millions of employees. She pointed out that *Abood* accommodated the First Amendment interests of objecting nonmembers by prohibiting compulsory funding of a union's political and ideological activities outside the collective bargaining sphere. And on a practical level, she predicted that *Janus* will result in dues-paying members, who will have to pick up the financial slack caused by nonpayers, to "begin to feel like suckers, and quit the union." Responding to that point, the majority held that it has taken far too long for agency fee payments to come to a halt, given that "billions of dollars have [already] been taken from nonmembers and transferred to public sector unions in violation of the First Amendment."

Janus will have a profound effect on national politics. Unions representing nonsworn employees are extremely active in the electoral process through campaign contributions, educating their membership, lobbying, and providing staff and volunteer support to campaigns. *Janus* is bound to affect all of those activities. It will also substantially reduce unions' ability to support candidates for office, which may have an effect on federal legislation and, ultimately, the federal judiciary.

Union and legislative reactions to Janus

Given that *Janus* made agency shop illegal nationwide, most public employee unions and public employers have taken immediate steps to stop deducting agency fees. Not doing so would lead to a risk of claims by nonmembers against the union and the employer. However, unions will certainly be seeking agreements from public employers to offset the

impact of *Janus* through heightened access to employees, involvement in new employee orientations, and negotiations over lawful alternatives to agency shop.

The California Legislature has taken steps to help public-sector unions out in their time of need. Government Code Section 3550 (effective January 1, 2018) prohibits public employers from deterring or discouraging employees from becoming or remaining members of a union. Senate Bill 866—new legislation signed by Governor Jerry Brown on the day *Janus* was issued—extends that prohibition to job applicants and precludes statements that would discourage employees from paying dues or agreeing to fee deductions. It also requires employers to meet and confer with unions before sending any "mass communication" to employees about their rights to join or support—or to refrain from joining or supporting—an employee organization.

Bottom line

Janus will have a profound impact on most public-sector unions. Public safety unions, which historically have high membership percentages, likely won't be significantly affected. The impact of *Janus* on national politics will be equally profound, given the millions of dollars public-sector unions contribute annually toward Democratic causes and candidates for office. Given all of that, expect increased activity by unions trying to prove their worth to members and nonmembers alike. Also, expect unions to be more active in seeking access to new employees during employer orientation sessions.

Public-sector employers, and the public at large, should be concerned about recent legislation prohibiting noncoercive speech on issues tied to unionization. As the Supreme Court forcefully affirmed in *Janus,* freedom of speech is fundamental to our society. Prohibitions against noncoercive employer speech expressing an opinion about the benefits or detriments of unionization are questionable as public policy and may be legally questionable, as well.

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