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Janus v. AFSCME: Implementation Issues

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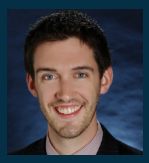

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On June 27, we issued an alert [http://www.shipmangoodwin.com/us-supreme-court-declares-compelled-public-sector-agency-fees-unconstitutional] concerning the decision of the United States Supreme Court in *Janus v. AFSCME* (June 27, 2018). There, the Court held that mandatory agency fees (also sometimes known as service fees) for public employees violate the First Amendment rights of the affected employees. We wish now to follow up with further observations and recommendations for actions that public employers should consider to comply with the ruling.

- **Stop all agency fee deductions.**

  Under Connecticut law, employers should always have an authorization for deductions from wages (except for state and federal income tax and social security withholding). Therefore, most public employers have been deducting dues and agency fees from wages pursuant to written authorizations. One may now claim, however, that such authorizations for agency fee deductions were not voluntary because they were required in order to keep one's job. Accordingly, employers should not rely on any such authorizations (or wait until the employee rescinds them). Rather, all agency fee deductions should cease immediately. Indeed, several large unions have already notified public employers to stop taking deductions.

- **Refer employees asking to withdraw from the union or to stop dues deductions to the union.**

  Some public employers have already been approached by union members with requests for information on how to withdraw from union membership and/or how to stop dues deductions. Public employers should comply with written rescissions of authorization to withhold dues (depending upon the wording of the rescission, which may be dependent upon termination of union membership), because employers may not withhold from pay except as authorized in writing by the employee (or otherwise by statute). However, public employers should take care not to advise employees on how to withdraw from union membership or to rescind such authorizations. Rather, we recommend that public employers refer employees making such requests to the union and/or to the State Board of Labor Relations. Union membership and dues deduction is a matter between the individual employee and the union, and there may be union rules as to when and how an employee may terminate union membership and the concomitant obligation to pay dues. If public employers get directly involved in advising employees how to terminate their

union membership or to rescind their authorization to withhold dues, the union may well claim interference with protected union activity. Given the likelihood of such requests, we further recommend that public employers reach out to their unions now to discuss how best to handle such requests in an effort to promote good communication and to avoid disagreements later.

- **Review the collective bargaining agreement.**

  Agency fee deductions have been a creature of contract, and the *Janus* decision will require that contract changes be made. Specifically, any contract language that requires agency (or service fee) deductions was rendered illegal and unenforceable when the Court handed down its decision in *Janus*. What happens next will depend on the wording of the collective bargaining agreement.

  Many contracts have severability clauses, also known as "savings" clauses because they "save" the contract from being illegal and unenforceable. Severability clauses provide that the illegal provision is void and that the rest of the contract carries forward. When the contract contains a severability clause, no formal action to amend the contract is required, and as described below, we do not believe that public employers have a duty to negotiate with unions over the impact of the *Janus* decision.

  By contrast, many collective bargaining agreements do not have savings clauses. In such cases, the contract must be considered as a whole, and after *Janus* such contracts are subject to legal attack because they contain an illegal provision. Nonetheless, we recommend that the public employer address the matter without drama and seek a simple contract amendment or even memorandum of understanding confirming that the agency fee provision is void and that the rest of the contract carries forward.

  Public employers should not let unions expand any such negotiation beyond simply striking the offending provision. While the *Janus* decision may have a significant impact on some unions, we do not believe that unions have the right to demand negotiations over the impact of that decision on them. Public employers have a duty to negotiate over changes that affect wages, hours and conditions of employment for members of the bargaining unit, and here the impact is on the union, not the employees. Nonetheless, we understand that one union has already raised the issue of impact negotiations, and we may anticipate further developments on this issue.

  In any event, we expect that unions will share the public employer's interest in a prompt resolution of this matter because it would be liable for any continued deductions in violation of the rights of the affected employees. Most collective bargaining agreements include an indemnification provision, stating that the union will indemnify and hold the public employer harmless against claims arising from the deduction of dues or agency fees.

- **Work cooperatively with the affected unions.**

  In addressing these issues, it is important to work cooperatively and respectfully with the affected unions. The unions will continue to be the exclusive bargaining representative

for all members of the bargaining unit. How public employers deal with this development may affect working relationships for better or worse.

We recommend that public employers send out a simple notice to agency fee payers about the *Janus* decision, with legal advice as appropriate. We also recommend that public employers confer with the union in advance on any such communication with agency fee payers. Significantly, however, the *Janus* decision has no impact on dues payers, and there is no need for a general communication about the decision. Indeed, advising dues payers about the *Janus* decision could invite a charge from the union that the public employer is seeking to undermine the union or otherwise inappropriately involving itself in union matters.

- **The *Janus* decision should not be applied retroactively.**

Some agency fee payers may not be satisfied that they are now relieved of agency fee obligations as of June 27, 2018, and they may ask for reimbursement for past deductions of agency fees. We do not believe that they have any right to such reimbursement. In 1977, the United States Supreme Court authorized agency fees. *Abood v. Detroit Board of Education*. While the Court did refine the rules in a few decisions in the intervening years, agency fees provisions were enforceable until the *Janus* decision last week. Nonetheless, we anticipate that some individuals may bring claims for past agency fee deductions, and the outcome of litigation over such claims is uncertain. However, when governmental agencies act pursuant to settled law, they are immune from liability for such actions unless and until the law changes. By responding promptly to the Court's decision in *Janus*, public employers should have no liability for past agency fee deductions.

Questions or Assistance:

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