Portfolio Media. Inc. | 111 West 19th Street, 5th floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

All Unions Likely To Feel The Impact Of Janus V. AFSCME

By **Joseph Gross and Adam Primm** (July 11, 2018, 4:37 PM EDT)

Joseph Gross

Adam Primm

The U.S. Supreme Court recently dealt a devastating blow to unions representing public-sector employees and their ability to collect agency or "fair share" fees from those who choose not to join the union. In its June 27, 2018, decision in Janus v. AFSCME, the Supreme Court found that public-sector employees' First Amendment rights outweigh their unions' need for those fees.

Mark Janus, an Illinois children's rights worker, refused to join the union that represented the employees in his agency. Though not a member of the union, he was forced to pay fair-share fees under Illinois law. Janus filed a lawsuit to stop paying those fees. After several years, the case was accepted by the Supreme Court. In a 5-4 decision, the court held that a public employer's forcing nonmembers to pay union dues was akin to forcing employees to subsidize political speech — a violation of the First Amendment. The Janus majority found, "The First Amendment is violated when money is taken from nonconsenting members for a public-sector union; employees must choose to support the union before anything is taken from them." Thus, "neither an agency fee nor any other form of payment … may be deducted from an employee … unless the employee affirmatively consents to pay." The majority explained that a union's actions in bargaining with a local or other government over pay and working conditions is inherently political activity, which public-sector employees cannot be forced to fund.

In the short term, Janus severely damages unions that represent public-sector employees. Although only 6 percent of private-sector employees are union members, approximately 34 percent of public-sector employees are represented by unions.

Although Janus does not directly affect private-sector employees, it will impact unions representing both private- and public-sector employees, as well as union funding of political causes.

Affirmative Consent

Janus held that the First Amendment is violated any time money is taken from a nonconsenting public-sector employee and routed to a union. Specifically, "neither an agency fee nor any other form of payment to a public-sector union may be deducted from an employee, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay." This question of "affirmative consent" could be the next legal battleground.

Most unions already utilize authorization cards through which they obtain "consent" to deduct dues or fair-share fees from employee wages. However, whether these cards can be considered affirmative consent is an open question, as the employees signing them were presented with just one option: Pay the union's dues or the union's reduced fair- share fee. The option now required by Janus of paying nothing was generally never an option.

Public employers are now considering whether to immediately cease deducting fair-share fees or to

wait until an employee explicitly revokes a prior authorization. Some public-sector unions, like the National Education Association, or NEA, expected state agencies to stop collecting fair-share fees immediately. Using the same logic, some commentators have suggested that continuing to deduct fair-share fees could expose public employers to litigation over whether they violated their employees' First Amendment rights by continuing with the status quo.

A public employer could provide consent forms to their fair-share employees to explicitly confirm their wishes to stop their fair-share deductions, but that could be considered unlawful direct dealing with employees.

Decrease in Membership and Revenue

The most direct impact of Janus is the potential decrease in the coffers of unions representing public-sector employees. Many public-sector employees may now decide to drop their union membership. Prior to the ruling in Janus, the Illinois Economic Policy Institute estimated that union membership among state and local government employees could decrease by 8 percent while others estimate it could be more. If enough employees withdraw their membership from their unions, the unions could lose their majority status with some employers and risk not being recognized as the bargaining representative of their employees.

In addition to an 8 percent reduction in union dues from the loss of memberships, unions will no longer be able to collect fair-share fees from employees who were not members already. Approximately 3 percent of the NEA's budget is based on those fair-share fees. That means Janus could result in an 11 percent reduction in revenue received by unions. That reduction could impact a number of things. First, unions might play a lesser role in political campaigns because their war chests will be significantly leaner. Second, public-sector unions might watch their expenses a bit more. For example, the number of grievances pursued to arbitration may be reduced as unions could choose to engage in more rigorous review of the merits of those grievances.

To counter their reduced revenue, unions have a few options. They could increase their organizational activities to attract and/or retain members or they could raise dues. Raising dues would seem to reduce their potential success in attracting new members or retaining current ones, so operations in the short term may be difficult as the unions attempt to stretch their soon to be reduced revenues.

Political Power

Directly related to the unions' reduced funds will be their reduced political clout. Money talks, especially in elections, and a substantial decrease in union revenues will probably result in a corresponding decrease in union spending in favor of certain political candidates. In the 2016 election cycle, public-sector unions spent $64.6 million on campaigns — 90 percent of which went to Democrats.

Possible Weakening of Union Brotherhood

A possible side effect of Janus is that it could fracture what was previously viewed as a single, cohesive workforce. If public-sector unions no longer are funded, employee solidarity — a pillar of union strength — could be undermined. In fact, one alternative approach — implemented through new legislation in New York — limits a public union's duty of fair representation to those who do not pay dues to merely negotiating and enforcing a collective bargaining agreement. That limited obligation is much less than the individual representation dues-paying members can receive from their unions, creating two different classes of employees within a bargaining unit.

Private Sector and Right-to-Work

The Janus decision does not extend to private-sector unions. Nonetheless, right-to-work advocates may be emboldened by the ruling and use it as a stepping stone for additional victories. Janus essentially makes all public-sector workplaces right-to-work. Considering that consequence of Janus and the fact that right-to-work states now represent a majority of states — 28, state legislators in non-right-to-work states may try to continue the momentum from Janus in their own states.

On June 28, the National Right to Work Legal Defense Foundation asked the Supreme Court to

reconsider a Sixth Circuit Court of Appeals decision that private-sector workers cannot sue to challenge rules about when and how they can revoke their union membership and automatic dues deduction.[1] Currently, employees' ability to revoke authorizations and dues deductions is highly regulated by unions, including some requiring that revocations occur by certified mail within a limited time period each year. The Sixth Circuit decided that the claims belonged before the U.S. Department of Justice Department or the National Labor Relations Board. The Janus decision, which now requires public-sector employees to provide affirmative consent for union-designated deductions, seems inconsistent with requiring private-sector employees to jump through hoops to opt out of such fees and/or membership.

Liberal Legislation

Democrats in the U.S. House of Representatives have already introduced the Public Service Freedom to Negotiate Act to reaffirm policy aimed at encouraging collective bargaining, which would require public employers to recognize and reach a written agreement with unions selected by their employees. The legislation would also allow for the deduction of union fees that employees authorize and provides access to arbitration, mediation and other procedures to resolve disputes.

Furthermore, 23 mayors in cities like New York, Philadelphia, Minneapolis, Sacramento and Honolulu signed a pledge outlining efforts to "empower working people and make it easier for them to join in unions." The mayors promised to work with local public-sector unions to share the benefits of being union members with new hires, provide new employees access to union representatives, involve union representatives at new employee orientations and give existing bargaining unit members regular opportunities to meet with their union representatives. The pledge also honors electronic signatures and adopts "employer-neutral policies" that prevent supervisors or managers from making statements that discourage employees from being union members. The pledge standardizes time periods for employees to opt out of union membership and allows union participation at training seminars.

Janus Task Force

The National Right to Work Foundation has already created a "Janus Task Force" — led by William Messenger, the attorney who represented Janus at the Supreme Court — to assist employees in exercising their First Amendment rights to cease paying fair-share fees. The task force will provide information and guidance about employee rights and how to exercise them and will offer no-cost legal aid to any public-sector employee who does not want to join a union or pay fair-share fees.

Joseph N. Gross is a partner and Adam Primm is an associate at Benesch Friedlander Coplan & Aronoff.

[1] Ohlendorf v. United Food & Commercial Workers International Union, Local 876
