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Janus: The New Reality for Public Employers

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Today's Speakers



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Please Note:

The following discussion of the *Janus* decision and responses to it does not constitute legal advice, and should not be relied on without speaking with an attorney.



Agenda

- Pre-*Janus* background
- Brief explanation of *Janus* decision
- Public Employer obligations in the wake of *Janus*
- Impact on Union Security clauses
- Union bargaining demands
- Impact on unions going forward

OVERVIEW OF THE PRE-*JANUS* STATE OF AFFAIRS FOR PUBLIC SECTOR FAIR SHARE FEE AGREEMENTS

Pre-Janus

- *Abood v. Detroit Board of Ed.*, 431 U.S. 209 (1977): Allowed public unions to charge non-members fair share fees for non-political activity.
- IPLRA, 5 ILCS 315/6 and IELRA, 115 ILCS 5/11
- *Hudson v. Chicago Teachers Union*, 475 U.S. 292 (1986): Union's are required to provide nonmembers with "fair share notice."
- Quid pro quo for union security clauses is the indemnification provision. *Dixon v. City of Chicago*, 948 F.2d 355 (7th Cir. 1991)

***Janus v. American
Federation of State,
County, and Municipal
Employees, Council 31,***

Janus: Majority Opinion

- 5-4 Decision
- Majority opinion delivered by Alito, joined by Roberts, Thomas, Kennedy, and Gorsuch
 - *Abod* is inconsistent with First Amendment Principles.
 - Fees are not supported by the First Amendment's original meaning.
 - *Pickering v. Board of Ed. Of Township High School Dist. 205, Will Cty.*, 391 U.S. 563 does not support fair share fee arrangements
 - *Stare decisis* does not require retention of *Abod*

Janus: Dissent Reasoning

- Justice Kagan, joined by Ginsberg, Breyer, and Sotomayor issued the dissent
- *Aboud* struck a stable balance between First Amendment rights and government employers' interests in running their workforce.
- The decision fit within the Court's First Amendment framework
- The *Janus* decision will have large-scale negative consequences
- The majority improperly disregarded the usual principle of *stare decisis*.

Obligations in the Wake of *Janus*

- Cease collection of deductions except where employee has voluntarily agreed to the deductions
 - CAUTION, there is more than meets the eye here



Union Security Clauses

- Fair Share provisions are unenforceable
 - “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 payment, unless the employee affirmatively consents to pay.” p. 48.

- Simply carving out reference to fair share or agency fees from the text of a CBA article may not be sufficient

- Effects bargaining

Illinois Wage Payment and Collection Act

- Illinois Wage Payment and Collection Act, 820 ILCS 115/9 Prohibits wage deductions except where:
 1. Required by law
 2. To the benefit of employees
 3. In response to a valid wage assignment
 4. Made voluntarily with express, written consent by the employee at the time of the deduction
 5. Made by certain public employers (see Act) to pay a debt owed by the employee
- *Possible liability for an employer for improper dues deduction*

Union Bargaining Demands

- *Pre-Janus*: Fair Share was default option
 - ❖ Proposals to be notified of all new hires
 - ❖ Proposals to be notified of and invited to orientation sessions
 - ❖ Proposals to be allowed to address employees during the year
 - ❖ Demand employer neutrality

Union Concerns About 3rd Parties

- Hostile organizations submitting FOIA requests regarding employee dues authorization
 - ❖ Proposals that employer provide notice of FOIAs
 - ❖ Proposals that employers not turn over employee information

Impact on Public Sector Unions?

- Attempts to Amend the IPLRA and IELRA
 - ❖ Union is the exclusive representative for all employees in the Unit
 - ❖ Unfair Labor Practice for union to breach its duty to represent non-members
- Litigation arguing duty to represent the interests of non-members violates Union's First Amendment rights.

Impact on Public Sector Unions

- Other Solutions to address “free riders”
 - ❖ Charge hourly fees for consultation about grievances
 - ❖ Charges for outside counsel
 - ❖ Employee responsibility for arbitrator fees
 - ❖ Other service charges

Impact on Public Sector Unions

Public Sector Union Statistics

<u>State</u>	<u>2010</u>	<u>2011</u>	<u>2012</u>	<u>2013</u>	<u>2014</u>	<u>2015</u>	<u>2016</u>	<u>2017</u>
Indiana	32.1	31.4	26.8	25.6	30.1	31.7	31.9	29.2
Wisconsin	49.6	53.4	40.3	37.6	33.8	32.1	26.3	21.9
Illinois	52.6	54.1	53.4	53.9	57.8	56.0	52.7	52.8
Minnesota	59.2	61.8	56.9	56.3	56.1	48.7	49.3	54.5
Michigan	51.7	55.0	55.4	56.9	53.3	52.4	49.7	51.9

What *Janus* Doesn't Mean in Illinois

- The public sector union movement in Illinois will not disappear; it may not even be all that weakened
- Many public sector unions have deep roots, established long before there was compulsory collective bargaining:
 - 1915 – FOP established
 - 1916 – AFT established (in Illinois)
 - 1918 – IAFF established
 - 1932 – AFSCME established
- Police and Fire unions will not necessarily suffer
- Many police unions offer legal defense plan benefits, limited to members
- Teachers and skilled trades likely to remain strong

Other Questions for Public Employers

- Will Illinois reconsider the exclusive representation principle?
- Will unions become energized and recover their passion for organizing/improving communications with employees they represent?
- Will employers overreach in their dealings with unions and employees, driving employees to become members?

QUESTIONS

