



In a blow to public unions, SCOTUS holds that public employees cannot be required to pay union fees

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On June 27, 2018, the U.S. Supreme Court held in *Janus v. AFSCME* that public sector employees who are not members of the union do not have to pay so-called “agency fees,” because requiring such payments violates their First Amendment rights.

In *Janus*, an Illinois public employee refused to join a union, because he disagreed with many of its positions. State law, however, required that he pay a reduced fee to the union to cover the union’s collective bargaining activities but not its political and ideological projects. This arrangement had been acceptable under an earlier Supreme Court decision, *Abood v. Detroit Board of Education*, which was expressly overruled in the *Janus* opinion.

Previously, agency fees were justified on two grounds, despite implicating the First Amendment. First, the fees promoted “labor peace.” However, the *Janus* decision cited the fact that since the *Abood* decision, 28 states have passed “right to work” laws prohibiting agency fees, and any concerns of labor disruption have been proven to be unfounded.

The second rationale was called the “free rider” problem. That is, nonmembers could reap the benefits of the union’s collective bargaining activities without paying their fair share. However, in *Janus*, the Court compared this argument to current non-agency fee states and noted that unions *voluntarily* choose to be the exclusive representative for both members and non-members, because it benefits the unions.

According to *Janus*, neither of these justifications supports limiting a public employee’s First Amendment rights when there are less restrictive means available to promote labor peace and avoid free riders. For example, the court noted that unions could

deny grievance representation to non-members altogether or charge a fee per service.

This Supreme Court decision will, in all likelihood, substantially affect public unions' bottom lines and membership rates. And public employers should be prepared for increased activity from unions to drum up support among their existing base and draw in new members. Collective bargaining may look quite different for public employers the next time around.

Authors

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