FREEDOM FOUNDATION

A WORKPLACE GUIDE TO *JANUS V. AFSCME*

How public employers can interpret and apply the U.S. Supreme Court's landmark ruling on labor relations.

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Overview: the *Janus v. AFSCME* decision

On June 27, 2018, the U.S. Supreme Court ruled in *Janus v. AFSCME* that it is unconstitutional to force public employees to fund union advocacy as condition of employment.

In *Janus*, Illinois state employee Mark Janus brought suit against his employer and union seeking to invalidate the Illinois statute authorizing public-sector unions to assess agency fees (often termed "fair share" fees) from public employees who were not members of a union but who nonetheless belonged to a workplace bargaining unit for which a union was designated as the exclusive representative.[1]

The Court agreed that such laws are unconstitutional, overruling its earlier 1977 decision in *Abood v. Detroit Board of Education*. In *Abood*, the Court had held that, although compulsory agency fees infringed workers' First Amendment rights to free speech and free association, such fees were justified by the compelling state interests of promoting "labor peace" and "avoiding free riders." [2]

Prior to *Janus*, therefore, states could require public employees to pay agency fees to cover certain union expenses.

In *Janus*, however, the Court made clear that the perceived interests in "labor peace" and "avoiding free riders" (among others) were insufficient to justify the infringement of public employees' First Amendment rights caused by agency fees.[3] The Court also held that public-sector collective bargaining is inherently political speech, that *Abood* "did not sufficiently take into account the difference between the effects of agency fees in public and private sector collective bargaining," and that *Abood* did not "foresee the practical problems that would face objecting nonmembers" as it relates to which union expenses they could be legally obligated to pay for.[4]

The Court held:

"*Abood* was poorly reasoned. It has led to practical problems and abuse. It is inconsistent with other First Amendment cases and has been undermined by more recent decisions. Developments since *Abood* was handed down shed new light on the issue of agency fees, and no reliance interest on the part of public sector unions are sufficient to justify the perpetuation of the free speech violations that *Abood* has countenanced for the past 41 years. *Abood* is therefore overruled." [5]

The Bottom Line:

Agency fee requirements in the public sector are now illegal in all 50 states. Under no circumstances may payments from public employees to labor organizations be compelled. This is true regardless of whether the employer deducts the fees or, if the employer does not deduct dues/fees directly from employees' paychecks, whether a union contends a worker must be discharged for not paying fees directly to the union. A public employer cannot discharge an employee for failure to pay in such circumstances.

1 138 S. Ct. 2448, 24060-61 (2018).

2 *See generally*, 431 U.S. 209 (1977).

3 138 S. Ct. at 2465-68.

4 *Id.* at 2480.

5 *Id.* at 2460.

Note: This guide is not intended to constitute legal advice related to any specific situation, union, or employee. Each factual scenario requires an analysis of the law and the language of the purported dues deduction agreement.

Step-by-Step: the scope of *Janus v. AFSCME* and how to apply it

In *Janus*, the U.S. Supreme Court did much more than simply rule that agency fees are unconstitutional.

The Court also held that the long-established use of “opt-out” schemes is unconstitutional, and that an agreement between a union and a public employee to pay union dues constitutes a waiver of the employee’s constitutional rights. Because the waiver of a constitutional right must satisfy a much heavier burden than that of a normal contractual right, such waivers must be proven by “clear and compelling” evidence.

The Court held:

“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 a payment, unless the employee affirmatively consents to pay. By agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed. Rather, to be effective, the waiver must be freely given and shown by ‘clear and compelling’ evidence. Unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met.” [6]

1. Opt-out schemes are illegal.

“Opt-out schemes” are agreements between a union and an employer which require the employer to deduct union dues/fees from an employee’s wages without the employee’s authorization. Under such an arrangement, deductions may cease only if an employee affirmatively objects to the automatic deductions.

Such schemes are now illegal in the public sector in all 50 states.

In *Janus*, the Court made clear that no amount of money can be deducted from a public employee “unless the employee affirmatively consents to pay.” [7] This includes any type of money that an employer could theoretically deduct and forward to a union, however it is categorized (e.g., “initiation fees,” “processing fees,” etc.).

The Bottom Line: Public employers must now obtain “clear and affirmative consent before any money is taken” from an employee’s wages.[8]

6 *Janus*, 138 S. Ct. at 2486.

7 *Id.*

8 *Id.*

2. Agreements to pay union dues must constitute valid constitutional waivers.

"[B]y agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed." [9]

In the above sentence, the Court made clear that an agreement between a union and a public employee requiring the employee to pay union dues must constitute the valid waiver of the employee's constitutional right to not fund union advocacy.[10] This is significant because the party seeking enforcement of a constitutional waiver must satisfy a much heavier legal burden than the normal burden necessary to show the waiver of a contractual right.

In evaluating the burden necessary to show that a public employee validly waived his or her constitutional right under *Janus*, it's important to keep several points in mind.

First, courts never presume a waiver of constitutional rights.[11] This is why opt-out schemes are now illegal in the public sector.[12]

Second, valid waivers of a constitutional right "must be freely given and shown by 'clear and compelling' evidence." [13] This requires the party seeking enforcement of a constitutional waiver to show by clear and compelling evidence that the other party "voluntarily, intelligently, and knowingly" waived his or her constitutional right.[14]

The Bottom Line: In order for an agreement to pay union dues to be valid, a public employee must voluntarily, intelligently, and knowingly waive his or her right to not fund union advocacy. Any party seeking to enforce such a waiver must prove the waiver by clear and compelling evidence.

9 *Janus*, 138 S. Ct. at 2486.

10 The employee seeking to invalidate an agreement to pay union dues *may* have become a union member when signing the agreement to pay dues, but the agreement to pay dues would still be between a union and a *nonmember* employee because, *at the time immediately preceding the employee's signature on such an agreement*, the employee was not a member of the union.

11 *Id; see also, College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 682 (1999).

12 *See Janus*, 138 S. Ct. at 2486.

13 *Id.* (citing *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 145 (1967).

14 *See D.H. Overmyer Co. Inc. of Ohio v. Frick Co.*, 405 U.S. 174, 187 (1972) (applied to a waiver of due process rights); *See College Savings Bank*, 527 U.S. at 682 (cited in *Janus*)The Ninth Circuit adopted this standard related to First Amendment waivers. Leonard v. Clark, 12 F.3d 885, 889 (9th Cir. 1993) ("...First Amendment rights may be waived upon clear and convincing evidence that the waiver is knowing, voluntary and intelligent.").

3. An agreement to pay union dues must have been executed on or after June 27, 2018 to be valid.

As noted, "clear and compelling" evidence is a heavy burden in civil cases. It is much more difficult to satisfy than simply a preponderance of evidence.

The first requirement is that the constitutional right is recognized. A person cannot *knowingly* waive a constitutional right that has not been recognized by courts.[15] Thus, at a minimum, the waiver between the nonmember employee and the union must have been executed *after* the Court issued its decision in *Janus* on June 27, 2018.

Further, private sector precedent cited by the Ninth Circuit indicates that an agreement to pay dues is invalid if it was signed at a time when the worker was required to pay union dues (e.g., pursuant to a CBA's agency fee provision) and that requirement no longer exists.[16]

The Bottom Line: Any existing agreement to pay union dues that was executed before June 27, 2018 is invalid and unenforceable. A public employee's agreement to pay union dues is only valid and enforceable if it has been executed on or after that date.

15 *See Butts*, 388 U.S. at 145 ("We would not hold that Curtis waived a 'known right' before it was aware of the New York Times decision."). *See also, Felter v. Sout.hern Pac. Co.*, 359 U.S. 326, 336 (1959) ("...we doubt whether the right to revoke could be waived at all in advance of the time for its exercise..."); *see also, Walker v. Pepersack*, 316 F.3d 119, 127-128 (4th Cir. 1963) ("it is clear that he did not intentionally abandon a known right since there was no such right for him to abandon... before the Supreme Court's decision" recognizing the right.). *See* Pls.' Rep. Br., 24-30.

16 *NLRB v. Albert Van Luit and Co.*, 597 F.2d 681, 684 (1979) (citing *Penn Cork & Closures, Inc.*, 156 NLRB 411, 414-15 (1965)).

4. A valid agreement to pay union dues must also meet these other requirements.

In addition to being executed on or after June 27, 2018, an agreement to pay union dues must meet several other requirements in order to constitute a voluntary, intelligent, and knowing waiver.

1. The employee must be free from all forms of intimidation or coercion when presented with the waiver. Otherwise, the waiver is not "voluntary." [17] The circumstances must be free of any *appearance* of intimidation, coercion, trickery, word games, threats of the loss of rights, etc.

2. The waiver must be knowing and intelligent. This means a party seeking to enforce the waiver must show the employee both knew and understood his or her constitutional right to not fund union advocacy. At a minimum, the language of the waiver on its face must describe the right being waived and that the document constitutes a waiver of that right.[18]

3. The language itself must therefore include more than language permitting the employer or union to deduct union dues/fees from the employee's wages.[19] It must explicitly state that (1) employees have the unequivocal right to not fund union advocacy, that (2) the document being presented constitutes a waiver of that right, and that (3) declining to fund union advocacy will have no adverse effect on their employment.

4. The process for obtaining the waiver and honoring objections to union membership and dues deductions should not be entirely controlled by the union (e.g., notifying employees of their rights, processing employee objections to union membership and dues payments, etc.).[20]

5. It is in the public employer's interest to maintain the waiver or a copy of the waiver to be able to have and furnish proof that it exists.

The public employer and/or union will bear the burden of proving a constitutional waiver, meaning they must be prepared to counter the court's skepticism with "clear and compelling" evidence that overcomes the factors weighing heavily against a finding of waiver.

The Bottom Line: Any agreement to pay dues which purports to act as a waiver of a public employee's constitutional right to not fund union advocacy should meet the requirements listed above. These minimal requirements do not guarantee a court will find any particular document to be a valid constitutional waiver. But taking these steps significantly increases the likelihood that public employees' rights will be protected and public employers' liability will be limited.

17 "[A]ny evidence that" a person "was threatened, tricked, or cajoled into a waiver will, of course, show" that the person "did not voluntarily waive his privilege…" *Miranda v. Arizona*, 384 U.S. 436, 476 (1966).

18 *Fuentes v. Shevin*, 407 U.S. 67, 95 (1972) ("We need not concern ourselves with the involuntariness or unintelligence of a waiver when the contractual language relied upon does not, on its face, even amount to a waiver.").

19 *See, Id.* at 95-96.

20 Courts are also skeptical of processes related to dues payments that are "entirely controlled by the Union, which is an interested party." *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 301 (1986).

5. Dues cancellation requests

Many collective bargaining agreements contain clauses requiring the public employer to defer any dues cancellation requests they receive to the union for processing (for example, because a union wants to enforce a dues irrevocability card limiting an employee's ability to stop dues payments). However, because all agreements to pay union dues that were entered into before June 27, 2018 are invalid, public employers can be confident in their legal standing to process those cancellation requests. Since employees who have not affirmatively consented to dues deductions since *Janus* should effectively be treated the same as former "fair share" employees, their cancellation requests should be immediately processed when received by the employer.

Public employers may only refuse to process and/or defer an employee's dues cancellation request to the union when all the requirements for a valid waiver of an employee's constitutional rights under *Janus* are met. All other dues cancellation requests received from employees can and should be immediately processed. For this reason, it is in the employer's best interest to maintain copies of its employees' dues authorization agreements in its own file, especially if the union wants to enforce a dues irrevocability card which limits the employee's ability to stop dues payments. The employer should do its own due diligence to ensure such agreements constitute a valid waiver of an employee's constitutional rights.

The Bottom Line: As explained previously, public employers should stop deducting union dues or fees to begin with from any employee who has not adequately waived his or her constitutional rights under *Janus*. If such deductions have continued, however, public employers should immediately process any dues cancellation requests received from those employees.

Conclusion

Janus v. AFSCME not only made agency fees illegal, but placed the obligation to prove the legitimacy of union dues/fees deductions squarely on employers and unions.

A public employer should take every reasonable step to (1) protect its employees' constitutional rights, and (2) limit its own liability (financial and political). Public employers should not outsource their own liability or the protection of employees' constitutional rights to a party with a strong pecuniary interest in ensuring employees do not learn of their rights or exercise them.

The right recognized in *Janus v. AFSCME* is the right of the *individual employee*. Unions do not have a constitutional right to the money of employees.[21] The ability of a union to exclusively represent public employees and have public employers deduct union dues from employees' wages are extraordinary privileges[22] that take a back seat to employees' individual constitutional rights.

State law and collective bargaining agreements should reflect the priority courts place on employees' individual rights.

21 *Davenport v. Washington Education Ass'n*, 551 U.S. 177, 185 (2007) ("[U]nions have no constitutional entitlement to the fees of nonmember employees.").

22 *See Janus*, 138 S. Ct. at 2460 and 2467 (exclusive representation "substantially restricts the rights of individual employees," "confers many benefits on unions," and "results in a tremendous increase in the power" of the union).

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