

Supreme Court Issues *Janus* Decision

Today, the U.S. Supreme Court announced its much-anticipated decision in *Janus v. AFSCME*, (June 27, 2018), overruling *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), holding that mandatory “agency” or “fair share” fees are unconstitutional. The decision, which is effective immediately upon its announcement, means that public employers with unionized workplaces may no longer deduct state-mandated agency or fair share fees from employees. This decision only affects public employers in states that have authorized mandatory agency or fair share deductions.

Agency fee payments are a long-standing, state-authorized method to require public-sector employees to pay for union representation when the employee does not desire to become a union member. These fees, historically and in *Janus*, have been challenged on First Amendment grounds, under the theory that they constitute government-compelled speech. The *Abood* Court had ruled that any minor infringement of a free speech interest was justified by the state’s legitimate interest in preventing so-called “free riders” from undermining a union’s ability to represent the bargaining unit. In *Abood*, the Court found a balance was achieved by requiring unions separate agency fees used for collective bargaining from the portion of union dues used for “political” purposes. In *Janus*, the Court found this arrangement unconstitutional, invalidating agency fee laws in more than 20 states that have passed such laws.

Public employers in states with fair share laws should take the following steps:

Identify all processes currently in place for deducting and transmitting agency fees. The decision is effective immediately, so public employers should immediately determine how agency fees are deducted from non-union members’ compensation.

Immediately stop agency fee deductions. Public employers should stop the deduction of agency fees from the pay of non-union members immediately. No further deductions for these fees should be made absent a clear affirmative consent from an employee to any voluntary deduction. If the employer has withheld but not yet remitted agency fees, it should contact the union and confirm in writing whether the union desires to have those fees transmitted now. The employer should require specific indemnification from the union for a transmittal of those amounts.

Prepare for union requests for information and access. Unions will request both information pertaining to non-union employees and access to employees and/or to facilities to meet with employees to persuade non-union employees to become full union members or enter into a voluntary agency fee agreements. Public employers should review their collective bargaining agreements and ensure that they are prepared to comply with any permissible request made by a union representative, either for information or for access to facilities. Public employers should also be prepared for requests to modify existing collective bargaining agreements to increase access and to create voluntary agency fee agreements.

Anticipate union efforts by bypass the effects of the ruling. Unions will likely approach friendly legislatures or governors in an effort to find alternative means of making up for the loss of revenue they anticipate.

Contact counsel with any questions regarding these steps or issues that may arise.



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