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Unions and Right-To-Work Employment Post-Janus Decision: Implications for Public and Private Employers

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Unions and Right-To-Work Employment Post-Janus Decision: Implications for Public and Private Employers

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Agenda

- Background Regarding the *Janus* Decision
- The majority and dissenting opinions in *Janus*
- Impact of the *Janus* Decision
- What *Janus* and *Epic Systems* Means for Employers
- Legislative Response to *Janus*
- Key Considerations for Unions and Employers
- Impact of the *Janus* Decision on Private Sector Employees

Background Leading Up to the *Janus* Decision

Janus Background

Abood v. Detroit Board of Education (1977)

- A group of Detroit public school teachers argued that they should not be required to pay fees to a union if they did not belong to the union
- In a 7-1 decision, the Supreme Court upheld the constitutionality of public sector fair share clauses
- The Court ruled that non-union members may be charged for the portion of union dues attributable to activities that are "germane to [the union's] duties as collective-bargaining representative," but non-union members may not be required to fund the union's political and ideological projects
- The Court defended the agency-fee arrangement as serving the State's interest in "labor peace" and avoiding the risk of "free riders"

Janus Background

Harris v. Quinn (2014)

- Eight home health workers objected to paying agency fee dues to the union as non-union members
- In a 5-4 decision, the Supreme Court held that the agency fee provisions in the contract between the State of Illinois and the SEIU that covered home health care workers was unconstitutional
- The Court determined that the home health care workers were only "quasi-public sector employees" and could not be compelled to pay agency fees to the union
- The decision did not overrule *Abood*, but in the majority opinion, Judge Alito argued that the analysis in *Abood* was questionable on several grounds

Janus Background

Friedrichs v. California Teachers Association (2016)

- The question before the Supreme Court was whether *Abood* should be overruled and whether it violated the First Amendment to require public employees to opt-out vs. opt-in to subsidizing nonchargeable speech
- After oral argument on January 11, 2015, observers felt that the Supreme Court would hold that public sector fair share clauses were unconstitutional
- Justice Scalia died on February 13, 2016, thus changing that prediction
- On March 29, 2016, the Supreme Court reached a 4-4 decision in the case, meaning that the 9th Circuit's decision to follow *Abood* was upheld on a non-precedential basis

The *Janus v. AFSCME* Majority Opinion

The *Janus* Majority Opinion

- In *Janus,* public sector employee Mark Janus challenged an Illinois statute that required employees who choose not to join the union to still pay an "agency fee" that covers the union's cost of representing employees during collective bargaining negotiations and other related matters
- Janus argued that the difference between an agency fee designed to cover the costs of negotiation and amounts designed to cover political projects was not relevant because the issues the union advanced in negotiation were also political

The *Janus* Majority Opinion

- The *Janus v. AFSCME* decision was issued on June 27, 2018
- In a 5-4 decision, the Supreme Court overruled *Abood* and held that compelling public sector employees to pay mandatory agency fees to public sector unions as a condition of employment violates employees' First Amendment rights
- Justice Alito wrote the majority opinion, joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Gorsuch

The *Janus* Majority Opinion

- Public employees have certain constitutional rights to free speech
- Freedom of speech "includes both the right to speak freely and the right to refrain from speaking at all."
- "Compelling a person to *subsidize* the speech of other private speakers raises similar First Amendment concerns."
- "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."

The *Janus* Majority Opinion

- The Court considered whether speech is on a matter of public or only private concern
  - Citing *Harris*, the Court reiterated that "it is impossible to argue that the level of … state spending for employee benefits … is not a matter of great public concern."
  - Wages, benefits, and pension obligations have an impact on the public and taxes
  - The Court noted that union speech in collective bargaining addresses other matters of great public importance such as education, child welfare, healthcare, and minority rights

The *Janus* Majority Opinion

- The Court held that "free-rider arguments … are generally insufficient to overcome First Amendment objections."
  - Unions represent millions of public employees in jurisdictions that do not permit agency fees
  - Designation as exclusive representative results in tremendous increase of the union's power
  - Unions do not represent nonmembers in grievance proceedings solely for the benefit of nonmembers
    - Justice Alito also noted that individual nonmembers could be required to pay for the union's service/representation in individual grievance matters
- The Court explained that duty of fair representation is "a necessary concomitant of the authority that a union seeks when it chooses to serve as the exclusive representative of all the employees in a unit"

The *Janus* Majority Opinion

- The Court rejected *Abood's* holding
  - Core issues such as wages, pensions, and benefits are important political issues in the public sector
  - *Abood* failed to appreciate the difficulty of distinguishing in public-sector cases between union expenditures that are made for collective bargaining purposes and those that are made to achieve political ends
  - *Abood* failed to foresee the practical problems that would face objecting nonmembers
- The Court noted that unions have been on notice for several years that the holding in *Abood* was questionable and subject to being overturned

The *Janus v. AFSCME* Dissenting Opinion

The *Janus* Dissenting Opinion

- Justice Kagan wrote the dissenting opinion, joined by Justices Ginsburg, Breyer, and Sotomayor
  - *Abood* struck a stable balance between public employees' First Amendment rights and government entities' interests in running their workforces
  - The Court's decisions have long made plain that government entities have substantial latitude to regulate their employees' speech – especially about terms of employment – in the interest of operating their workplaces effectively
  - Public employee unions will lose a secure source of financial support
  - *Abood* avoids the concern regarding "free-riders"

The *Janus* Dissenting Opinion

- Exclusive representation arrangements benefit some government entities because they can facilitate stable labor relations
- Governments may be unable to avail itself of those benefits unless the single union has a secure source of funding
- Agency fees are often needed to ensure stable union funding
- The Court has rejected previous attempts by employees to make a federal constitutional issue out of basic employment matters, including working conditions, pay, discipline, promotions, leave, vacations, and terminations
- The majority is exposing government entities to increased First Amendment litigation and liability or crafting a “unions only” carve-out to employee-speech law
- Leads to confusion and the need to revise or redo collective bargaining agreements

Impact of the *Janus* Decision

Impact of the *Janus* Decision

- The day after issuing the *Janus* decision, the Supreme Court invalidated the 7th Circuit Court of Appeals decision in *Riffey v. Rauner* (formerly the *Harris v. Quinn* case) and remanded the case for reconsideration in light of *Janus*
- *Riffey* involves a case by Illinois home health care workers seeking to obtain approximatly $32 million in fees that SEIU collected from non-union member health care workers
- Other cases have been filed across the nation seeking similar paybacks

Impact of the *Janus* Decision

- The effects of the *Janus* decision will be felt primarily in the states that do not have “right to work” laws
  - Potential decrease in union members
  - Potential decrease in public sector worker earnings
  - Potential decrease in annual economic activity
- Estimates vary as to how extensive these changes may be, however
- Note: ruling could increase employees’ free-speech rights in public sector organizations

Impact of the *Janus* Decision

- Unions have already begun trying to minimize any such effects
  - Increased campaigns to preserve or increase union membership
  - Redistributing dues check-off cards
  - Letters to employers urging employers not to communicate with employees regarding the *Janus* decision
  - Attempting to prevent third parties from informing employees about *Janus*
  - Considering changes in dues amounts
  - Considering changes in union budgets
  - Bargaining requests and demands
  - Other efforts to prove their worth to employees

What *Janus* And *Epic Systems* Means for Employers

The Connection Between The Decisions in *Janus* And *Epic Systems*

- The *Janus* decision comes just a month after the Supreme Court's Decision in *Epic Systems v. Lewis*
- In *Epic Systems*, the same majority (in a 5-4 decision penned by Justice Gorsuch) reversed the decisions of the 7th and 9th Circuits that had held that the National Labor Relations Act rendered any sort of collective litigation waiver in an employment arbitration agreement unenforceable
- The Supreme Court held that contrary to the *NLRB's* claims that class action waivers are invalid under the NLRA, class action waivers are valid and enforceable

The Connection Between The Decisions in *Janus* And *Epic Systems*

- Different considerations before the Court: *Epic Systems* concerned two federal statutes governing the private sector, whereas *Janus* concerned the Constitution
- Nonetheless, some scholars have viewed these decisions as a signal that labor law and union support is in decline
- Others have viewed the decisions as conservative justices eroding the rights of workers to join together
- With the likelihood of an additional conservative justice on the Court, this trend in jurisprudence is expected to continue
- Both decisions have prompted Congressional and/or state legislatures to introduce legislation to minimize their effects

Legislative Response to *Janus*

Legislative Response to *Janus*

- In anticipation of *Janus* and following the U.S. Supreme Court's decision, some state legislators have taken pro-Union measures.

- California has enacted some of the most Union-friendly legislation.

- Meyers-Milias Brown Act governs labor relations for California public sector employees.

Legislative Response to *Janus*

- June 12, 2017: California legislature passed AB 119.
  - Guarantees access of Union representatives to public sector new employee orientations.
    - New Jersey, New York and Washington have similar “captive audience” access.
  - The public employer must provide the contact information for new employees within 30 days of hire.
  - The public employer must provide 10 days’ notice of new employee orientation meetings.

Legislative Response to *Janus*

- The public employer must negotiate over the "structure, time, and manner of access to orientations."
- The parties must arbitrate over terms of access if there is no agreement reached within 45 days of the first negotiation or 60 days of the request.

Legislative Response to *Janus*

- October 7, 2017: California legislature passed SB 285.
  - A public employer shall not deter or discourage public employees from becoming or remaining members of an employee organization.
    - Oregon has similar language that prohibits any act by a public employer to assist, promote or deter union organizing, which includes influencing an employee's decision whether to become a member.
    - New Jersey prohibits employers from encouraging employees to leave their unions.

Legislative Response to *Janus*

- June 18, 2018: California legislature passed SB 866.
  - Covers virtually all public employees in California.
  - The requirement that public employers not deter or discourage membership in unions applied to job applicants.
  - The public employer must meet and confer with the Union before sending a "mass communication" to employees and applicants regarding encouraging or discouraging Union membership.
    - New Jersey prohibits employers from encouraging revocation of dues deduction authorizations.

Legislative Response to *Janus*

- If no agreement is reached during the meet and confer process, the public employer must simultaneously send employees, in addition to its own communication, a "comparable" communication from the Union.
- The date, time and location of new hire orientations must be kept confidential and only made available to employees, the Union, and any vendor who provides services for the orientation.
- The public employer must honor the Union's dues deduction request.
- The Union is not required to provide copies of the dues deduction authorizations unless a dispute arises about its existence of terms.

Legislative Response to *Janus*

- New Jersey: The Workplace Democracy Enhancement Act.
  - Took effect on May 18, 2018
  - Employees who have authorized payroll deductions for agency fees may revoke the authorization only during the 10 days following the anniversary date of their employment.
  - The public employer then must notify the Union within five days.
  - The notice of revocation will then be effective on the 30th day after the employment anniversary date.

Legislative Response to *Janus*

- The proposed amendments establish a presumption that the union has conducted all its negotiations in good faith: “There is hereby established the presumption that the employee organization recognized as the exclusive representative has conducted all of its negotiations in good faith based upon the employee organization’s understanding of what is best for the bargaining unit as a whole.”

- The proposed amendments would allow public employee unions to choose to represent and charge nonmembers for statutory or administrative appeals, grievances or filings for arbitration even if nonmembers do not want their participation or have hired their own representation. Further, it gives the Union veto power.

Legislative Response to *Janus*

- Hawaii: HB1725.
  - Signed into law on April 24, 2018.
  - Limits employees to a 30-day window each year in which they can end further payment of their union “agency fees.”

Legislative Response to *Janus*

- Massachusetts: Promoting discrimination?
  - Currently prohibits public employers from discriminating against those who are not union members in hiring, tenure, or any term or condition of employment, in order to encourage or discourage membership in any union.
  - Proposed amendment: "[A] collective bargaining agreement may provide different terms and conditions of employment for members of the employee organization than those terms and conditions applied by the public employer to employees who have elected not to maintain membership within the employee organization."

Legislative Response to *Janus*

- Current law: prohibits a public employer or its designated representative from discriminating "in regard to hiring, tenure, or any term or condition of employment to encourage or discourage membership in any employee organization."

- Proposed amendment: "except that a collective bargaining agreement may provide different terms and conditions of employment for members of the employee organization than those terms and conditions applied by the public employer to employees who have elected not to maintain membership in the employee organization."

Legislative Response to *Janus*

- Proposed amendment: “The employee organization, recognized as the exclusive representative shall have the right to negotiate wages, benefits, hours of work and all other working conditions on behalf of all employees of the unit whether such an employee is a member or non-member of the employee organization.”

- Simply stated, unions have the sole right to negotiate lesser pay and reduced benefits *on behalf of non-members.*

Legislative Response to *Janus*

- The proposed amendments give unions access to the home address, personal email address and home or mobile telephone number of any employee or family member.

- Similar to California, the proposed amendments also give unions a new level of workplace access. For example, they would have the right to meet with newly hired employees for a minimum of 30 minutes.

Legislative Response to *Janus*

- In Illinois, much will depend on the November elections
- If Democrats regain control of the governor's seat, there is an increased potential for union-friendly amendments to the state's public labor relations laws
- A proposed bill in the Illinois House of Representatives (H.B. 5309) would prohibit bonuses to employees of state agencies, unless the employee is subject to a collective bargaining agreement

Union Response to *Janus*

- Unions have drawn on favorable aspects of recent legislation.
  - Captive audience presentations at new hire orientation.
  - Communications to employee and applicants.
  - Limited window of time to terminate dues deductions (MOU negotiations).
  - Limited window of time to terminate dues deductions (during term of MOU).

Key Considerations for Employers

- It is likely that additional legislative action will occur.
  - Direct questions regarding withdrawal to the Union.
  - Engage the Union in bargaining regarding agency fee and dues deduction provisions.
  - Ensure a strong indemnification provision.
  - Communicate with impacted employees.
  - Keep an open eye for bullying/intimidation in the workplace.
  - Be alert regarding FOIA and bargaining obligation information requests.

The *Janus* Ripple: Implications for NLRA Section 8(a)(1)

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Wooley v. Maynard, 430 US 705 (1977)

- A state may not “require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public.”

  430 U.S. at 713

Wooley – Balanced State's Interest

- "Where the state's interest is to disseminate an ideology no matter how acceptable to some, such interest cannot out-weigh an individual's First Amendment right to avoid becoming the courier for such message"

  430 U.S. at 717

Union Buttons

- *UPS v. NLRB*, 41 F.3d 1068(6th Cir. 1994)
  - Consistent effort to project an image of cleanliness, uniformity and efficiency.
    - Note: Court denied enforcement to 312 NLRB 596 (1993).
- *In-N-Out Burger, Inc. v. NLRB*, 894 F.3d 707 (5th Cir, 2018)
  - Court enforced requirement Employer allow buttons to be worn.

Union Logo on Uniforms

- *Lee v. CWA*, 393 F.3d 491 (4th Cir. 2005).
  - Wearing of union logo on uniform
  - NLRB held: Uniform conveyed employer's image/message
  - Court held: Union logo was reflection of individual employee not company.
  - Illegal for employer and union to agree all employees had to wear logo
    - Note: National Right to Work represented Lee.

The *Janus* Ripple: Workplace Harassment

- #MeToo vs Title VII is not a civility statute
- *RAV v. St. Paul*, 505 U.S. 377(1992) severe and persuasive imposition.

The *Janus* Ripple: Animal Exerbuence must be tolerated

- Judge Brown: DC. Cir. days of “boys will be boys” should end.

The *Janus* Ripple: Union Postings / Bulletin Boards

- *Purple Communications, Inc*., 361 NLRB 1050 (2014)
  - Employers must allow employees to use email system.
- *Caesar Entertainment Corporation d/b/a/ Rio All-Suites Hotel and Casino,* 28-CA-060841
  - Request for Amicus briefs made by NLRB.

Other Cases of Note

- Conduct, which is “inherently expressive” is entitled to First Amendment protections.

  Rumsfield v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47, 65-66 (2006).

- Conduct based laws may implicate speech rights where
  - (1) “conduct itself communicates a message:

    Holder v. Humanitarian Law Project, 561 US L, 28 (2010).
  - or (2) conduct has an expressive element:

    Clark v. Cmtg for *Creative Non-Violence*, 468 US 288 (1984).

Questions?

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