

# Payroll Deductions and Union Dues: Can Government Employers Still Encourage Employees to Support the United Way?

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We now know that Act 10 has been upheld against all legal challenges. However, during the legal challenges, confusion developed concerning a municipality's or a school district's ability to use its payroll deduction system for various purposes other than collecting union dues from general municipal employees. It is our opinion that this confusion arising from the court challenges has now been resolved, and payroll deductions for charitable organizations by local government employers can be allowed without requiring a municipal or school district employer to also allow payroll deductions for union dues and other political purposes.

## Source of the Confusion

On March 30, 2012, Federal Judge William Conley decided that Act 10's prohibition on payroll deductions for voluntary union dues was unconstitutional. He issued an injunction barring application of that provision of Act 10. He indicated there must be a "rational basis" for any such distinction, and he could find no rational basis to distinguish between allowing deductions of union dues for public safety unions while prohibiting deductions of union dues for general municipal employee unions. As a result of this decision, many government employers did one of two things: they continued to allow payroll deductions for union dues for general municipal employee groups, or they banned all payroll deductions for all purposes, including charitable contributions. As an unfortunate consequence, charitable contributions through payroll deductions by government employers to organizations like the United Way have dropped substantially over the last two years.

## Clarifying that Source of Confusion

Since Judge Conley's decision was issued, two important events occurred. Judge Conley's decision was appealed, and the Seventh Circuit Court of Appeals overturned that decision in every respect, including the payroll deduction issue. Next, the Wisconsin Supreme Court upheld Act 10 in its entirety and upheld the ban on payroll deductions for general municipal employee unions. It is important to understand the Seventh Circuit Court of Appeal's rationale, as this rationale will apply to future decisions by local government employers concerning the use of voluntary employee payroll deductions through the employer's payroll system.

The Court of Appeals confirmed that prohibiting union access to deductions through the employer's payroll system is not a barrier to protected speech under the First Amendment. With or without payroll deductions, unions and other advocacy groups can still engage in speech, raise funds, and spend those funds. Access or lack of access to payroll deductions to collect dues does not change that power. A local governmental entity's decision to allow payroll deductions "subsidizes speech," but does not regulate or otherwise limit it. Therefore, a line of so-called "subsidy cases"—not free speech cases—were used by the Court of Appeals to establish the legal tests applicable to payroll deductions.

Specifically, a governmental employer's decision to allow payroll deductions for one purpose, but not for another, must meet a "rational basis" test, and must be "viewpoint neutral." In applying these tests, the Court of Appeals indicated "compelling deference" must be given to the governmental body's decision in this area with the burden on the objecting party to show there is no governmental purpose being served.

Viewpoint neutrality is not violated simply because one organization might have different views than another on a particular matter. Viewpoint discrimination does not occur unless the purpose for the distinction between allowing payroll deductions for one group but not for another is suppressing a particular point of view. The Court of Appeals determined Act 10 did not have as its purpose the suppression of a particular point of view because, among other things, general municipal employee unions and public safety unions largely had the same point of view on many subjects. In other words, under Act 10, the use or nonuse of the payroll deduction system did not hinge on a particular point of view on any particular issue.

Of significance to employers who banned all payroll deductions as a reaction to Conley's original decision, the Seventh Circuit Court of Appeals rejected the Union's argument that different groups all have different points of view, stating

Such an interpretation of the First Amendment would leave legislatures with the unpalatable choice of funding all expressive activity or none at all.

Clearly, the Seventh Circuit Court of Appeals contemplates that governmental entities are not expected to make such an "all or nothing" choice, and, therefore, use of payroll deductions for some purposes, but not for others, is certainly constitutionally allowed if done properly. And, in making that decision, the Seventh Circuit applied the following standard:

Instead, the law is presumed constitutional, and we impose a weighty burden on the Unions—they must "negative every . . . basis which might support" the law because we will uphold it "if there is any reasonably conceivable state of facts" supporting the classification.

This is strong support for the exercise of discretion.

### **Which Payroll Deductions are Allowed for Municipal or School District Employers?**

In light of these decisions, we now must determine how a local government employer might lawfully allow the use of its payroll deductions for some purposes, but not others. Following the Seventh Circuit analysis described above, any distinctions drawn between one deduction and another will be subject to a "rational basis" test requiring "viewpoint neutrality." If there is any legitimate, non viewpoint-based rationale for the distinction, the judgment of the local government employer should be upheld.

The most popular and common use of payroll deductions are for employer-sponsored benefit programs, such as employee-funded deferred compensation programs and life and disability insurance benefits. Allowing payroll deductions for those purposes, but not for others, will easily meet the rational basis test.

Some employers choose to allow payroll deductions for specific advocacy groups, such as the NRA or the ACLU. To allow contributions through payroll deductions to some political advocacy groups, while denying payroll deductions for other political advocacy groups, will present significant challenges to remain viewpoint neutral. That is not to say such distinctions might not be lawful. For example, we believe an employer may make such selections on a purely random basis from among "nominations" submitted by employees or by an employee-based committee to develop an organization selection process that is "viewpoint neutral."

However, the most important consideration for purposes of this *Legal Update* is a governmental employer who wants to use payroll deductions for certain charitable organizations, but not for other purposes. Charitable organizations make decisions about where to focus their charitable efforts in ways that some may disagree with, such as school choice programs, arts funding, or family planning services. Nevertheless, they still serve a general charitable purpose for the benefit of society. The decision of a charitable organization to focus its efforts on one segment of society, but not another, is not political advocacy per se. Thus, organizations such as the United Way, Education Foundations for the local school district, or funding for the arts, should easily meet the "rational basis" test. Allowing payroll deductions for those types of organizations, while denying payroll deductions for advocacy groups, including general municipal employee unions under Act 10, has both a legitimate governmental purpose and is viewpoint neutral.

Therefore, we believe that the prior confusion resulting from the challenges to Act 10 should no longer be a reason for local government employers to prohibit employees from using payroll deductions for making charitable contributions to a wide variety of local charitable organizations, including the United Way. Government employers can listen to their employees, establish charitable fund-raising missions and goals through employee payroll deduction, and further the employees' spirit of public betterment without creating risky legal entanglements.

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