

U.S. Supreme Court Prohibits Compulsory Fair Share Payments In Public Sector Bargaining Agreements

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Practice Area: County and Municipal Governance & Government Law

On June 27, 2018, the United States Supreme Court in *Janus v. AFSCME* decided that public-sector employers and unions cannot contractually require "fair share" payments to be automatically deducted by non-consenting employees represented by the union. Fair Share agreements violate the First Amendment rights of those employees who do not directly authorize making the "fair share" payment. As a result of *Janus*, public sector employers and unions may now only collect "fair share" payments from employees who directly authorize such payment.

Janus affects every municipality and county in Wisconsin that has a collective bargaining agreement with a Law Enforcement, Fire, or Transit Union where that agreement provides for a fair share required contribution. Immediate and careful attention to this matter is required by public sector employers to avoid allegations of constitutional violations by affected employees who no longer want to contribute any fair share contribution.

Factual Background

The *Janus* case involved a challenge to a fair share requirement by a state of Illinois employee Mark Janus represented by AFSCME. Janus refused to join the Union because he opposed "many of the public policy positions that [it] advocates," including the positions it takes in collective bargaining. Janus believes the Union's "behavior in bargaining does not appreciate the current fiscal crises in Illinois and does not reflect his best interests or interests of Illinois citizens." Therefore, if he had the choice, he "would not pay any fees or otherwise subsidize the Union." Under his unit's collective bargaining agreement, however, he was required to pay an agency or fair share fee of \$44.58 per month which would amount to about \$535 per year. The total chargeable amount for nonmembers was 78.06% of full union dues. Janus claimed that all "nonmember fee deductions are coerced political speech" and that "the First Amendment forbids coercing any money from the nonmembers."

The Supreme Court's Holding and Reasoning

The United State Supreme Court found on behalf of Janus holding that government employers and public-sector unions cannot extract agency or fair share fees from nonconsenting employees. Neither an agency fee nor any other payment to the union may be deducted from a nonconsenting employee'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, the employee is waiving their First Amendment rights, but such a waiver cannot be presumed. The Court specifically indicated that unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met.

The Court determined that forced payments to a union constitute a waiver of an employee's First Amendment. This finding was based on the notion that such payments effectively subsidize a union's private speech on matters of public concern.

Application in Wisconsin

In Wisconsin, the legislature has initiated a "Right to Work" law prohibiting the requirement that employees pay union dues. However, the Wisconsin law also allows for bargaining dues and fair share agreements in certain public sector units including law enforcement, fire and transit units. Based upon the Supreme Court decision in *Janus*, provisions in existing public sector contracts requiring fair share payments may no longer be enforceable depending upon how they are written.

Questions & Answers

Since *Janus* was decided, we have received many client questions with regard to how this affects their respective municipality. Ultimately, the answer to how each municipality will be affected depends on many factors; however, in an effort to provide practical and timely guidance, below is a list of questions our clients should consider when working through complying with *Janus*.

Question: Our law enforcement bargaining agreement contains a fair share/agency shop provision. We are scheduled to make deductions of fair share for payroll this week. Can we make those payments?

Answer: According to the Supreme Court decision, unless you have specific authorization from each respective employee, you cannot make that deduction. The authorization cannot be presumed. The employee must provide the employer with authorization.

Question: The representative for our firefighters has provided us a letter indicating that all unit members have authorized them to have fair share deductions made. Is this sufficient?

Answer: No. The generalized claims of the union representative would not be sufficient. You will need specific authorization from each respective employee. The validity of past "authorizations" collected by the union may be questionable since they may have been entered without the full disclosure of rights now set forth in the *Janus* decision.

Question: One of our law enforcement employees has indicated that based on this decision, she no longer wants to be in the bargaining unit. Can we honor this request under the *Janus* decision and Wisconsin's "Right to Work" law?

Answer: No. This decision addresses fair share payments and the employee can not completely opt out of the bargaining unit. The state law dealing with bargaining units is a separate issue. Prior case law has upheld state laws providing bargaining rights.

Question: Is there any estimate as to how many employees have not given their employers and unions individual authorization to deduct "agency fee" payments through a "fair share" agreement, and who, therefore, will be affected by *Janus*?

Answer: Our firm made immediate contact with the Wisconsin Professional Police Association and learned that the vast majority of its 10,000+ members have previously executed an authorization form. Thus, for employers with employees represented by WPPA, there may be a minimal affect; however, this depends on how each municipality interprets *Janus*.

Question: What do you mean when you say each public-sector employer can interpret *Janus* differently?

Answer: Employers can take at least two different approaches toward interpreting *Janus* and, therefore, complying with *Janus*:

1. Require each union to provide the employer with all previously executed employee authorizations. The employer should stop deductions for employees who have not executed such an authorization.
2. The employer can take the position that all prior authorizations are unenforceable because the authorization was executed under a wholly different legal landscape where fair share deductions were mandatory, because prior to *Janus*, all employees were under the impression they had to pay "agency fees" to unions. Therefore, any authorization executed by such employees was arguably not truly voluntary.

Question: One of our employees who wants to opt out of paying fair share has expressed concern to us about retaliation by coworkers. What should we do?

Answer: Clearly communicate to the workforce that any retaliatory behavior against a coworker who chooses to pay or not pay dues is unprofessional and unbecoming and will not be tolerated by the employer. The employer should promptly and carefully evaluate any allegation of retaliatory conduct and consider appropriate response for that individual situation. Employees may also be apprised of their rights under Wis. Stat. 111.70.

Question: What does an example employee authorization look like?

Answer: "I, _____, hereby authorize the City/Town/Village/County of _____ to deduct union dues or Fair Share Fees in an amount not to exceed \$_____ per month (or per paycheck) from my wages, and to transmit such amounts to _____."

Things to Do Now

As a result, employers should immediately consider the following:

- Determine if you have sufficient voluntary authorization from employees to deduct fair share payments and if no, stop deducting these payroll deductions.
- Review collective bargaining agreement language and place the union on notice that existing fair share language may be unlawful as a result of *Janus*. Depending on the language of the collective bargaining agreement, the parties may need to engage in collective bargaining to negotiate replacing the unlawful language;
- Consider educating employees on their rights to pay or not pay dues and the expectation that no employee should feel coerced to pay or not pay dues or retaliated against for his or her decision; and
- Develop a reliable process for obtaining individual authorizations from employees who consent to deductions of union dues and fair share contributions and tracking of those who do not give consent.

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