Members Brief

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Effect of *Janus* on Agency Fees and Other Collective Bargaining Matters

In *Janus v. AFSCME*, the U.S. Supreme Court ruled that collecting agency fees (also known as "fair share fees") from a nonconsenting, nonunion public sector employee violates the employee's First Amendment rights, overturning a previous decision allowing the fees. This brief explains the concept of agency fees, summarizes the change in the Court's analysis, and examines how lower courts have applied the analysis to related matters.

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Introduction

In 2018, the U.S. Supreme Court determined in *Janus v. AFSCME, Council 31*[1] that state laws requiring a nonunion public employee to pay an agency fee to a union violates speech and associational rights. Previously, the Court had held such a fee did not violate those rights. Lower courts have been reluctant to expand the Court's analysis in *Janus* to other collective bargaining issues.

[1] 138 S. Ct. 2448 (2018).

Union security clauses and agency fees

A union security clause in a collective bargaining agreement governs whether a union may compel an employee to join or support the union. Historically, "agency shop" union security clauses have been common. In an agency shop arrangement, an employer may hire an employee regardless of the employee's union membership status. Additionally, the employee may not be required to join the union as a condition of keeping the employee's job. But an employee who does not join the union must pay an "agency fee" to the union to cover costs associated with collective bargaining.[2]

Agency fees under Ohio's Public Employee Bargaining Law

The Ohio Public Employee Collective Bargaining Law[3] (PECBL) governs collective bargaining between the state, its political subdivisions, and public employees. It prohibits a collective bargaining agreement from requiring an employee to join a union as a condition of employment. It does, however, allow an agreement requiring a nonunion employee to pay a "fair share fee" (a term that is interchangeable with "agency fee") to the union. Under the PECBL, the fair share fee is automatically deducted from a nonunion employee's pay and sent to the union. The fee may not exceed the dues paid by union members who are in the same bargaining unit. The nonunion employee also may obtain a rebate for any portion of the fee spent on partisan politics or ideological causes not relevant to collective bargaining.[4]

As explained below, it appears that the agency shop provision of the PECBL is unconstitutional and unenforceable under *Janus*.

Pre-*Janus*: Agency fees permissible in public sector agreements

Before 2018, the U.S. Supreme Court held that agency shop agreements were permissible in public sector collective bargaining. In *Abood v. Detroit Board of Education*,[5] the Court addressed whether a public sector agency shop agreement, authorized by state law, violated the First Amendment rights of a public-sector employee who objects to unions or to activities financed by agency fees. Drawing on previous cases involving private-sector collective bargaining, the Court found that agency agreements further two state interests. First, they encourage peaceful labor relations by providing the union with funding to negotiate and administer a complex collective bargaining agreement with a government entity. Second, they ensure that nonunion public employees who benefit from collective bargaining pay their share of the costs. The Court also rejected an argument that public-sector agency fees infringe on First Amendment rights more than similar fees in the private sector. According to the Court, a public sector employee who disagrees with the union is still free to express the employee's viewpoint through communicating with, and voting for, state legislators.

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[2] See "Agency-shop agreement" in Ballentine's Law Dictionary, 3rd Edition.

[3] R.C. Chapter 4117.

[4] R.C. 4117.09.

[5] 431 U.S. 209 (1977).

Thus, before *Janus*, public sector collective bargaining laws and agreements could require nonunion employees to pay agency fees for activities "germane" to collective bargaining. Agency fees could not be used for political or ideological purposes unrelated to collective bargaining.[6]

Janus: public sector agency fees violate the First Amendment

In *Janus*, the Court overruled *Abood* and held that public sector agency shops violate the First Amendment. The Court departed from the *Abood* holding that public sector agency fees do not significantly impair First Amendment rights. Instead, the *Janus* Court determined that public sector agency fees compel public employees to subsidize the speech of unions. When a state action infringes on First Amendment rights, courts apply different levels of scrutiny in different contexts to determine whether the actions is constitutional. In *Janus*, the Court applied what is known as "exacting scrutiny." Under exacting scrutiny, a law requiring a person to subsidize another's speech must achieve a compelling state interest. It also must be the least restrictive means to achieve the interest.

The Court in *Janus* acknowledged maintaining labor peace is a compelling state interest. It found, however, that the interest can be achieved through means significantly less restrictive of associational freedoms than public sector agency shop arrangements. According to the Court, labor peace has been maintained in 28 states that prohibit agency shop agreements in public sector collective bargaining.

The Court also found that requiring nonunion public employees to pay for benefits they receive from collective bargaining is not a compelling interest. The First Amendment does not permit the government to compel a person to pay for another's speech simply because the government believes the speech is beneficial.[7]

Additionally, to support the decision to overrule *Abood*, the Court noted that *Abood* was poorly reasoned, unworkable, and an anomaly in First Amendment jurisprudence.

After *Janus*, states and public sector unions may no longer extract agency fees from nonconsenting public employees. The First Amendment is violated when any payment to a union is deducted from the wages of a public employee who is not a member of the union, unless the employee affirmatively consents.[8]

Application of *Janus* to other collective bargaining issues

Since *Janus*, plaintiffs have asked courts to apply the reasoning of the case to other aspects of collective bargaining. So far, courts have largely refused to do so. These topics include:

- Agency fees paid *before* the *Janus* decision;
- Resigning union members and opt-out windows;
- Exclusive representation by public sector unions;

[6] See *Abood* at 235-236.

[7] *Janus* at 2460-2469.

[8] *Janus* at 2478-2486.

- Union meeting and training participation; and
- Private sector collective bargaining.

Agency fees paid before *Janus*

After *Janus*, public sector unions generally stopped collecting agency fees. Since *Janus,* some nonunion employees have sued unions for refunds of fees deducted from the employees' paychecks during the time the deductions were allowed under *Abood*.

Generally, when the Supreme Court applies an interpretation of the U.S. Constitution, the interpretation "must be given full retroactive effect."[9] Recognizing a constitutional right retroactively does not, however, guarantee a remedy for past violations of the right. A court will deny or limit a retroactive remedy when the right violated was not "clearly established" or policy concerns support denial or limitation.[10]

The consensus since *Janus* has been to allow a public sector union to assert a good faith defense against repaying agency fees withheld from an employee's pay before *Janus*. The defense applies only to fees collected before *Janus* because, at the time, unions were following state laws and the *Abood* case, which was binding precedent when the fees were collected.[11]

Resigning union members and opt-out windows

Janus did not involve a union member who resigned from a union. The plaintiffs in *Janus* were not union members, and they argued that nonmember fee deductions are coerced political speech forbidden by the First Amendment. The Court agreed with the plaintiffs and held that a nonunion public employee cannot be required to pay agency fees, unless the employee affirmatively consents to pay.[12] *Janus* did not evaluate a public sector union's ability to continue seeking dues from a union member who consents to paycheck deductions but later resigns membership.

Since *Janus*, several appellate courts, including the Sixth Circuit (the federal circuit that contains Ohio), have considered whether *Janus* limits deducting union dues from a member's paycheck. In these cases, the plaintiffs were public employees who, before *Janus*, joined the unions that represented their bargaining unit rather than pay agency fees. After *Janus*, the plaintiffs resigned their memberships and requested their employers stop withholding dues. The plaintiffs were told their membership agreements specified that they could withdraw authorization for the deductions only through a specific method or during specific time periods.

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[9] *Harper v. Va. Dept' of Taxation*, 509 U.S. 86, 97 (1993).

[10] See *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 758-759 (1995).

[11] *Lee v. Ohio Educ. Ass'n*, 951 F.3d 386 (6th Cir. 2020); see also *Janus v. AFSCME,* 942 F.3d 352, 364 (7th Cir. 2019); *Danielson v. Inslee*, 945 F.3d 1096, 1101 (9th Cir. 2019); *Doughty v. State Emples. Ass'n of N.H.*, 981 F.3d 128 (1st. Cir. 2020); *Akers v. Md. State Educ. Ass'n*, 990 F.3d 375, 381-382 (4th Cir. 2021); *Brown v. AFSCME*, 41 F.4th 963, 969 (8th Cir. 2022).

[12] *Janus* at 2461-2462 and 2486.

The plaintiffs argued that, under *Janus*, they had a First Amendment right to resign membership and withdraw dues deduction authorizations at any time.[13]

In all of these cases the courts reasoned that union membership agreements are governed by state contract law. The courts determined the First Amendment does not prohibit the enforcement of obligations that are bargained for and self-imposed by the contracting parties.[14]

Exclusive representation by public sector unions

State public sector collective bargaining laws, including Ohio's PECBL, incorporate the doctrine of exclusive representation. The doctrine requires a single union to negotiate the collective bargaining agreement between the employer and all of the employees in a bargaining unit. The employer must negotiate with the union, and the union must fairly represent all employees in the bargaining unit, regardless of their status as union members.[15]

Two years after *Janus*, the Sixth Circuit decided a case in which a public employee argued that *Janus* invalidates the exclusive representation provision of the PECBL because it violates the employee's speech and association rights.[16] The Sixth Circuit agreed with the employee that the *Janus* analysis appears to be inconsistent with an exclusive representation requirement in public sector collective bargaining. It noted, however, that the Supreme Court upheld a similar exclusive representation requirement in a previous case that *Janus* did not overrule. When a Supreme Court decision directly applies to a case, but appears based on reasons rejected in another decision, an appellate court must follow the directly applicable case.[17]

Several other federal circuit courts have reached conclusions similar to the Sixth Circuit with respect to applying *Janus* to the issue of exclusive representation.[18] The Supreme Court has not taken a case challenging the constitutionality of exclusive representation after *Janus*. Therefore, previous cases not overruled in *Janus* continue to control the issue in the lower courts.

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[13] *Littler v. Ohio Ass'n of Pub. Sch. Emples.*, No. 20-3795, 2022 U.S. App. Lexis 8182, 2-6 (6th Cir. 2022); see also *Belgau v. Inslee*, 975 F.3d 940, 944-945 (9th Cir. 2020); *Bennett v. Council 31 of the AFSCME*, 991 F.3d 724, 726-730 (7th Cir. 2021); and *Hendrickson v. AFSCME Council 19*, 992 F.3d 950, 954-957 (10th Cir. 2021).

[14] See *Littler* at 15-17; *Belgau* at 950; *Bennett* at 731; and *Hendrickson* at 964.

[15] See R.C. 4117.04, 4117.05, and 4117.11.

[16] *Thompson v. Marietta Educ. Association*, 972 F.3d 809, 813-814 (6th Cir. 2020).

[17] *Thompson* at 813 (*citing Minnesota State Board of Community Colleges v. Knight*, 465 U.S. 271 (1984)).

[18] *Bierman v. Dayton*, 900 F.3d 570, 574 (8th Cir. 2018), *cert denied*; *Reisman v. Associated Faculties of the Univ. of Me*, 939 F.3d 409, 414 (1st Cir. 2019); *Boardman v. Inslee*, 978 F.3d 1092, 1114-1115 (9th Cir. 2020); *Ocol v. Chi. Teachers Union*, 982 F.3d 529, 532-533 (7th Cir. 2020); *Hendrickson* at 969; *Akers v. Md. State Educ. Ass'n* at 383, n. 3 (4th Cir. 2021); *Adams v. Teamsters*, No. 20-1824, 2022 U.S. App. Lexis 1615 (3rd Cir. 2022), *cert. denied*.

Union meetings and training participation

Some unions restrict the extent to which nonmembers may participate in union activities.[19] Before *Janus*, the U.S. Supreme Court held that limiting a nonmember's participation in union activities may pressure the nonmember to join. That pressure does not infringe on a nonmember's First Amendment rights.[20] *Janus* did not revisit the issue.

A year after *Janus*, the Massachusetts Supreme Court examined whether the case affects a union's ability to limit nonmember participation. In the case, nonunion public employees challenged barring nonmembers from union meetings not involving contract ratification and prohibiting nonmembers from voting on officers, contract proposals, and bargaining strategy.[21]

According to the Court, a union has a duty to represent all employees in a bargaining unit when negotiating and enforcing a collective bargaining agreement. The duty does not extend to the union's internal procedures. The Court also held that internal union rules not dictated by statute do not constitute the state action necessary to trigger the First Amendment protections at issue in *Janus*. Even if the union's internal rules were considered state action, the Court held that the employees were permitted to vote on whether to unionize and on whether to ratify a collective bargaining agreement. According to the Court, the employees would get another chance to be heard: "they can vote to decertify the union after a certain period of time."[22]

Private sector unions

Private sector collective bargaining is generally governed by the federal National Labor Relations Act[23] (NLRA). Like the PECBL, the NLRA requires exclusive representation and permits agency shop agreements.[24] *Janus* did not involve private sector unions or employees. The free speech analysis in *Janus* applies only to state actors. However, the NLRA allows a state to prohibit agency shops in private-sector collective bargaining.[25]

Courts have so far rejected attempts to extend *Janus* to private sector collective bargaining agreements. The Supreme Court itself expressed uncertainty whether the First Amendment applies to private sector agency shop arrangements. And, even if it does, the Court noted that "the individual interests at stake still differ."[26]

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[19] See, e.g., page 9 of the AFSCME Constitution 2020 (PDF) (restricting "full participation" in union decisions to members only); and Member Resources—AFSCME Advantage (restricting various union sponsored programs to members only). Both documents can be accessed by conducting a keyword "constitution" and "advantage," respectively, search on the AFSCME website: afscme.org.

[20] *Knight* at 290.

[21] *Branch v. Commonwealth Employment Relations Board*, 481 Mass. 810, 812-813 (2019), *cert denied*.

[22] *Branch* at 824-828.

[23] 29 United States Code (U.S.C.) 151 *et seq*.

[24] 29 U.S.C. 158 and *NLRB v. GMC*, 373 U.S. 734, 742 (1963).

[25] 29 U.S.C. 164(b).

[26] *Baisley v. Int'l Ass'n of Machinists & Aero. Workers*, 983 F.3d 809, 811 (5th Cir. 2020) (quoting *Janus* at 2480).