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U.S. Supreme Court Rules Compulsory Agency Fees Unconstitutional

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On June 27, 2018, the United States Supreme Court decided the case of Janus v. American Federation of State, County, and Municipal Employees, Council 31. In a landmark 5-4 ruling, the Court, in a decision authored by Justice Alito, held that public employers may no longer deduct an "agency fee" or any other payment to a union from a nonmember's wages without the employee's affirmative consent. Justice Elena Kagan penned the dissent, accusing the majority of inappropriately weaponizing the First Amendment.

At issue in the case was an Illinois statute which requires that public employees whose positions are included within a bargaining unit, but who choose not to become union members, must pay an agency fee to the union. An agency fee is a portion of union dues to cover costs for activities related to the union's duties as collective bargaining representative for members and nonmembers alike. The Court had previously upheld the constitutionality of a similar agency fee arrangement in the case of Abood v. Detroit Bd. of Ed., decided over 40 years ago in 1977. The Janus decision overrules Abood, on the basis that compulsory agency fees violate employees' rights to free speech under the First Amendment to the U.S. Constitution, by compelling employees to support and subsidize views – the union's –with which they may disagree.

The Janus decision will have an immediate and significant effect on public employers and unions in Massachusetts, where agency fee provisions are expressly authorized by state statute, and are common in collective bargaining agreements. Under Section 12 of Chapter 150E of the Massachusetts General Laws, a public employer and a union may include a provision in a collective bargaining agreement which requires employees who choose not to join the union to nonetheless pay an agency fee to the union as a condition of employment. These payments are typically made pursuant to a deduction from the employee's wages. Under the Court's holding in Janus, requiring the payment of an agency fee as a condition of

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employment is now unconstitutional, and an employer cannot deduct an agency fee from the wages of a nonmember without the employee's affirmative consent.

The Court also noted that by agreeing to pay an agency fee, nonmembers are waiving their First Amendment rights. It further stated that such a waiver cannot be presumed, but must instead be "freely given and shown by 'clear and compelling' evidence." It emphasized that this standard cannot be met unless employees "clearly and affirmatively consent" to the deduction.

In light of the Janus decision, public employers will need to take prompt action to review each of their collective bargaining agreements to determine whether each agreement contains a compulsory agency fee, and to review the consents currently on file from employees paying an agency fee. In consultation with legal counsel, employers should consider sending written notice to the affected unions that the employer intends to take steps to come into compliance with the Janus decision, including ceasing to deduct agency fees from the wages of nonmembers without an affirmative written consent from the employee.

An important reminder is that even though a public sector union may no longer require the payment of agency fees, the Janus decision does not affect its status as the exclusive representative of the employees in the bargaining unit. In addition, employers should be aware that they may have an obligation to bargain with the union over impacts stemming from this change in law. The extent of such obligation may vary depending on contract language and other agreements and practices in this regard.

The holding of the Janus decision is limited to agency fees required of nonmembers. The decision does not address the ability of an employer to continue to deduct union dues from the wages of union members, pursuant to a valid authorization, although some commentators are suggesting that the concept of voluntariness in this context may become the next issue.

We expect that the Division of Labor Relations, the agency responsible for enforcement of Chapter 150E, will issue guidance for unions and employers in the near future in light of the Janus decision.

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Legislative action is also a possibility, although it is unclear at this time how, if at all, any proposed legislation may affect employers. Of course, no legislative action can change the fundamental decision that has now been made by the Supreme Court.

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We will continue to keep you updated. In the meantime, ***if you have any questions about this issue, please contact Kevin Bresnahan, Mike Maccaro, or Andy Waugh or the attorney assigned to your account, or call (617)479-5000.***

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