Janus v. AFSCME: Implementation Issues for School Boards

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On June 27, 2018, the U.S. Supreme Court (Court) issued its decision in *Mark Janus v. American Federation of State, County and Municipal Employees, Council 31, et al.* (*Janus*), holding that public sector agency fee arrangements, also known as "fair share fees," unconstitutionally violate the First Amendment free speech rights of nonconsenting public-sector employees by compelling them to subsidize private speech on matters of substantial public concern.[2] Fair share fees are the fees which unions collect from non-members pursuant to a provision in a controlling collective bargaining agreement (CBA). The fair share collection was previously permitted by law under the theory that non-members benefit from the CBA the union has with an employer and should not be permitted to "free ride." Prior to *Janus*, fair share fees had been permitted to cover the cost of union activities that benefit non-members — they could not be expanded for use by unions to express political views, to support political candidates, or to advance other ideological causes not germane to the union's collective bargaining and related duties. In 1977, fair share fees were declared constitutional by the Court in *Abood v. Detroit Board of Education* (*Abood*).[3] The Court's decision in *Janus* overturns *Abood*, under the reasoning that assessing fair share fees violates the First Amendment and *Abood* was an anomalous decision that erred in concluding otherwise.[4] Notably, the Court further held that "[n]either 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."[5] In other words, employees must opt in to pay union fees, and the Court held that such agreement "must be freely given and shown by 'clear and compelling' evidence."[6] The Court stated this cannot be met "unless employees clearly and affirmatively consent before any money is taken from them."[7]

Janus's implications for public school districts are wide-ranging. As such school boards may want to discuss the local implications with their board attorneys. It is ICSA's and IASB's hope that this document assists school boards at the local level in assessing the impact of *Janus* on local school districts.

Illinois is not a "one-size-fits-all" state when it comes to its school districts, and the impact locally will vary from district to district. **Developing a plan with the board attorney is critical.** This document is designed to provide a framework for assessing your local situation and a springboard for discussion and planning between school boards, their superintendents, and their board attorney(s). It also provides school boards with some initial thoughts about planning for and mitigating the impact to them of the Court's declaration that fair share fees are unconstitutional. It is important that boards seek legal advice through their board attorney(s). Determining your school district's implications and specific plans will be a shared decision involving the local school board with its attorney's guidance.

The issues identified in this document are to be reviewed by school districts in consultation with their board attorney.

1. **Since the Court has declared fair share fees unconstitutional, when do public school districts need to stop making fair share fee deductions?**

   The Court's decision is effective the day it was issued — June 27, 2018, and therefore school boards must immediately stop fair share fee deductions even if the CBA has not expired. Some school districts may have already received letters from local unions requesting or directing the district to immediately cease payroll deductions for fair share fees. It is important for boards, administrators, and the board attorney to assess when fair share fee deductions occur locally. Many school boards will have already deducted fair share fees for the 2018 fiscal year before the Court's decision was released. It is imperative that school districts consult with the board attorney before taking any additional fair share fee deductions.

2. **Now that the Court has declared fair share fees unconstitutional, can school districts be sued for damages under 42 U.S.C. §1983 for First Amendment violations?**

   There is no qualified immunity to the entity school board. However, CBAs often have an indemnification clause that may require the union to indemnify (and defend) the school board. Each clause is different, so each school board, with its board attorney, should examine its CBA to assess whether it has these clauses and whether they may apply. Interestingly, §1983 claims have a two year statute of limitations but contract claims have a 10 year statute of limitations. Another issue to discuss would be when the applicable statute of limitations would be deemed to start running.

3. **Even though the Court has declared fair share fees unconstitutional, will a CBA's severability clause keep it valid?**

   Severability clauses should keep a CBA valid[8], however there may be additional duties under such a clause depending on the specifics of the CBA. Similar to number 3, above, each school board should, with its board attorney, examine its CBA to assess how its severability clause will work in the context of the decision from the Court finding fair share fees unconstitutional.

4. **As a result of the Court's decision, is the validity of school district agreements other than CBAs at risk?**

   Agreements between a school board, its contractors, and private sector unions which require the contractors to hire only union workers in exchange for the unions agreeing not to strike while a school construction project is underway may be affected by the Court's decision. Boards should, with their board attorneys, review these agreements within the lens of the *Janus* holding that fair share fees are unconstitutional.

5. **What is the unions' response to fair share fees being declared unconstitutional?**

   Many unions have already issued written requests that all fair share deductions cease immediately. This question is necessarily speculative, but some attorneys believe that unions, now that they no longer have a captive set of "customers," will have to market themselves and show members that dues are good and valuable expenditures. In other words, where currently members have a choice of paying dues or paying fair share fees, many members might be electing to pay dues just because the alternative is not worth being branded as a non-member; if there are no fair share fees the option becomes to pay dues or pay nothing. Many more people may thus choose not to pay dues. Many attorneys believe that the unions are aware of this potential and are currently taking steps to make sure that their members recognize the value of union services. In some opinions, this will lead to more confrontational relationships with management as the unions struggle to show that union membership is worth the cost.

6. **Can we talk to our employees about this?**

The law remains the same with respect to employee communications. Employers are free to provide factual information to employees, which does not include any promise of a benefit or threat of a reprisal, and which does not disparage the union. Generally speaking, it is an unfair labor practice to discourage membership in a union, to bypass the union, and to negotiate directly with employees. Any information provided on this topic should be strictly factual and should not attempt to convince an employee to do or not do anything. Boards should, as part of the plan developed with the board attorney, include "talking points" for employee communications.

District employees may be contacted by their unions as well as by outside interest groups, such as the National Right to Work Foundation or the Illinois Policy Institute, to discuss membership and fair share concepts. When this happens, employees might raise questions to administrators and board members about these issues. Districts should work with their board attorney to ensure that consistent and legal responses are provided to employees on these important topics.

1 Editors: **Heather K. Brickman,** Hodges, Loizzi, Eisenhammer, Rodick & Kohn LLP; **Maryam T. Brotine,** Illinois Association of School Boards; **Stanley B. Eisenhammer,** Hodges, Loizzi, Eisenhammer, Rodick & Kohn LLP; **Thomas M. Melody,** Klein, Thorpe & Jenkins, Ltd.; **Kimberly A. Small,** Illinois Association of School Boards. Reviewed by: **Lisa R. Callaway,** Engler Callaway Baasten & Sraga, LLC; **Teri E. Engler,** Engler Callaway Baasten & Sraga, LLC; **Jay E. Greening,** Miller, Hall & Triggs, LLC; **Michael J. Hernandez,** Franczek Radelet P.C.; **Debra H. Jacobson,** Illinois Association of School Boards; **D. Shane Jones,** Tueth, Keeney, Cooper, Mohan & Jackstadt, P.C.; **Mary Kay Klimesh,** Seyfarth Shaw LLP; **James A. Petrungaro,** Scariano, Himes and Petrarca, Chtd.; **Merry C. Rhoades,** Tueth, Keeney, Cooper, Mohan & Jackstadt, P.C.; **Caroline A. Roselli,** Robbins Schwartz; **Brandon K. Wright,** Miller, Tracy, Braun, Funk & Miller, Ltd.

2 *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, et al., 585 U.S. ___, 2018 WL 3129785 (2018).

3 431 U.S. 209 (1977).

4 *Janus at* *23.

5 Id. at *31.

6 Id.

7 Id.

8 *Janus* itself states "[t]he agreement in the present case, by contrast, provides expressly that the invalidation of any part of the agreement 'shall not invalidated the remaining portions,' which 'shall remain in full force and effect.' [Internal citation omitted]. Such severability clauses ensure that 'entire contracts' are not 'br[ought] down' by today's ruling." Id. *at* *30.