Breaking News: A Public Sector Case we are Closely Monitoring

Janus vs. American Federation of State, County and Municipal Employees (AFSCME)

In ***Janus vs. AFSCME,*** the Supreme Court of the United States ("SCOTUS") is revisiting the constitutionality of a long-standing precedent that may impact the agency or "fair share" fees charged to public employees who choose not to join their union. Recent history, combined with the current composition of the Supreme Court suggests that the Court is likely to reverse that precedent. In anticipation of a decision shortly before the end of the 2018-2019 California fiscal year, public entities and their bargaining units should begin to assess how the anticipated ruling may affect their workplaces. An abrupt end to a practice that has been in effect for more than 40 years could upend labor relations and negotiating strategies; however, the full ramifications of the Janus case on benefits, terms and conditions of employment, and other activities are unclear. CSAC EIA and Eyres Law Group will be monitoring this case closely and will provide periodic updates and guidance to assist HR professionals in planning for potential impact on your roles vis-à-vis your bargaining units.

This Breaking News article will provide you with a brief summary of the issues before SCOTUS in the ***Janus*** case and how it might impact the California public sector.

What is the Constitutional Question?

In 1977, in *Abood vs. Detroit Board of Education*, SCOTUS ruled that when public employees vote to affiliate with a union, state and local governments may require those who don't join the union to pay partial fees to help cover the costs of negotiating and administering the collective bargaining agreement. The union is required by law to represent and negotiate on behalf of all of workers in the organization and the wage increases, benefits, and workplace rights they achieve through negotiation apply to every employee, regardless of their union membership. The contract provides benefits for all employees, whether or not they belong to the union. In *Abood,* the Supreme Court reasoned that while nobody is forced to actually join a union, non-union employees can be required to contribute to the cost of representation. If they join the bargaining unit, they pay regular membership dues. If they don't join, they may be compelled to pay partial fees in the form of an agency fee or a "fair share" fee. Because all the workers enjoy the benefits, job security and other protections that the union negotiates, the *Abood* opinion concluded that it was fair for workers to contribute to the union's negotiating activities.

The *Abood* precedent was premised on the analysis that agency/fair share fees pay only the costs of collective bargaining, from which the all fee-payers benefit and don't fund political speech: *"As long as a union is not lobbying or forcing ideological conformity, an employee can be required to participate (and pay a fee)."* The Constitutional questions before the Court in 2018 are threefold: (1) over the last 40+ years, have unions more often used their funds for activities beyond negotiating workplace rights; (2) if so, are those funds used to support lobbying, advocacy for public policy positions that are inherently political; and (3) if so, does money equate to "speech?" If money equals speech, compelled payment of fees to support political positions with which an individual disagrees would violate the free speech rights of non-union public employees.

The First Amendment protects free speech, including political speech. The government cannot control a person's political speech The Supreme Court's analysis In ***Janus*** focuses squarely on the constitutionality of requiring public employees to contribute money to unions that may take political positions with which the employee disagrees, through lobbying or donations to political issue campaigns. Accordingly, the fundamental issue is whether union activity is political; and, if so, does requiring workers to contribute money to the union compel them to engage in speech?

Last year in *Friedrichs vs. California Teachers' Association*, SCOTUS confronted this very issue. The CTA argued that the fees paid by members and non-members alike support the union's efforts on behalf of everyone. The opponents argued that "money is speech," which is consistent with other cases decided by SCOTUS in recent years. After the death of Justice Scalia, who likely would have voted to end agency fees, the Supreme Court deadlocked 4-4. This left the decision from the U.S. Court of Appeals for the Ninth Circuit decision in favor of the CTA and the status quo intact.

Fast forward to February 26, 2018, with oral argument in ***Janus*** before a full complement of nine SCOTUS Justices. The questioning was pointed and the legal principles sharply in dispute. The transcript is 80 pages and the pointed questioning and argument suggested the court may be poised to overrule *Abood,* with a narrow 5-4 majority. Justice Kennedy – who is often a swing vote that breaks a 4-4 ideological deadlock -- took the position that everything a public employee union bargains for involves public policy, and thus a public employee who disagrees with that policy should not be forced to pay for the negotiations (much less other political advocacy activities). California's lawyer Edward DuMont took the position that wages, hours and working conditions are not political. That prompted Chief Justice John Roberts to suggest that everything negotiated in a collective bargaining agreement with a public employer presents a public policy question. The Justices inclined to support the status quo repeatedly focused on the importance of consistency in the law. Justice Elena Kagan stressed that a 40-year-old court precedent should not be overruled without some compelling justification, stating that the case will affect "tens of thousands of contracts with these provisions," Unions fear that they will bleed operating funds to the point of ineffectiveness.

What Should HR Professionals Expect and How Should you Prepare?

With oral argument concluded, this important case will now take its place in the queue of decisions expected by the close of this session in June, 2018. While we won't know either the result or the underlying reasoning, we anticipate that both unions and employer HR representatives will use the coming months to assess how the potential changes will affect their ongoing relationships, interaction and negotiating positions in the years to come.

While a decision ending "agency/ fair share" fees may cause public employee unions to take a short-term financial hit, it is unclear what the broader impact will be for labor relations in general and workers benefits in particular. Most of the workplace rights that are codified in bargaining agreements are based on legal standards mandated by Constitutional, statutory, regulatory standards and judicial decisions upholding those rights. It is unlikely to affect worker safety, civil rights, or due process protections. How aggressively union leaders will focus on wages and benefits remains unclear. Likewise, the broader role of some unions in advocating for public policies they believe benefit workers, while not entirely scrapped, may be scaled back leaving them more time to focus on more local workplace issues. The areas of intense interest will be on negotiation strategies and related activities.

In the months leading up to the ***Janus*** decision, EIA and ELG will keep you abreast of key issues and will provide periodic guidance and checklists with strategies for HR and management teams to proactively prepare for all aspects of an eventual decision. As soon as we have an opinion from the Supreme Court, we will provide a webinar on the substantive details, nuances, and anticipated trends that will impact public sector management.

