

## *Janus* Ruling: A win for employees, employers and... Unions?

In a long-awaited, but not surprising decision, the Supreme Court ruled in late June, in a **5-to-4 vote**, that public sector employees cannot be forced to pay agency fees to a union.

The impact of this decision will be widespread. The case, *Janus v. American Federation of State, County, and Municipal Employees (AFSCME)*, Supreme Court Case No. 16-1466, essentially creates 50 right-to-work states for public sector employees and is a major win for employee rights.

But the ramifications don't end there. Unions across the country, despite being potentially hit with the loss of substantial fees and dues revenue as a result of the *Janus* decision, are attempting to use the decision as fuel to help renew a massive recruiting effort.

## WHAT DID THE SUPREME COURT DECIDE?

The Court Majority—Chief Justice Roberts and Justices Alito, Kennedy, Thomas and Gorsuch—ruled broadly for Mark Janus, requiring that unions representing public sector workers adopt an “opt-in” system to join and pay dues or fees rather than forcing workers to opt-out of doing so.

## MAJORITY OPINION

Justice Alito emphasized that the rise of union power in the public sector has led to increased public spending and subsequent funding problems for employee benefits packages, and contributed to multiple municipal bankruptcies.

*As Jefferson famously put it, “to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical.” We have therefore recognized that a “significant impingement on First Amendment rights” occurs when public employees are required to provide financial support for a union that “takes many positions during collective bargaining that have powerful political and civic consequences.”*

–Justice Samuel Alito | Majority Opinion

## MINORITY OPINION

In Justice Kagan’s dissent, the Justice argued that the *Janus* opinion will interfere in public debate about workplace governance and that the First Amendment is “meant for better things.”

*The majority overthrows a decision entrenched in this Nation’s law—and in its economic life—for over 40 years. As a result, it prevents the American people, acting through their state and local officials, from making important choices about workplace governance. And it does so by weaponizing the First Amendment ...*

–Justice Elena Kagan | Dissenting Opinion

# WHAT IS AN AGENCY FEE?

An agency fee is a payment made by workers in lieu of a union membership fee. These payments, in theory, are paid to a union to cover the union’s cost of representing the workers in question. Two dozen states previous to the *Janus* decision permitted the payment of these fees, totaling 5 million public-sector workers. Agency fees currently average around 2% of wages and provide millions of dollars annually to unions.

## Moving forward, it's perhaps most important for employers to understand the argument used in Justice Kagan's dissent, as that will serve as a central narrative in the unions' efforts to energize their base supporters and recruit new ones.

*"All over the country, workers are organizing and taking collective action as we haven't seen in years. More than 14,000 workers recently formed or joined unions in just a single week. This followed a year where 262,000 workers organized and the approval rating of unions reached a nearly 14-year high. Working families know the best way to get a raise, better benefits and a voice on the job is through a union contract. The corporate narrative of the labor movement's downfall is being dismantled by working people every single day. ... **We have never depended on any politician or judge to decide our fate and we aren't about to start now.**"*

AFL-CIO President Richard Trumka

*"This decision is yet another example of how billionaires rig the system against working people, but SEIU members won't let the extremists behind this case divide us. **We will stay united, help workers who are fighting to form unions, and call on our elected leaders to do everything in their power to make it easier for working people to join together in unions.**"*

Mary Kay Henry, president, SEIU

*"Janus is a gift to billionaires, corporate executives and far right lobbying groups that have worked for years to destroy worker rights and unions. **It also harms women and people of color who have historically had more economic opportunity in public workplaces in contrast to decades of discrimination by private employers.**"*

Deborah Burger, RN, co-president, NNU

*"This is a dark day in U.S. jurisprudence, a day when the thirst for power trampled the needs of communities and the people who serve them. The dissenting justices saw this case for what it really was—a warping and weaponizing of the First Amendment, absent any evidence or reason, to hurt working people. Not only was 40 years of settled law well within the mainstream of First Amendment law, it had been affirmed six times and applied to other cases upholding bar fees for lawyers and student activity fees at public colleges."*

Randi Weingarten, president, American Federation of Teachers

## WHAT'S NEXT?

Unions clearly understand the potential implications of this decision, and are pulling out all the stops. How exactly they plan on making up for expected lost fees and dues revenue and how they will try to use this decision to their advantage is still a bit unclear, but here are a few tactics we have seen:

## LEGISLATIVE ACTION

- California has already passed and/or is considering several laws and regulations to assist unions, including:
  - AB – 83, extending the right to organize to employees of the State Judicial Council
  - SB – 201, extending the right to organize to students who work at the state colleges they attend
  - SB – 285, prohibiting public employers from deterring or discouraging public employees from becoming or remaining members of a union
  - SB – 550, allowing public employee unions to be reimbursed for attorney's fees and costs if the state agency employer does not accept an offer from the union to settle a dispute and then does not obtain a more favorable judgement from arbitration
  - AB – 2049, authorizing school districts and community colleges rely on the union's representations of the validity of an employee's request to stop payroll deductions of union dues or fees
  - AB – 2970, prohibiting government agencies from publicly disclosing information about new employee orientations to prevent anti-union activists attending
  - State budget provisions that would allow unions mandatory access to new employee orientation sessions and would ban agencies from releasing personal email addresses to entities other than the unions

## GOING AFTER NEW TYPES WORKERS

- New industries are being targeted for unionization, including adjunct university professors, graduate teaching assistants, journalists, tech workers and service jobs employed by private contractors.

## ASKING MEMBERS TO RE-COMMIT

- In Minnesota, an 86,000-member teachers union asked educators to fill out membership renewal forms for the 2017-2018 school year, authorizing the union to deduct dues. The forms included a fine-print disclosure that said "this authorization shall remain in effect and shall be automatically renewed from year to year, irrespective of my membership in the union, unless I revoke it by submitting written notice to both my employer and the local union during the seven-day period that begins on September 24 and ends on September 30."
- The American Federation of Teachers and its state affiliates have launched "recommitment" campaigns in 18 states. The day before the *Janus* decision, they reported that of the 800,000 members in those states, they secured more than 500,000 membership cards over the previous five months.

## CREATING NEW MEMBERSHIP LEVELS

- Unions are expanding membership to "supporters and allies." Under this proposal, these "community ally members" would pay minimal union dues and not be able to vote or hold governance positions. These "allies" would, however, be able to contribute to the political action committees.

## RELYING ON AUTOMATIC RENEWALS

- Unions are revising their initial payroll deduction form to say, “this authorization shall renew annually, irrespective of my membership status,” “a revocation must be mailed ... postmarked between 75 days and 45 days before such annual renewal date,” etc.

## CUTTING BUDGETS/SPENDING

- Preliminary studies based on the projected *Janus* decision indicate that the four largest public sector unions—AFSCME, SEIU, American Federation of Teachers and the NEA—would decrease their political spending from approximately \$156 million in 2016 to \$55 million.

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These are just a few examples of actions being taken across the country. We can anticipate additional outside-the-box tactics for the foreseeable future. Unions know their survival depends on it. Another example is a proposal from a New York state legislator that would permit the State of New York to pay public sector unions their costs for representing public sector workers.

But now for some good news. Plaintiff *Janus* and the lawyers and organizations supporting his efforts have pledged to take further steps to ensure that the Supreme Court’s ruling is fully implemented.

Lawyer Jacob Huebert from the Liberty Justice Center who represented *Janus* stated, “if they’re [public sector unions] imposing unfair and unconstitutional barriers we’ll be prepared to challenge that in court.”

And organizations like the Liberty Justice Center and the National Right to Work Foundation have already pledged to educate as many workers as possible about their new *Janus* rights and to see that the *Janus* decision is followed by all governmental entities.

Also of note, public sector employees in various states are seeking repayment of back dues and fees. Numerous class action lawsuits already have been filed attempting to “claw back” such fees and dues as a result of the *Janus* decision. For example, seven California teachers say that teacher unions violated their constitutional rights by forcing them to pay union fees, so they have filed a class-action lawsuit trying to recoup their money.

But unions have been preparing for *Janus* for years, and are ready to implement what has been described as a “block and tackle” strategy.

Even in light of *Janus*, some argue that public sector workers will continue to support their unions and pay fees and dues.

The union movement no doubt has, to a certain extent, been simultaneously crippled and reenergized by the *Janus* decision.

It will be interesting to see whether reenergized efforts have an impact on the mid-term elections. The announced retirement of Justice Kennedy—who voted with the majority in the *Janus* case—and the inevitable confirmation battle in the United States Senate over Supreme Court nominee Brett Michael Kavanaugh is an important post-*Janus* development to follow.

Further, the *Janus* decision also increases the importance of the fall elections for the labor movement, as legislation already has been introduced by labor-friendly legislators that would make lawful the collection of mandatory fee payments from public sector workers. In the current Republican-controlled Congress, however, such legislation has virtually no chance for passage.

One thing is certain—*Janus* will have a lasting and profound impact on labor relations across the nation, and we will continue to monitor and report on this landmark development.