Association *of* Minnesota Counties

Mulling Over the Janus v. AFSCME Decision – July 5, 2018

I've made my way through the Janus v. AFSCME decision. The nut of it is that an employee has to "affirmatively consent" before any monies can be deducted from their paycheck to be sent to the union. It is up to the unions to secure affirmative consent (ideally in writing) from each member before they can notify a County's payroll department to deduct anything from the employees' paychecks. The prior landscape, in which fair share fees could be deducted automatically as the default, is gone. County Human Resources leadership may wish to inquire of the union regarding their process to secure that affirmative consent from employees going forward, in order to better understand the new approach and forms that will be used.

Most employers have now responded to the Janus v. AFSCME decision, which was effective June 27, 2018, by immediately halting fair share fee deductions. Individuals presently represented by bargaining units, as I write this one week following the Janus v. AFSCME decision, likely fall into the camp of either full dues paying union members or people who are not paying the union at all (which are often labeled "free riders"). However, there are probably individuals who really do want to be fair share – they like what the union does for them, but they might disagree with the union's lobbying efforts, for example. They may wish to provide the affirmative consent necessary to have fair share fees deducted from their paycheck. We might also see new fee structures in the future. For now, it's best to refer employees with questions, or wishing to make changes in their membership level or dues deductions, to their union for answers.

One of the areas the majority of the Supreme Court took issue with, is being paternalistic and deciding on behalf of employees: "In simple terms, the First Amendment does not permit the government to compel a person to pay for another party's speech just because the government thinks that the speech furthers the interests of the person who does not want to pay." (pp 18-19) This statement prohibits the prior approach of forcing employees to pay fair share dues if they did not want to pay full dues.

Since the Janus v. AFSCME decision came out, we've been mulling over the potential ramifications, and also fielding a number of great questions on the subject through the ***AMC Human Resources Technical Assistance Program***. We appreciate the prompts to dig into the determination, and opportunity to interact with members who are wrestling with these issues in the aftermath of such a momentous determination.

For example, one of the questions we've been hearing is: Are County employees who were formerly paying fair share fees, but now are not paying the union at all, still entitled to the pay and benefits negotiated under the collective bargaining agreement? After all, it seems completely counterintuitive that the union would still represent an employee who is not paying dues.

The answer is yes, the union still has to represent the employee, and the employee must abide by, and will receive the benefit from and be covered by, the terms and conditions of employment called for in the collective bargaining agreement (CBA). The employee continues to receive the benefits negotiated in the CBA, such as wages, uniform allowances, shift differential, etc. Why? The clearest or easiest to explain answer could already be in your CBA...

Union Security Article

Look to see if your CBA has language in the Union Security article along the lines of: "The Union agrees to represent all members of the unit fairly and without discrimination." The union has to represent everybody.

"But," you might say, "the language says all 'members.' Maybe a non-dues-paying employee is not considered a 'member.' Perhaps the union doesn't have to represent employees who don't pay dues?"

Yes, they do have to represent employees who don't pay dues. Why? Next, look at the Recognition article at the beginning of your CBA.

Recognition Article

Your CBA's Recognition article probably has language along the lines of, "The Employer recognizes the Union as the exclusive representative for employees of [COUNTY NAME] composed as follows: All employees employed by [COUNTY NAME, LOCATION] whose employment services exceed the lesser of 14 hours per week or 35 percent of the normal workweek and more than 67 work days per year in the [DEPARTMENT NAME], except for supervisory and confidential employees." … Or something along these lines. The article might even name specific classifications or job titles of employees.

You'll likely find the clause says it covers "all employees." It does not say "only full dues paying members," and in fact makes no reference to the status of union membership, and it does not state that the level of union representation correlates to the level of monetary contribution remitted to the union. (That might come in the future!) Likewise, the CBA's Recognition article likely states the County will only recognize the Union as the entity to represent the collective group of employees. It does not state that the Employer will work one-on-one with individual employees who do not like what is offered through the CBA.

"Well," you might say, "If we negotiated that 'all employees' language in, maybe we will negotiate some of that language out, so unions don't have to represent non-dues paying employees."

Negotiating out any language of a duty to represent non-dues paying employees won't absolve a union from having to represent the employee who don't pay anything. Why? Next look at your CBA's Savings Clause.

Savings Clause and State Law

Your CBA's Savings Clause, typically found near the end of the document, probably has language along the lines of, "In the event any provision of this Agreement shall be held to be contrary to law by a court or state or federal administrative agency of competent jurisdiction, or is in violation of legislation or administrative regulations, such provision shall be void and of no effect. The voided provision shall be renegotiated at the request of either party. All other provisions shall continue in full force and effect."

Even if your CBA does not have a Savings Clause, Minnesota Statutes, Section 197A.20, Subd. 2, as outlined here, serves the same purpose and doesn't let us violate state or federal law in our CBAs.

Next, you'll want to check if any contemplated language to exclude any non-dues paying members from the CBA would be in violation of any laws.

A quick look at Minnesota's PELRA chapter shows Section 179A.07, Subd. 4, as found here, is of interest. "Subd. 4. **Other communication.** If an exclusive representative has been certified for an appropriate

unit, the employer shall not meet and negotiate or meet and confer with any employee or group of employees who are in that unit except through the exclusive representative. This subdivision does not prevent communication to the employer, other than through the exclusive representative, of advice or recommendations by professional employees, if this communication is a part of the employee's work assignment."

This guidance redirects us back to who is in the unit, and constrains employers to work through only the exclusive representative. The Bureau of Mediation Services (BMS) consistently looks at *positions* and *classifications*, not at individual employees (let alone how much they pay or don't pay the union) when it certifies or clarifies who belongs in a bargaining unit.

Janus v. AFSCME, and Free Riders

Yep, you've got it. If the union has to represent the non-paying employees, and the non-paying employees benefit by (or are constrained by) the CBA, but the union can't require any payment anymore, yeah, they're probably not pleased with this arrangement. However, the Supreme Court says it's what the union bargained for when they asked to become the exclusive representative: "Nor can such fees be justified on the ground that it would otherwise be unfair to require a union to bear the duty of fair representation. That duty is a necessary concomitant of the authority that a union seeks when it chooses to serve as the exclusive representative of all the employees in a unit. As explained, designating a union as the exclusive representative of nonmembers substantially restricts the nonmembers' rights." (p 17)

Janus v. AFSCME addressed the necessity of preventing free riders as "simply not true." The Supreme Court pointed to the entire federal experience, where federal law does not permit fair share fees, yet unions survive and operate at the federal level. They also pointed to the 28 states which already prohibit fair share fees, and unions are still operating and representing in those states. The Supreme Court determined that the desired "labor peace" which necessitated the fair share fees in the first place in Abood v. Detroit Board of Education 41 years ago, is
"now undeniable that 'labor peace' can readily be achieved 'through means significantly less restrictive of associational freedoms' than the assessment of agency fees." (p 12)

A direct quote about how wrongful it is to assume that all fair-share people are "free riders":
"Petitioner strenuously objects to this free-rider label. He argues that he is not a free rider on a bus headed for a destination that he wishes to reach but is more like a person shanghaied for an unwanted voyage." (p 13) Wow – what a quote! Meaning, the employee didn't want what the CBA was giving him, so don't make him pay to get it. The Supreme Court determined that
"avoiding free riders is not a compelling interest" and that "free rider arguments … are generally insufficient to overcome First Amendment objections." (p 13)

It also compared union free riders to other private groups who lobby or speak out to obtain government action which will have the effect of also benefiting nonmembers of a group, but the government can't and doesn't make *all* people who benefit from the service pay the private group who spoke out. "May all those who are thought to benefit from such efforts be compelled to subsidize this speech? … It has never been thought that this was permissible. … Private speech often furthers the interests of nonspeakers, but that does not alone empower the state to compel the speech to be paid for." (p 13) And "In simple terms, the First Amendment does not permit the government to compel a person to pay for another party's speech just because the government thinks that the speech furthers the interests of the person who does not want to pay." (pp 13-14)

The Supreme Court acknowledged that "a State has a compelling interest in requiring the payment of agency fees because (1) unions would otherwise be unwilling to represent nonmembers or (2) it would be fundamentally unfair to require unions to provide fair representation for nonmembers if nonmembers were not required to pay. Neither of these arguments is sound." (p 14) First, it's simply not true because representation happens all over the country right now where there is no payment. Also, "In addition, a union designated as exclusive representative is often granted special privileges, such as obtaining information about employees, …, and having dues and fees deducted directly from employee wages, …. The collective-bargaining agreement in this case guarantees a long list of additional privileges. … These benefits greatly outweigh any extra burden imposed by the duty of providing fair representation for nonmembers." (p 15) … "Protection of their interests is placed in the hands of the union, and if the union were free to disregard or even work against those interests, these employees would be wholly unprotected. That is why we said many years ago that serious 'constitutional questions [would] arise' if the union were not subject to the duty to represent all employees fairly." (pp 17-18) It becomes a constitutional problem if the union does NOT represent the interests of ALL employees fairly.

Janus and Representing the Non-Member

The Supreme Court specifically said, "What does this mean when it comes to the negotiation of a contract? The union may not negotiate a collective bargaining agreement that discriminates against non-members, … And for that matter, it is questionable whether the Constitution would permit a public sector employer to adopt a collective-bargaining agreement that discriminates against nonmembers." (pp 15-16) It then wonders, and notes that no one weighing in on this case, "has explained why the duty of fair representation causes public-sector unions to incur significantly greater expenses than they would otherwise bear in negotiating collective-bargaining agreements." (p16) If no one made that assertion, then the Supreme Court wasn't going to dwell on it.

The court continues by stating that yes, unions still have to represent non-members in grievances, because the union has additional interests in controlling the administration of the CBA.

The court inkles at a fee-for-service concept, "Individual nonmembers could be required to pay for that service or could be denied union representation altogether…. Thus, agency fees cannot be sustained on the ground that unions would otherwise be unwilling to represent nonmembers." (p 17)

Who Should Communicate with the Fair Share People?

We've also heard from multiple counties inquiring as to what sort of communications would be appropriate on the part of the County, in light of the Janus v. AFSCME decision.

Minnesota Rules 5510.1410 describes how the Bureau of Mediation Services wants employees notified of fair share fee assessments, increases, or decreases. The notice should be given by the exclusive representative to the non-member employee at the employee's last known home mailing address. If the union wants to jointly author and issue a communication with the County, that could be acceptable. But, it could potentially be considered an unfair labor practice for the County to directly announce, "Hey, did you know you can get out of paying any dues or fair share fees to the union?" because this approach could be viewed as interfering. Again, we recommend that the employer refer employees to their union for information regarding the ruling and its impact, and their options going forward.

The union should be telling the employer when to start or stop full dues or fair share dues, and now when to apply "no payment." Some unions (LELS, Teamsters, AFSCME) have already been notifying

County employers to stop all fair share deductions and remittances, and to pro-rate June 2018's monthly amount to carve out June 27 – 30, 2018.

The advice from *Madden, Galanter, Hansen* law firm for the League of Minnesota Cities members (advice which would equally apply to Counties) was to immediately cease making fair share dues withholdings, and to issue a brief notice to the fair share members as to why withholdings were ceased. The *Madden, Galanter, Hansen* sample language shared by the League of Minnesota Cities is as follows: "Please note that your payroll check will no longer include a fair share fee deduction effective June 27, 2018. This change is a result of the U.S. Supreme Court's June 27, 2018 ruling in Janus v. AFSCME which determined that fair share fee deductions are unconstitutional and violate an individual's First Amendment rights unless the employee affirmatively consents to pay. The alteration in your payroll check will be reflected in the payroll check associated with wages payable for time worked on June 27, 2018, and thereafter. Your terms and conditions of employment are still governed by the applicable labor agreement. Please contact Human Resources with any questions."

The County might also consider adding reference to "contact the union with any questions."

It's best to work cooperatively with your unions, and the unions should already be notifying their fair share individuals directly. This is really between the unions and their membership - not the employer and the employees - no matter how much County employers may wish to assist employees through this transition.

Other Labor Actions to Consider

There are BMS rules on fair share fee challenges, abandonment, and decertification that are rarely used or thought about, but these might get dusted off and reviewed in the coming days.

In Closing

I encourage you to read the Janus v. AFSCME decision – it has some rich language included in the opinion. This is a momentous decision, and one of the most significant and consequential determinations of the present day for public sector human resources professionals. You'll be taking in a defining moment in U.S. history when you commit time to read through this Supreme Court decision. You can find the Janus v. AFSCME, No. 16-1466 U.S. (argued February 26, 2018 – decided June 27, 2018) decision here.