EMPLOYMENT SERVICES ALERT

6/27/18

Abood-Face: Supreme Court of the United States Supplants 41 Years of Precedent By Declaring Union Fair Share Fees Unconstitutional

By **Leighann Fink**, Attorney

On June 27, 2018, in *Janus v. American Federation of State, County and Municipal Employees, Council 31*, et al., 585 U.S. — (2018), the Supreme Court of the United States held (in a 5-4 decision) that union fair share fees, or "agency fees," paid by non-union members as a percentage of the full union dues, are unconstitutional because they infringe upon non-consenting public sector employees' First Amendment free speech rights. In so doing, the Supreme Court overruled the long-standing precedent set by *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). *Abood*, which has been relied upon for 41 years, upheld a Michigan law allowing a board of education to require those employees who were not members of the union representing public school teachers to pay "fair share" fees to the union because they also derived a benefit from the union's collective bargaining agreement with the board of education. The *Janus* decision, in overruling *Abood*, reasoned that *Abood* (1) "was poorly reasoned," (2) "led to practical problems and abuse," (3) "is inconsistent with other First Amendment cases," and (4) "has been undermined by more recent decisions."

Justice Alito, in delivering the opinion of the Court, wrote, "[f]ree speech serves many ends. It is essential to our democratic form of government and it furthers the search for truth[.]" Justice Alito further instructed, "[i]n 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 the speech furthers the interests of the person who does not want to pay." As such, "States and public-sector unions may no longer extract agency fees from nonconsenting employees." Instead, the non-member must affirmatively consent to these types of payments to the union, thus waiving any First Amendment rights.

The *Janus* ruling is indeed a game changer for public employers, unions, and public employees alike. In Ohio, Revised Code Section 4117.09(C) allows collective bargaining agreements to include provisions for non-members of the exclusive union representative to pay the employee organization a fair share fee. If this statutory provision is now considered unconstitutional as a result of the *Janus* decision, some immediate issues to consider include:

- should fair share fees immediately cease in order to protect a board of education or other public employer from violating a non-union member's First Amendment rights;

- will a public sector union instruct a board of education to cease withholding fair share fees to limit its liability;

- if a collective bargaining agreement does not include a severability clause, how should a public employer address removal of fair share fee language in a negotiated agreement; and
- would the Court's decision in *Janus* be considered "exigent circumstances" and a mechanism to allow and/or require mid-term bargaining between a public employer and the employee's exclusive bargaining unit representative?

Please contact any of the listed attorneys regarding the possible effects of *Janus* on your collective bargaining agreements. We welcome your questions.

Lewis Adkins, Jr.
Practice Group Manager
Public Law, Regulatory & Finance
216.615.4842 | ladkins@ralaw.com

Doug Spiker
Practice Group Manager,
Employment Services
216.696.7125 | dspiker@ralaw.com

Helen Carroll
330.849.6710 | hcarroll@ralaw.com

Fred Compton
330.849.6610 | fcompton@ralaw.com

Diana Feitl
216.615.4838 | dfeitl@ralaw.com

Leighann Fink
330.849.6633 | lfink@ralaw.com

This Alert is informational only and should not be construed as legal advice. ©2018 Roetzel & Andress LPA. All rights reserved.
For more information, please contact Roetzel's Marketing Department at 330.762.7725.