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4 Things To Watch After The High Court's Body Blow To Labor

By **Vin Gurrieri**

Law360 (June 27, 2018, 10:28 PM EDT) -- The U.S. Supreme Court's declaration Wednesday that requiring public-sector workers to pay unions “fair share” fees to cover the costs of bargaining dealt organized labor a stinging loss, and has observers wondering about potential challenges to unions' exclusive representation rights as well as whether the ruling's impact will carry over into the private sector.

In **a 5-4 decision** that split the court along ideological lines, the court’s conservative wing, led by Justice Samuel Alito, upheld Illinois state worker Mark Janus' bid to overturn the standard set in a 1977 ruling known as Abood v. Detroit Board of Education, which allowed public employers to require nonunion workers in union-represented bargaining units to pay agency fees, also known as “fair share” fees, to cover the cost of collective bargaining so long as the workers were not forced to pay for a union’s political or ideological activities.

The majority held instead that it is a violation of the First Amendment for public-sector employees to be forced to pay the fees if they haven't given consent.

“This decision frees public-sector employees from being forced to pay union fees as a condition of working for the government,” said Kevin Kraham of Littler Mendelson PC. “This is a landmark win for workers’ rights and the First Amendment, and a significant loss for public-sector labor unions.”

While Schiff Hardin LLP partner Lauren Novak said it remains “a big open question whether this will be the death knell for public-sector unions,” she said the ruling “certainly dealt a big blow to them, there is no question.”

Although there was little surprise either from management advocates or unions that the decision resulted in Abood’s demise, attorneys said there are numerous issues that are still worth watching now that the ruling is in the books.

Unions Facing Uncertain Road

As soon as the high court’s decision was released, union leaders that represent workers in the public and private sectors forcefully denounced the majority’s decision.

A sampling: Lee Saunders, president of the American Federation of State, County and Municipal Employees, the union that Janus sued, called the case an “unprecedented and nefarious political attack designed to further rig the rules against working people.” National Education Association president Lily Eskelsen Garcia said the decision is “a blatant slap in the face” to educators and all other public servants. And AFL-CIO president Richard Trumka said the Janus decision “will be a political stain” on the Supreme Court until it is overturned.

While it is likely that, as a result of the decision, unions will lose some members who would rather not pay fees while still enjoying union benefits — so-called free riders — attorneys on both sides of the bar said the decision hardly marks the end of unions in the public sector.

"This will not be the death knell of public-sector unions; in some sense this challenge was a wake-up call to them," said Alan Klinger, co-managing partner of Stroock & Stroock & Lavan LLP whose practice includes representing various public-sector unions and who filed a brief in the case on behalf of the New York City Municipal Labor Committee, a consortium of municipal unions in the city.

"I think unions are going to have to be smart about how they utilize their resources, and they're going to have to be out there showing the workforce what they have accomplished and what they can accomplish for them," he added.

Kevin Connelly of McDermott Will & Emery LLP offered a similar outlook, saying unions will face an adjustment period as they seek to implement more creative methods of trying to retain dues-paying members, many of whom might be persuaded either by the union itself or by their union-supporting friends and colleagues.

"I wouldn't underestimate the unions. If someone wants to say this is the end of the day for public-sector unions — nope, not true," Connelly said. "There will be consequences, but I think the unions that operate in that sector will be clever enough to make the appropriate adjustments."

Meanwhile, Fisher Phillips partner Todd Lyon said the biggest and most immediate impact of Janus on unions will be a decrease in their political power. But he also said it's likely that public sector unions will be forced to cut back on their advocacy activities including legal services like court actions and arbitrations, saying unions will "probably … become more selective about cases they take to arbitration."

A Teaser for the Next Fight

While Connelly said that the court appeared to go "out of its way" to say that its concerns on the issue of compelled speech are unique to the public sector, he noted that the majority opinion offers signals that "exclusive representation might also be a First Amendment challenge issue in a future case."

The National Labor Relations Act, the Railway Labor Act and state statutes governing public-sector collective bargaining are all premised on the fact that a union, once selected, speaks for all members of a bargaining unit, according to Connelly. If unions only represented a subset of the bargaining unit, Connelly said it could undermine solidarity, which is partly where unions gain strength.

In Wednesday's majority opinion, however, Connelly highlighted language used by Justice Alito that "designating unions as the employees' exclusive representative substantially restricts the rights of individual employees," saying the words used by the court invite a question about what the nature of that substantial restriction might be.

"There is at least a suggestion, not a strong suggestion, but a suggestion that the court might be willing to entertain whether exclusive collective bargaining representation is in and of itself a First Amendment issue," Connelly said.

Klinger said while there had been some speculation that after Janus there could be an attack on whether it violates the First Amendment to say that a union was the exclusive bargaining representative, he doesn't believe Justice Alito's opinion does much to advance that possibility.

Instead, the high court's ruling appeared premised on the fact that exclusivity "is a valid construct that would not violate the First Amendment, and I think that comes through loud and clear from the decision," Klinger said.

"There were a lot of people anticipating that the way Janus would be written would be an invitation to take on exclusivity next," he said. "I think those people are going to be sorely disappointed because I don't see how you read Justice Alito's opinion and not see the fact that he accepted exclusivity as a key element in the legitimate public policy of promoting labor peace."

Affirmative Consent Now the Standard

One aspect of the majority opinion that caught some employment law observers off-guard was the justices' decision to reach beyond agency fees to say that the First Amendment is violated any time money is taken from a nonconsenting employee and directed to a public union, and that employees "must choose to support the union before anything is taken from them."

"Accordingly, neither an agency fee nor any other form of payment to a public-sector union may be deducted from an employee, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay," the opinion said.

Andrew Grossman of BakerHostetler, who authored a brief in support of Janus on behalf of the Competitive Enterprise Institute, a libertarian public policy organization, noted that the high court's adoption of that framework was somewhat unexpected and it essentially rejected complex opt-out procedures that unions sometimes use to "make it difficult for workers to exercise their First Amendment right not to support a union."

"The court not only held that public workers have a right not to support a union but that the union cannot take money from a public worker … without their affirmative consent," Grossman said.

While some "squabbling" might be on the horizon about what exactly constitutes affirmative consent and how workers can exercise their right to opt out of a union, Grossman said he believes the high court's decision "is very full-throated that this is not a requirement to be taken lightly" and that it remains to be seen whether any types of limitations on workers opting out of a union are constitutional.

With the new standard in mind, Grossman said the onus will ultimately fall on public-sector employers to recognize that they "face a real litigation risk" if they deduct money from workers' pay that is directed toward labor unions "without some really direct indicia of their affirmative consent."

"A smart public entity would probably send around a consent form and ask their workers, 'Is this something you actually consent to or not?' and unless they [get] back a signed consent form they would be well-served not to deduct union fees from their workers," Grossman said. "Otherwise, they face a real risk of violating their workers' First Amendment rights, and then potentially litigation and all the costs that entails."

Unclear Impact on Private Sector

While prior to the decision, employment observers wondered whether the decision would be broad enough to extend beyond unions in the public sector to those in the private sphere, attorneys said the outcome of the case doesn't lend itself easily to that conclusion, even if there may be individuals or entities that try anyway.

But Connelly said it appeared the majority "went out of its way to say that its concerns about compelled speech were unique to the public sector" and indicated that it would decline to apply Janus to labor statutes that apply to private sector workers.

With that in mind, however, Connelly said Janus "is not the last case challenging fair share fees in either the public-sector or private-sector context."

Novak for one said that the same First Amendment issues at play in Janus "aren't going to be at play on the private-sector side," but said the court at least showed the direction it might take with private-sector unions going forward.

But where the private side could be affected, Novak said, is if there is an enhanced push for federal right-to-work legislation that would cover private-sector workers.

"I don't necessarily see that as a direct result of Janus, but I think that the conversation is headed

in that direction," Novak said.

--Editing by Pamela Wilkinson and Alanna Weissman.

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