

Janus v. AFSCME Explained

In a five to four decision in *Janus v. AFSCME*, the conservative Justices on the Supreme Court effectively read into the First Amendment of the U.S. Constitution a national right to work law for the public sector. Under the decision, no state or school district or other public employer anywhere in the country can permit a union to charge nonmembers a fee for the costs of their representation. Such fees – often called fair share or agency fees – had previously been permitted in many states with public sector collective bargaining and allowed unions who represented a bargaining unit to spread the costs of representing that unit in bargaining across all employees in the unit.

The *Janus* decision means that unions in the public sector can no longer charge nonmembers fair share or agency fees. This short overview provides a brief review of the answers to the most frequently asked questions we received from the field.

Immediate Impact

The Court's decision in *Janus* makes clear that the deduction of fair share fees from nonmembers in the public sector is unlawful.

- We have notified all public employers where we represent bargaining units to stop collecting fair share fees from nonmembers starting June 27, 2018.
- In addition to notifying employers of their obligation to stop collecting fair share fees, NJEA will monitor incoming dues deduction reports from locals where districts have not stopped deducting dues for the year.
- If we determine that a district has mistakenly deducted fair share fees from a non-member, we will work to ensure that the affected individual(s) promptly receive refunds of their local, county, NJEA and NEA dues.
- There is currently one lawsuit filed against NJEA and the state of NJ seeking repayment of fair share fees, and challenging the Workplace Democracy Enhancement Act and there are likely others to follow. We believe that these lawsuits are without merit because NJEA relied in good faith on law and precedent that permitted the deduction of fair share fees. We will take all reasonable measures to comply with the *Janus* decision going forward.

Silver Linings

Although the collection of fair share fees from nonmembers must stop immediately, there are numerous parts of the majority decision suggesting that retroactive refunds of fair share fees are not required.

- The decision states that employers and unions may “no longer” collect fair share fees, and that fair share provisions in state laws and contracts may not “continue.”
- The courts will ultimately have to resolve this issue, but our current position is that retroactive repayment of dues to fair share fee payers is not required.

Although the *Janus* decision is deeply disappointing and will impose new challenges and costs on unions, the outcome was expected, and it will not weaken NJEA or the labor movement.

In partnership with our locals, we have done extensive organizing and held thousands of individual conversations everywhere in the state to engage members around the value of belonging to their union. We are seeing more educators and individuals in other employment sectors choose unions now more than ever before.

This decision is likely to generate new energy and urgency for greater grassroots organizing and activism by unions to combat the increasing influence of wealthy elites and a harmful “everybody-for-themselves” mentality that has taken hold in our politics and our courts, as is evident in this decision.

Finally, the *Janus* decision is yet another reminder of the fact that elections have consequences. A different outcome in the 2016 presidential election would very likely have resulted in a different composition on the U.S. Supreme Court and a different outcome in this case. The Court's decision to overturn 41 years of precedent in U.S. labor law should drive home that all rights workers have earned need to be continuously defended, not only at the bargaining table, but through political action as well.

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1. Can the Janus decision be overturned by federal or state law? No, the *Janus* decision held that the First Amendment of the U.S. Constitution prohibits charging nonmembers fair share fees. The U.S. Supreme Court is the supreme arbiter of what the U.S. Constitution, our highest governing law, means. Only the U.S. Supreme Court can overturn its ruling as to what the U.S. Constitution means.

2. My school district is saying that *Janus* means the union needs to re-sign existing members, is that right? No, that is wrong. *Janus* only addresses whether involuntary fair share fee or agency fees are permitted, and holds that they are not. The Court's opinion expressly states (at page 48) that it is only addressing payments collected from nonmembers (feepayers) by stating as follows: "Neither an agency fee nor any other payment to the union may be deducted from a **nonmember's** wages, nor may any other attempt be made to collect a payment, unless the employee affirmatively consents to pay." Clearly, the Court's reference to "consent" applies to (former) fee payers, and not existing dues paying members.

3. Can unions decline to represent feepayers altogether or charge them fees for that representation? When a union is acting as an exclusive collective bargaining representative, meaning it has been recognized by the employer as the sole authorized representative of the employees in a bargaining unit, the union is obligated by state labor law to treat all employees in the unit fairly without discrimination. That means, among other things, that unions cannot withhold from feepayers' collective bargaining representation that it provides to members. *Janus* also makes clear that the First Amendment prohibits a public sector employer from agreeing to provide union members with greater benefits in a collective bargaining agreement than are provided to nonmembers.

But there are many services and benefits that unions provide to members besides collective bargaining. Unions may restrict those services and benefits solely to members. For example, teacher dismissal matters are governed by tenure law, and nothing in *Janus* prohibits unions from declining to represent nonmembers in such disputes.

4. Given *Janus*, why should my union do anything at all for non-members? Nonmembers are potential members. Like anyone else, the union should treat nonmembers with respect, engage them to help them understand how educators and students will be better off if everyone does their part. Collectively, we are stronger than any one of us as individuals. We should consider any nonmembers now as potential members.

5. What should my union be doing in response to *Janus*? The real work of the union after *Janus* is continuing to re-engage existing members and organize new members.

6. Does *Janus* in anyway address when members can opt-out of the union? No, *Janus* was about what fees may be charged to feepayers, it did not address union membership or payroll dues deductions for members. However, New Jersey passed the Workplace Democracy Enhancement Act in May of 2018 which does address timelines for opting out of the union. Before, that window occurred at the beginning of July and the beginning of January. Now it is the 10-day period after any individual's date of hire.

7. The local association is worried about possible decertification if membership dramatically drops. How does *Janus* affect this? The decision in *Janus* does not affect the certification of unions at all. Nothing in the decision or its application could result in the automatic decertification of the union. Nevertheless, a group with membership levels close to 50% is vulnerable to a successful drop campaign, so it is important for the local to put together a member engagement plan ASAP.

8. What do we do with contracts that have language which specifically deals with the deduction of fair share fees? Technically, the language is null and void following the ruling, so it's not critical to do anything. In fact, we would urge the local take no action at this time. The NJEA staff Collective Bargaining Committee (CBC) will analyze the situation and make recommendations.

9. How can public employers continue to support the value of strong labor management relationships? In the wake of *Janus*, many public employers have communicated with their employees about their continuing support for the strong labor management relationships that strong unions make possible. In addition, New Jersey has passed the Workplace Democracy Enhancement Act that provides exclusive bargaining representatives with important rights to access and contact information for employees so that the representative can effectively represent all employees in the unit.

The Act strengthens our ability as a public employee union in New Jersey to carry out our duty to represent members effectively. The law is intended to ensure that unions can carry out their statutory duties by having access to employee contact information and the ability to communicate with the employees they represent, including using the employer's email system. The law also gives unions the right to meet with employees on employer property during the work day, as well as conduct worksite meetings during lunch and breaks, and to meet with new hires for orientation meetings. Lastly, the new law prohibits employers from discouraging union membership and respective consequences should the law be violated, and further ensures the preservation of automatic dues deductions.

10. Should we be concerned about what the Supreme Court might do next? Yes, absolutely. The *Janus* decision was the result of Trump filling the vacant seat on the Supreme Court. Trump's appointment of Justice Gorsuch provided the critical fifth vote in the *Janus* case for overruling *Abood*. Another Trump Justice on the Court would jeopardize core workers' rights, health care coverage for millions, prohibitions against state funding of religious schools, voting rights, affirmative action, civil rights including LGBT rights, the ability of states and municipalities to ban assault weapons and enact sensible gun control measures, rights to access to public education, protections for the environment and consumers and even the ability of the President to be held accountable under the laws of our country.