The *Janus* Decision: The History, the Decision, and Where we Go From Here

Ann R. Goering

Shareholder, Ratwik, Roszak & Maloney, P.A.

October 4, 2018

RRM

Ratwik, Roszak & Maloney, P.A.

THE HISTORY

- *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977)
  - Non-union members in bargaining units with an exclusive representative could be compelled to pay "fair share" or "agency" fees, because the state has interests in promoting labor peace and avoiding free riders.

THE HISTORY

- *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986)
  - Exclusive representatives charging agency fees must provide an explanation of the basis of the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for amounts in dispute until challenges are resolved

THE HISTORY

- *Lehnert v. Ferris Faculty Association*, 500 U.S. 507 (1991)
  - Fair share fees must be germane to collective-bargaining activity and justified by government's vital interest in labor peace and avoiding free riders
  - Fair share fees cannot unduly add to the burden on free speech already inherent in an agency shop.

THE HISTORY – EFFORTS TO UNDO *ABOOD*

- *Davenport v. Washington Education Association*, 551 U.S. 177
  - States can require public-sector unions to show "affirmative authorization" from non-members before agency fees can be spent on electoral purposes.

THE HISTORY – EFFORTS TO UNDO *ABOOD*

- *Harris v. Quinn*, 134 S.Ct. 2618 (2014)
  - Agency-fee provision for home-care personal assistants who were only public employees for limited purposes did not further a compelling state interest
  - *Abood* applies only to fully-fledged public employees
    - *Harris* suggests that *Abood*'s analysis is questionable

THE HISTORY – EFFORTS TO UNDO *ABOOD*

- *Friedrichs v. California Teachers Association*, 136 S.Ct. 1083 (2016)
  - Intended to address same issue as *Janus*, but Justice Scalia died, resulting in 4-4 summary affirmance of 9th Circuit.

JANUS V. AFSCME, 138 S.Ct. 2448 (2018)

- Non-union child support specialist working for Illinois Department of Healthcare and Family Services challenged Illinois law mandating the collection of agency fees for exclusive representatives, arguing that this practice constituted "coerced political speech."
  - Employee refused to join the union because he did not support many of the union's positions, and felt that the union's positions in collective bargaining did not support his interests or the interests of the state of Illinois.

JANUS V. AFSCME, 138 S.Ct. 2448 (2018)

- Supreme Court agreed that mandatory deduction of agency fees amounted to "compelled subsidization" of the exclusive representative's speech.
  - This would only be permissible with an employee's knowing and voluntary waiver of his or her First Amendment rights.
  - "[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." *Janus*, 138 S.Ct. at 2464.

JANUS V. AFSCME - CONTINUED

- Freedom of speech includes the right not to speak.
- The First Amendment includes the right to "eschew association for expressive purposes."
- Forcing employees to "speak" via fair share fees would only be permissible under an "exacting scrutiny" standard
  - "Exacting scrutiny" requires that the compelled speech serves a compelling state interest that cannot be achieved through significantly less restrictive means

JANUS V. AFSCME - CONTINUED

- *Abood* identified state interests in labor peace and avoiding "free riders."
  - *Janus* concluded that labor peace could be achieved through other means that did not infringe on employees' First Amendment rights, and that avoiding free riders was not a compelling state interest.
    - "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." *Janus*, 138 S.Ct. at 2466.

JANUS V. AFSCME - CONTINUED

- AFSCME argued that *Pickering v. Board of Education* protected union's right to collect fair share fees from nonconsenting non-members.
  - *Janus* rejected this argument. *Pickering* protects public employees' First Amendment rights to speak as private citizens on matters of public concern, unless their employer's interests in promoting the efficiency of its services outweigh the employees' interests in speaking.
    - *Pickering* was thus intended to account for public employee speech that might be considered "disruptive" to an employer, not for employer-compelled or union-compelled speech.
    - Further, *Janus* held, even if *Pickering* did apply, a public employer's "regulation" of speech by withholding fair share fees from non-union member employees was not backed by sufficient interests to outweigh non-union-member public employees' free speech rights.

JANUS V. AFSCME - CONTINUED

- Finally, *Janus* concluded that *Abood* was wrongly decided and needed to be overruled for three reasons:
  - *Abood* misinterpreted the court's prior decisions in *Railway Employees v. Hanson* and *Machinists v. Street*;
  - *Abood*'s distinction between chargeable and nonchargeable expenses was practically unworkable
  - *Abood*'s presumption that exclusive representation in the public sector depending on an agency shop had proven untrue.

RRM
Ratwik, Roszak & Maloney, P.A.

IMPACT TO PELRA

Minn. Stat. § 179A.06, subd. 3: "An exclusive representative may **require** employees who are not members of the exclusive representative to contribute a **fair share fee** for services rendered by the exclusive representative. The fair share fee must be equal to the regular membership dues of the exclusive representative, less the cost of benefits financed through the dues and available only to members of the exclusive representative."

IMPACT TO PELRA

- Fair share fees in Minnesota were previously capped at 85% of the union dues, and had to follow all the requirements of *Chicago Teachers Union v. Hudson*.
  - Minnesota Rule 5510.1410, subpart 4: Employers required to withhold agency fees from non-union employees' paychecks with the effective date of the fee assessment, holding the first deduction in escrow for 30 days in case the employee challenged the fee amount

WHAT *JANUS* CHANGES

- Public employees who are not members of an exclusive representative union cannot be forced to pay “fair share” fees anymore.

WHAT *JANUS* CHANGES

- Public, non-union member employees in Minnesota must knowingly and voluntarily waive their First Amendment rights to resume paying fair share fees on a voluntary basis.
  - Waiver must be clear and documented in writing.

MINIMAL REQUIREMENTS

- Name
- Date
- Agree to voluntarily pay [Union] [$$] per month
- Waiving First Amendment rights
- Signature

WHAT *JANUS* DOES NOT CHANGE – EXISTING CBAS

- Non-union employees are still bargaining unit members and are still covered by their respective CBAs.
  - Non-union employees are still entitled to the same protections, the same wages, and the same rights that the union provides under existing CBAs. The only provision of a CBA that may be impacted by *Janus* is a provision governing fair share fees.

WHAT *JANUS* DOES NOT CHANGE – EXCLUSIVE REPRESENTATION

- *Janus* did not address the constitutionality of exclusive representation. *Bierman v. Dayton*, 900 F.3d 570 (8th Cir. 2018). Unions can still be exclusive representatives of a bargaining unit.
  - Janus has no impact on unions that are not exclusive representatives.

WHAT *JANUS* DOES NOT CHANGE – THE DUTY OF FAIR REPRESENTATION

- *Janus* does not abrogate the common-law duty of fair representation, because that duty is a creation of state law.
  - In *Eisen v. State, Department of Public Welfare*, 352 N.W.2d 731 (Minn. 1984), the Minnesota Supreme Court held that exclusive representatives have a duty to fairly represent all employees in their bargaining unit in grievance proceedings.
    - The exclusive representative plays a "pivotal role" in grievance proceedings because it "assumes the responsibility of determining whether to press the employee's claims." *Bowen v. U.S. Postal Service*, 459 U.S. 212 (1983).

WHAT *JANUS* DOES NOT CHANGE – THE DUTY OF FAIR REPRESENTATION

- PELRA requires all contracts to include "a grievance procedure providing for compulsory binding arbitration of grievances, including all written disciplinary actions." Minn. Stat. § 179A.20, subd. 4.
- *Eisen* took the logic of *Bowen* and applied it to PELRA's grievance procedure requirement to conclude that employees had an individual right of action against the union if the union did not fairly represent their interests for discriminatory or invidious reasons.
  - Otherwise individual employees, who could not appeal unfavorable arbitration awards without the exclusive representative, would have no recourse if they were not fairly represented by the union.

WHAT *JANUS* DOES NOT CHANGE – VOLUNTARY FAIR SHARE DEDUCTIONS

- *Hudson* still applies to the rare non-union employee who voluntarily agrees to pay fair share fees.
  - In these instances, public sector employers will need to follow the procedures established by Rule 5510.1410, subpart 4, and hold the first agency-fee deductions in escrow in the event of a challenge.
    - Employers should not do this, however, <u>until</u> they have received a written waiver of the employee's First Amendment right to not pay fair share fees.

LEGAL DEVELOPMENTS IN RESPONSE TO *JANUS* — CASES

- *Hoekman, et al v. Education Minnesota, et al*, 18-cv-01686 – class action suit seeking refund of "all fair share fees."
  - Similar lawsuits have been filed in other states to claw back pre-*Janus* fair share fees.
- *Uradnik v. Inter Faculty Organization*, 18-cv-01895 – St. Cloud State professor alleges she was forced to pay union dues, that the union has negotiated special preferences for union faculty members, and that the union discriminates against non-union employees.
- *Keller v. Shorba*, 17-cv-01965 – challenge by state court employees to fair share fees. Dropped after *Janus* was decided

LEGAL DEVELOPMENTS IN RESPONSE TO *JANUS* — STATUTES

- Other states have enacted legislation in response to *Janus*
  - California – mandatory access for exclusive representatives at new employee orientations. Cal. Gov. Code § 3556
  - New York – public employers must let unions meet with new hires within their first 30 days; unions are no longer obligated to represent non-members in grievances. N.Y. Civil Serv. Law §§ 208, 209-a.
  - New Jersey – public employers must let unions meet with employees for 30–120 minutes in their first 30 days. N.J. Stat. Ann. § 34:13A-513.
  - No such legislation in Minnesota, yet.

BARGAINING PROPOSALS IN RESPONSE TO *JANUS*

- Mandatory access for exclusive representatives at new employee orientations
- Paid time to meet with union within the first week/month of employment for up to 60 minutes.
- Union access to premises during work hours for non-grievance matters.
- Union access to work email for union business.

WHAT YOU SHOULD DO ABOUT *JANUS*, IMMEDIATELY

- Stop deducting fair share fees from paychecks of non-union members, if you haven't already.
- Refund any fair share fees collected after June 27, 2018.
- Obtain written verification from the union regarding its members.
  - Waivers of First Amendment Rights "should not be presumed" - *Janus*
  - Include any authorization for deductions from employees who want to voluntarily contribute fair share fees. These authorizations should not pre-date *Janus*.
- Make sure your CBA has a severability clause.

WHAT YOU SHOULD DO ABOUT *JANUS* IN YOUR NEXT CBA

- Avoid any provisions relating to fair-share fees
- Ensure union responsibility for providing affirmative proof that each member has "opted-in" to having dues withheld from their paycheck
  - Include union responsibility to re-secure authorization for any non-union employees who want to voluntarily contribute fair share fees.
- Include a strong indemnity clause
- Avoid agreements to force employees to meet with the union

LOOKING AHEAD IN GENERAL

- The Golden Rule: If an employee approaches you with questions about union membership or fees, direct them to the Bureau of Mediation Services.
  - This includes if the employee has questions about possible litigation against the union post-*Janus*.
- Employees who voluntarily waive their First Amendment rights and pay fair share fees are subject to the same rules and procedures as before *Janus*.
- Unless some law changes Minnesota's duty of fair representation, exclusive representatives will still need to represent all employees, regardless of union membership status.

THE NEXT BIG QUESTION

- Can a union enforce a card, signed by the employee, that binds the employee to membership and dues withholding that renew on a year-to-year basis, with only a limited annual window to opt out?
  - This has come up post-*Janus*, for example, in the context of teacher's unions. Teachers in Minnesota have been presented with cards to reaffirm their commitment to the union. The fine print of these cards specifies that the employee is committing to an annual membership with the union that automatically renews unless they opt out in writing between September 24–30.

THE NEXT BIG QUESTION – WHAT WE HAVE SEEN SO FAR

- New Jersey has passed a law uniformly requiring this sort of arrangement. Union membership now renews annually by statute, and employees are only allowed to opt out of union membership within the 10 days after their hiring anniversary. N.J. Stat. Ann. § 52:14-15.9e
- Michigan, on the other hand, has ruled that these provisions are unconstitutional, because they interfere with employees' rights to refrain from union activity. *See Saginaw Educ. Ass'n v. Eady-Miskiewicz*, 902 N.W.2d 1, 15–16 (Mich. App. 2017)
- No Minnesota case or statute addressing the legality of these "maintenance-of-membership" or "maintenance-of-dues" provisions. Stay tuned.

QUESTIONS?

THANK YOU FOR ATTENDING!

RRM
Ratwik, Roszak & Maloney, P.A.