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Agency Fee Decision May Have Big Impact in CT

The U.S. Supreme Court's decision at the end of June declaring agency fee requirements for public sector workers unconstitutional has substantial implications for thousands of state and local government employees in Connecticut, and for the unions that represent them. *Janus v. AFSCME* overruled the high court's own 41-year-old precedent, and created a number of issues that may take some time to work out.

The closely watched case arose from a challenge by an Illinois public employee to the requirement that he pay agency fees to the union that represented him. Prior case law prohibited requiring public sector employees to join a union and pay union dues as a condition of employment. However, twenty-two states permitted contractual provisions requiring non-member employees to pay a fee to cover the costs of collective bargaining and contract administration. The plaintiff in *Janus* argued that requirement interfered with his First Amendment rights because it forced him to financially support his union's political activities, even if he disagreed with them.

The immediate effect of the court's decision is that agency fee or "fair share" provisions in collective bargaining agreements (and in some statutes, like the one governing collective bargaining for Connecticut state employees) are invalid. The court specifically stated that agency fees and similar payments may not be deducted from a public employee's pay unless he/she has specifically consented to the deduction. However, the opinion does not address a number of practical problems that virtually every municipal employer in Connecticut, as well as the state itself, will have to address. For example:

- Since most deductions from paychecks have to be approved by employees, agency fee payers presumably have authorized those deductions. However, can they now say those deductions were involuntary because they were required by law or contract, so they are no longer valid?
- Because agency fees are often the same amount as dues, employers may not have clear records of who is a union member and who is an agency fee payer. Whose responsibility is it to sort that out, labor or management?
- Can a dues-paying union member drop out now that there is a "free rider" option available? The answer may depend on the terms of the contract, internal union rules, or the wording of the membership application the employee signed.
- Should an employer deduct agency fees from paychecks issued after the *Janus* decision but covering time worked before *Janus*?
- Can agency fee payers seek reimbursement of amounts paid months or even years before *Janus* was decided? That seems unlikely, but apparently there has already been a lawsuit filed in California over the issue.

Our advice to public employers is to consult with their unions about how to implement the Supreme Court's decision. However, formal negotiations with unions are probably not required, except where a contract calls for bargaining over replacement of a provision that is found to be illegal. In most cases the safest approach is to stop all agency fee deductions unless and until employees submit authorizations that are clearly voluntary.

Our opinion is that *Janus* may have far-reaching consequences in states like Connecticut where the vast majority of public employees are unionized, and their unions have considerable political clout. If unions like AFSCME lose ten to twenty percent of their financial support or more, will their influence be significantly diminished? On the other hand, will they be forced to become more aggressive in order to show those they represent that they are worthy of financial support? Will future contract negotiation include proposals by unions to cut services to free riders, or to charge them fees for things like processing grievances? Only time will tell.

Cell Phone Recording Creates Workplace Issues

Cell phones are everywhere, and now smart phones with their apps have more functions than many computers. One of those functions is the ability to record without anyone knowing that they are being recorded. In the workplace, such actions can cause concerns, as managers and supervisors wonder whether employees are recording their conversations and will be able to edit what they say to their detriment. A recent Connecticut Superior Court decision does not solve the problem of how to stop the unknown recording, but recognizes the potential for managers to sue employees for doing so.

Here's the scenario: Several employees were upset at work. They met with their managers, and without telling them, recorded their conversations related to safety in the workplace. One of the employees was fired, and in a federal lawsuit claimed that his discharge violated a workplace safety statute. In discovery, he produced a transcript of the conversations he had secretly recorded.

After learning about the secret recording, the employer and the managers sued the employee who made the recording. They alleged that the recording was made without permission and violated their right to privacy. They further alleged that the former employee's conduct was highly offensive and objectionable, and caused the company and the managers to suffer damages.

The former employee sought to have the case thrown out, but the court found that the complaint alleged sufficient facts to move the case forward, since secret recording of an in-person workplace conversation would be highly offensive to a reasonable person. While the company and managers have not won a judgment, they now have the right to continue their lawsuit, to prove their allegations, and to seek to recover from the former employee for his actions.

Our advice to employers is still to be careful what they say in conversations with employees, since they never can be sure they are not being recorded. While they can take some solace in the availability of a lawsuit against the person who made the recording, there is no guarantee that their words can't be used against them, perhaps even by a different employee.

Supreme Court Upholds Class Action Waivers

Recently the U.S. Supreme Court issued a decision that upheld provisions in employment agreements requiring employees to arbitrate any employment-related claims individually. In issuing its decision, the court actually resolved three separate cases, all of which involved employees who were required, as a condition of employment, to sign agreements to arbitrate individual employment claims, as opposed to joining a class action or engaging in other litigation.

In one case, for example, an employee attempted to participate in class action litigation under the Fair Labor Standards Act despite having signed an arbitration agreement with a class action waiver, and the company sought to preclude the employee from doing do based on

that agreement. The court thus had to address whether the arbitration agreement prevailed over the employee's right to participate in a class action.

The Supreme Court's analysis focused on the interaction of two federal laws, the Federal Arbitration Act (FAA) and the National Labor Relations Act (NLRA). In years past, these two laws did not appear to be in conflict, and arbitration agreements requiring employees to arbitrate their employment claims individually were generally upheld. However, more recently the National Labor Relations Board and some courts have taken the position that such arbitration agreements violate the NLRA because they preclude employees from participating in concerted activity. In reviewing the two laws at issue, the court ultimately found that the interests promoted under the FAA prevailed, and that the arbitration provisions at issue were enforceable.

The significance of this decision goes beyond a clarification of the two federal laws at issue. Many employers have been using arbitration agreements for years, and have attempted to enforce those agreements against employees pursuing separate litigation. The primary purpose of using an arbitration agreement is to avoid the expense and time associated with jury trials and class action lawsuits. The Supreme Court's ruling provides additional support for the enforceability of these arbitration agreements, and therefore gives employers greater latitude to use them.

Our opinion is that reasonable people can differ on these issues. While some (especially plaintiffs' lawyers) argue that employees should always have the right to go to court, the reality is that arbitration is usually a more cost-effective and faster process for all parties involved. On the other hand, while class actions are difficult and costly for employers to defend, employees are less likely to pursue even meritorious individual claims if the amount at issue for any one individual is small, such as overtime pay for a few minutes each day. Therefore, employers and employees alike should carefully consider the benefits of arbitration agreements and class action waivers.

What Constitutes "Discipline"? Our Courts Disagree

A Connecticut state court judge recently issued a decision giving a more expansive definition to the term "discipline" as it is used in Connecticut's "free speech" law, Section 31-51q. In doing so, the Court departed from the majority of previous state court decisions addressing this issue.

Section 31-51q prohibits an employer from subjecting "any employee to *discipline or discharge* on account of the exercise by such employee of rights guaranteed by the first amendment of the United States Constitution or [certain sections] of the Constitution of the state." The law, however, does not include a definition of "discipline" or "discharge" and thus our state courts have been left to interpret the statute to give each of those terms their intended meanings.

With respect to "discipline," the majority of courts in Connecticut have held that the term is limited to affirmative acts of punishment or acts that diminish the status of the recipient rather than the failure to enhance that status. Thus, for example, if an employee is suspended without pay and claims that such a suspension was because of his/her protected speech, such a claim would fall within the ambit of "discipline" under Section 31-51q. On the other hand, if an employee does not receive a promotion or other job enhancement that he/she has no established right to receive, that action would not be considered "discipline."

In this recent case, however, the court found that the definition of "discipline" as employed by Section 31-51q is broader than previously viewed. According to the judge in that case, "discipline" refers to "any *adverse material consequence* relative to a right, term, condition, or benefit of employment that existed at the time of the protected speech." Thus, under the court's new interpretation, an employee may be able to maintain

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a claim under Section 31-51q if, for example, he/she engages in protected speech and, shortly thereafter, is denied a benefit previously promised or expected, like regular renewal of an employment contract.

Our opinion is that, because there appears to be no appellate authority in Connecticut regarding the definition of "discipline" as contemplated by Section 31-51q, this may be an issue that will remain in flux for some time. Such uncertainty may make it difficult for employers to succeed early on in any litigation based on an argument that the allegations do not establish a disciplinary action.

Legal Briefs *and Footnotes*

Paid for sleeping? The U.S. Department of Labor is suing a New London home care company and its owners for not paying its employees overtime, even though they often work up to 100 hours per week. Apparently a significant factor in the dispute is that workers sleep at clients' homes. However, the DOL says the company's own policy states that employees will be paid for overnight hours if they are interrupted so often that they don't get at least five straight hours of sleep.

Tip sharing rules change: Last year the federal government proposed a rule that would allow employers who pay tipped workers at least the full minimum wage to retain or redistribute their customer tips. The backlash prompted Congress to enact this year a statute that prohibits management from taking or keeping employee tips, and allows tip sharing with non-tipped employees like cooks and dishwashers only if the tipped employee is paid the full minimum wage.

Intern test simplified: The U.S. Department of Labor has abandoned its complicated six-factor test for determining whether an intern qualifies for employee status, and has adopted an "economic reality" standard that focuses on which party is the primary beneficiary of the relationship. This standard was initially developed in 2015 by the federal appeals court with jurisdiction over Connecticut. Employers that have shied away from internships in order to avoid claims that they are really employees may want to revisit the issue.

Ministerial exception applied: One manifestation of the separation between church and state in our country is the immunity of churches from certain employment-related litigation. The Archdiocese of Hartford recently dodged a discrimination lawsuit by an employee whose position the court found to be ministerial in nature. Although he was an administrative assistant, he also held the title of "sacristan" which the judge said was inherently religious. He rejected the employee's argument that the two positions should be considered separately, and that he should at least be able to pursue his discrimination claim with respect to his administrative assistant function.

Flipping off Trump: Earlier this year we reported on the firing of a Virginia woman by a federal contractor after a photo of her giving a middle finger salute to the president's motorcade went viral. She sued her employer, but a judge has ruled she doesn't qualify for any of the narrow exceptions to Virginia's employment-at-will doctrine. While the government would be prohibited from taking action against her employer based on First Amendment grounds, that protection apparently doesn't extend to her personally. The result might be different in Connecticut, which prohibits even private sector employers from interfering with an employee's free speech rights.

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