

There are *not* two sides to this *Janus*

How *Janus v American Federation of State, County and Municipal Employees* will change the private sector employment relationship

What is Janus?

- Janus v American Federation of State County and Municipal Employees decided June 27 2018
 - Mark Janus was an employee of the State of Illinois, and member of AFSCME
 - He objected to paying agency fees
 - Agency fees collected and separated and agency members receive yearly *Hudson* notices

Cont'd

- Relies on *Citizens United v. Federal Election Comm'n*, 558 U.S. 310 (2010);
- Overrules *Abood v. Detroit Bd. of Educ.*, which permitted agency fees
 - Agency fees are fees paid to the union not for membership, but for costs involved in collective bargaining, grievance representation, other enforcement of terms and conditions of employment
 - Under the then-extant structure of agency fees, agency fees were 78% of full member dues

How did Janus do this?

- Held, first, that based on *Citizens United*, money is speech. Then, the Court determined that agency fees amount to compelled speech.
- Then, reviewed the five-factor *stare decisis* test:
 - Quality of the decision to be overturned;
 - Workability of the existing rule;
 - Consistency with related decisions;
 - Developments since the decision; and
 - Reliance on the decision

Cont'd

- To say that *Abood* was neither workable nor capable of producing reliance on a broad swath of the economy which has been working for the past 40 years is difficult.

Cont'd

- “Free rider” problem cured by *Abood* is now front and center
- Not enough CBAs have expired since *Janus* to know what the real-world impact on unionization will be
 - Could galvanize membership
 - Could destroy membership by bankrupting the union

Does it Matter for the Private Sector?

- Yes
- Free speech is not often an issue in the private sector. However, Unions are legal only because of government involvement
 - Machinists v. Street, 387 U.S. 740 (1961) and Railway Employees v. Hanson (1956) authorized the use of agency fees in the private sector via the Commerce Clause

Cont'd

- If paying dues (money) is a constitutionally protected speech activity, no member of a private sector Union could be required to be a member
 - What happens to membership and to the exclusive representative
 - Will employers have to administer one set of rules for members of the union, and a different set of rules for each and every individual who opts out?
 - Unions still have a duty of fair representation; employers invariably get dragged into that fight

Other considerations

- Commerce Clause
- If government permission is tantamount to government action,
 - Are individual 401(k), 503(b) contributions ripe for constitutional protection?
 - Are contributions to health insurance plans and other benefits ripe for constitutional protection?

What to do

- If your workforce is unionized, make a plan
- Have employees sign waivers or other written instruments evidencing their intent to participate and consent to decision-making for specific periods of time; have them re-sign every x number of months.

Questions

Thank you!