What Does the Opt-In Provision in the Janus Decision Mean?  
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Public employers, specifically those in non-right-to-work states, should immediately stop collecting union dues from all public employees unless the employee signed a waiver of their First Amendment rights after June 27, 2018.

As many expected, the landmark victory in Janus v. AFSCME protected public employees’ First Amendment right to choose whether or not to pay unions. The Supreme Court ruled that government unions could no longer have public employees fired for not paying them.

However, in the decision, the Court went further than simply allowing public employees to opt out of paying their union. Writing for the majority, Justice Samuel Alito explains, “States and public-sector unions may no longer extract agency fees from nonconsenting employees,” and “[n]either 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 such a payment, unless the employee affirmatively consents to pay.”

The decision establishes an opt-in procedure for “nonmembers … waiving their First Amendment rights, and such a waiver cannot be presumed.” (emphasis added) Further, Justice Alito writes, “[r]ather, to be effective, the waiver must be freely given and shown by ‘clear and compelling’ evidence.”

The question now is: who does this opt-in requirement cover? The decision is clear that employees must affirmatively consent to waiving their First Amendment rights before state or municipal employers can deduct dues from their wages to give to unions. There also must be “clear and compelling evidence” of this waiver.

After the Janus ruling, California, New York and several other states that traditionally have

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1 Janus v. AFSCME Council 31, 585 U.S. ___, 2018 p 48 (June 27, 2018)
2 Id
been union strongholds stopped deducting fees from agency fee payers—public employees who resigned their membership in the past.

However, the decision goes much further than just eliminating agency fees. According to a July memo written by William Messenger of National Right to Work Legal Defense Foundation, who argued the case, someone cannot waive a constitutional right they don't know they have.

“Employees could not have knowingly waived a constitutional right before that right was recognized to exist,” writes Messenger. He added that “employees could not have knowingly waived their First Amendment right not to subsidize union advocacy before the Supreme Court recognized that right in Janus.”

Messenger points to the Curtis Publishing case where the Supreme Court held “an effective waiver must . . . be one of a ‘known right or privilege.’” Messenger explains, “The logic of Curtis Publishing controls [in Janus]: employees could not have knowingly waived their First Amendment right not to subsidize union advocacy before the Supreme Court recognized that right in Janus.”

Patrick Hughes, president of the Liberty Justice Center, which also represented Plaintiff Mark Janus, agrees that “any previous authorizations for the deduction of dues or fees that employees made before the Janus decision were based on a choice the Supreme Court has declared unconstitutional,” and therefore “is invalid because it does not satisfy the ‘clear and affirmative’ consent standard.”

Broken down, this means that unless a public employee who was formerly required to pay union dues or fees signed a waiver after Janus was decided on June 27, 2018, the union can no longer take dues out of that person’s paycheck or collect them in any other way.

There may be litigation to determine exactly which public employees unions must convince to opt in to their union. This can be broken down into three scenarios of public employees, all of which are likely to have the opportunity to opt in to the union and should be considered automatically opted out by Janus. The decision shows that likely all three should have the opportunity to opt in or stay out of the union, but for each scenario, there is an increasing chance that litigation will be necessary for enforcement.

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6 Id

State and municipal employers should stop the automatic collection of dues from the following three types of employees:

1. **Employees who are not union members.** There is no doubt that state and municipal employers must immediately stop collecting dues from these employees. States such as California, Connecticut, Maryland, Minnesota, New Hampshire, New York, Pennsylvania, and others have already announced they will cease deducting dues or fees from this first scenario of employees.

2. **Public employees in all states that a union considers members but who have not signed a union membership/dues check off agreement, or employees for whom the union cannot provide evidence of a signed agreement.** State and municipal employers should also stop collecting dues from these employees as the Supreme Court called for “clear and compelling” evidence of a waiver of rights to collect dues. If the union cannot produce such a waiver or membership agreement then there is no evidence and thus no waiver.

3. **Employees in non-right-to-work states who have signed a membership/dues check off agreement before the decision was handed down on June 27, 2018.** Employees could not have waived rights that they did not know they have. This means that all membership agreements in these states prior to Janus are invalid and the state cannot collect dues from almost all public employees.

Unions and possibly public employers may also run financial risks if they collect dues from public employees without clear and compelling evidence of a waiver.

After the Supreme Court issued the decision in Janus, it also allowed the class-action lawsuit Riffey v. Rauner to proceed. In the Riffey case, non-unionized home healthcare providers are suing the Service Employees International Union for $32 million in dues that were improperly deducted.

The Court’s blessing of the class-action lawsuit may indicate that they are sympathetic to other class actions involving improperly deducted dues. If this happens, unions or employers who deduct dues from employees who have not affirmatively opted in may be on the hook for vast sums which would need to be returned to public employees.

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