Waiving a Fundamental Right

In *Curtis Publishing*, the United States Supreme Court stated that waiver of a constitutional right could not take place prior to the Supreme Court precedent that articulated that right. It is well established by Supreme Court precedent that a waiver of constitutional rights is not to be presumed, and to be effective, a waiver must be knowingly, clearly, and voluntarily made. Additionally, “[c]onstructive consent is not a doctrine commonly associated with the surrender of constitutional rights.”

The First Amendment of the Constitution is the “fixed star in our constitutional constellation” and waivers of that right may not be presumed and must be shown to have been given knowingly, clearly, and voluntarily. This must be shown by clear and convincing evidence. The Supreme Court has stated that “[w]here the ultimate effect of sustaining a claim of waiver might be an imposition on that valued freedom [of speech], we are unwilling to find waiver in circumstances which fall short of being clear and compelling.” This is a high threshold that must be met before an individual can waive their First Amendment rights.

On June 27, 2018, the Supreme Court ruled in *Janus v. AFSCME* that the collection of agency fees from public employees was an unconstitutional violation of their First Amendment rights and should cease immediately. The Court also stated that employers need affirmative consent to collect dues from union members:

> [N]either an agency fee nor any other form of payment to a public-sector union may be deducted from an employee, nor may any other attempt be made to collect such a payment unless the employee affirmatively consents to pay.

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1. *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 145 (1967) (“We would not hold that Curtis waived a ‘known right’ before it was aware of the New York Times decision. It is agreed that Curtis’ presentation of the constitutional issue after our decision in New York Times was prompt.”)
3. *See, e.g., D.H. Overmyer Co., Incl. v. Frick Co.*, 405 U.S. 174, 185 – 86 (1972); *See also Edwards v. Arizona*, 451 U.S. 477, 482 (1981) (stating that for waivers of the constitutional right to counsel, waivers “must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment.”).
To be effective, a waiver by a public employee of his or her right to not join and pay a union must be dated after the Janus decision—June 27, 2018. Workers could not have waived a constitutional right they did not know they had, and their First Amendment rights must be protected. The court articulated this right on June 27, 2018, and therefore, no employee could have waived that right until then. It is well established by case law that “[a] waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege.” Because employees would not have known of their rights until the June 27, 2018, Janus decision, they could not have made a knowing waiver of their rights until June 28, 2018.

Additionally, any waiver signed after June 27, 2018, must make clear to any employee that he is waiving a constitutional right when he signs a form to authorize a dues deduction. Waivers of constitutional rights in contracts have been discussed at length by courts. For example, in discussing contractual waivers of the Seventh Amendment right to a jury trial, “courts typically consider any actual negotiations over the clause, whether the clause was presented on a take-it-or-leave-it basis, the conspicuousness of the waiver, the degree of bargaining disparity between the parties, and the experience and sophistication of the party opposing the waiver.” In determining whether a contractual waiver of a constitutional right was voluntarily, knowingly, and intelligently made, the Supreme Court in Fuentes v. Shevin found that it matters whether the contract was one of adhesion—that is, whether there was no bargaining over the terms of the contract and that parties and there was unequal bargaining power. Many union dues authorization forms qualify as contracts of adhesion where employees are pressured into signing and have no bargaining power.

It is unlikely that any dues deduction form signed before June 27, 2018, would have had the necessary language to inform an employee that they were waiving a constitutional right, since that right had not yet been articulated by the courts. Additionally, very few dues deduction authorization forms after June 27, 2018, likely include language that would pass constitutional muster to be a knowing waiver of a constitutional right. Since waivers of constitutional rights are not presumed and waiver must be knowing, clearly articulated language is often required. Any waiver language should state specifically that the employee has a First Amendment right of association and that they recognize they may not be compelled to be a member of the union or pay any money to the union.

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13 Fuentes v. Shevin, 407 U.S. 67, 95 (1972) (“There was no bargaining over contractual terms between the parties who, in any event, were far from equal in bargaining power. The purported waiver provision was a printed part of a form sales contract and a necessary condition of the sale. The appellees made no showing whatever that the appellants were actually aware or made aware of the significance of the fine print now relied upon as a waiver of constitutional rights.”). Cf. D.H. Overmyer Co., Incl. v. Frick Co., 405 U.S. 174 (1972) (finding a written waiver of constitutional rights was valid where there was not unequal bargaining power and the contract was not a contract of adhesion).

* This issue is currently being litigated. Courts such as the United State District Court, Western District of Washington, have ruled in favor of the state and union on a motion for summary judgment. See Belgau v. Inslee, 359 F. Supp. 3d 1000. The court failed to find the state agency deducting dues qualified as the necessary amount of state action to trigger First Amendment protections. Because of this, the court then failed to give appropriate weight to the inability of employees to make a meaningful waiver before the Court articulated the right in Janus. This is in direct contradiction to the Supreme Courts' decision in Curtis Publishing, which the District Court did not cite or discuss. It is also imperative to understand the fact that the right to end union membership and the right to end financial support of a union are inextricably linked under the First Amendment freedom of speech and association. The decision has been appealed to the Ninth Circuit Court of Appeals.