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Supreme Court Rules "Fair Share" Fees Are No Longer Fair

By Jonathan J. Downes, George S. Crisci, and Scott H. DeHart*

On Wednesday, June 27, 2018, the U.S. Supreme Court handed down its highly-anticipated and historic ruling in *Janus v. AFSCME Council 31*. In a 5-to-4 decision, the closely-divided Court held that public employee collective bargaining agreements ("CBA") that require non-union member employees to pay involuntary "fair share" fees are unconstitutional. Specifically, the mandatory withholding of these "fair share" fees violates the First Amendment rights of non-members of the union by compelling them to subsidize private speech on matters of substantial public concern.

Union Dues and "Fair Share" Fees.

When a majority of employees in a "bargaining unit" vote to be represented by a union, that union becomes the exclusive representative of <u>all</u> employees in that bargaining unit – including employees who choose not to join the union as dues-paying members.

While non-members are not required to pay union dues, the Supreme Court previously held, in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), non-members could be required to pay an "agency fee" or "fair share" fee instead. Fair share fees were typically a reduced percentage of the full union dues, and subsidized the activities that the union performed on behalf of non-members (such as collective bargaining and grievance handling). Under *Abood*, public employee unions were required to subtract from the fair share fees any "non-chargeable" expenses – i.e., any costs associated with union political and ideological projects – as a safeguard for employee First Amendment rights.

In the four decades since *Abood*, fair share fees became a common feature of public employee CBAs. Ohio was one of twenty-two states in the U.S. that allowed the mandatory deduction of fair share fees as a condition of continued employment. *See* Ohio Revised Code Section 4117.09(C).

However, in recent years the Supreme Court began to sharply criticize *Abood* as an anomaly among other First Amendment cases dealing with compelled speech. In 2015, the Supreme Court agreed to hear oral arguments in *Friedrichs v. California Teachers Association*, in which public employees challenged the deduction of "fair share" fees as a form of compelled subsidy of speech that violated their First Amendment rights. The Supreme Court was widely-expected to overrule *Abood* in *Friedrichs* and to strike down fair share fees as unconstitutional. Justice Antonin Scalia's unexpected death in February 2016 left the Court evenly-divided in *Friedrichs*. The question of fair share fees was left for another day.

The Janus Decision.

Following President Trump's nomination (and the Senate's confirmation) of new Associate Justice Neil Gorsuch, that day arrived. The Supreme Court granted review in *Janus v. AFSCME Council 31*, a case that closely mirrored *Friedrichs*. Plaintiff Mark Janus, an Illinois state employee, challenged the state's deduction of "fair share" fees as a violation of his First Amendment rights. Janus argued that

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he disagreed with many positions taken by his union, and that everything a public employee union does is inherently political. Specifically, Janus argued that union wage and benefits demands were damaging to Illinois' finances.

In the ruling announced on June 27, 2018, the Court's majority agreed with Janus. Justice Alito wrote the Court's opinion, in which he explained the majority's rationale for overruling *Abood* and concluded that deducting compulsory "fair share" fees to pay for union collective bargaining activities necessarily compels public employees to subsidize private political speech, a clear violation of the employees' First Amendment rights.

The Court also explained that an employee's authorization to pay union dues or fair share fees is a waiver of his or her First Amendment rights, and such a waiver must be freely given. Without an employee's clear and affirmative consent, it is unconstitutional for employers to automatically deduct dues or fair share fees and to require employees to 'opt out.' Rather, under *Janus* an employee must affirmatively 'opt in' before any such payments could be withheld by the employer.

The Court's decision will have an immediate and lasting effect on public employee collective bargaining across the U.S. Twenty-two states, including Ohio, permitted the deduction of public sector "fair share" fees. In Ohio, the mandatory fair share provisions in R.C. 4117.09(C) are now unconstitutional because of *Janus*. Many public employee CBAs also contain fair share language that the *Janus* decision has rendered unenforceable. Employers should closely review the "fair share" and "severability" provisions in their CBAs, cease involuntary fair share fee deductions, and assess any obligations they have to meet and discuss with unions regarding *Janus*.

Several public-sector unions have indicated that they will propose new CBA language to automatically reinstate "fair share" fees in the event the Supreme Court ever reverses *Janus*. Others have explored the possibility of charging non-members a fee for certain services actually rendered by the union (i.e., grievance handling). State legislatures also may revisit the statutory responsibilities of unions to represent employees who choose not to become dues-paying members. The long-term impact of *Janus* on labor-management relations, union membership, and collective bargaining remains to be seen.

Employers should collaborate closely with labor counsel to address the short- and long-term impact of *Janus*. Public agencies should act promptly — but cautiously — as they halt "fair share" payroll deductions for non-union employees. Employers should also carefully manage their communications with employees to avoid committing unfair labor practices.


***Jonathan J. Downes**, **George S. Crisci**, and **Scott H. DeHart** practice in Z&R's labor and employment groups. For more information about the *Janus* decision or for your other labor and employment needs, please contact Jonathan (jjd@zrlaw.com) and Scott (shd@zrlaw.com) at the firm's Columbus office at 614-224-4411 or George (gsc@zrlaw.com) at the firm's Cleveland office at 216.696.4441.

Z&R SHORTS

Upcoming Speaking Engagements

July 17, 2018

Scott H. DeHart and **Brad E. Bennett** present *"Hiring and Onboarding Legal Skills You Must Know"* and *"Easy I-9 and Immigration Compliance Methods That Protect Your Employer"* at The National Business Institute Seminar at the Quest Conference Center in Columbus, Ohio.

July 26, 2018

Brad E. Bennett presents *"Likes, Tweets, and Texts! Social Media and Technology in the Workplace"* at the Ohio Municipal Attorneys Association 2018 Municipal Law Institute at the Marriot Northwest in Dublin, Ohio.

July 27, 2018

Drew C. Piersall presents *"Attorney Conduct – Sexual Harassment"* at the Ohio Municipal Attorneys Association 2018 Municipal Law Institute at the Marriot Northwest in Dublin, Ohio.

August 17, 2018

Jonathan J. Downes presents *"Texts, Tweets & Likes: The Intersection of Social Media & Employment Law"* at the 2018 Ohio Municipal League Regional Training Meetings at The Hancock Hotel in Findlay, Ohio.

Whistle While You Work: Supreme Court Adopts Narrow Definition of "Whistleblower" Under The Dodd-Frank Act

By Scott Coghlan*

The U.S. Supreme Court recently held that employees protected from retaliation by employers under the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") must provide information or make reports of potential security-law violations directly to the Securities Exchange Commission ("SEC"). *See Digital Realty Trust, Inc. v. Somers*, 138 S. Ct. 767 (2018). In so holding, the Court narrowed the scope of potential plaintiffs under Dodd-Frank, excluding the broader category of individuals who report security-law concerns internally within their company but not to the SEC. While publicly-traded companies may welcome the decision as one that reduces the number of potential lawsuits, the decision also may have the effect of incentivizing employees not to raise security-law concerns internally and, instead, to go directly to the SEC to ensure protection under Dodd-Frank.

In the wake of the 2008 financial crisis, Congress enacted Dodd-Frank as a measure to "improv[e] accountability and transparency in the financial system." Under Dodd-Frank, employers are prohibited from retaliating against "whistle-blowers," defined as individuals who provide "information relating to a violation of the securities laws to the [SEC]." *See* 15 U.S.C. §78u-6(a)(6). Whistleblowers who prevail on their claims are entitled to double backpay with interest and additional damages, including litigation costs and attorneys' fees.

In *Digital Realty*, the plaintiff worked as a vice president for a real estate investment trust. The plaintiff alleged his employer discharged him shortly after he notified senior management that he believed the company had violated securities laws. He did not, however, report any suspected violations to the SEC. After his discharge, the plaintiff filed suit alleging a whistleblower claim under Dodd-Frank. In response, the company moved for dismissal on the grounds that the plaintiff did not qualify as a whistleblower because he did not make a report to the SEC. The court denied the motion, and the employer appealed that decision to the U.S. Court of Appeals for the Ninth Circuit.

On appeal, the Ninth Circuit affirmed the lower court's decision. In doing so, the court acknowledged that the language of Dodd-Frank defined a "whistleblower" as someone who provides information to the SEC. Nonetheless, the Ninth Circuit concluded it would be absurd to protect employees who make internal complaints only if they also reported to the SEC, as the court believed this dual reporting would be rare. The Ninth Circuit's decision only added to the uncertainty regarding the scope of Dodd-Frank's anti-retaliation protection, as the Fifth and Second Circuits previously interpreted Dodd-Frank differently. The Supreme Court granted certiorari in *Digital Realty* to resolve the split between the Circuit Courts.

In *Digital Realty*, the Supreme Court justices unanimously agreed that, in order to qualify for Dodd-Frank's anti-retaliation protections, purported whistleblowers must actually provide information or reports of suspected security-law violations to the SEC. In reaching its conclusion, the Supreme Court noted that the statute was "unequivocal" in limiting the definition of whistleblower to those individuals who provide information to the SEC. In addition, the Court noted that this narrow definition of whistleblower was consistent with Congress' purpose and design in enacting Dodd-Frank. Specifically, the "core objective" of Dodd-Frank's whistleblower provisions was "to motivate people who know of securities law violations *to tell the SEC*." The Court also noted that whistleblowers, who raise concerns internally but not to the SEC, may pursue retaliation claims under the Sarbanes Oxley Act of 2002 ("SOX"), provided that they file an administrative complaint within SOX's 180-day deadline.

In sum, employees of publicly-traded companies who raise concerns of potential security-law violations internally, but not to the SEC, will not receive whistleblower protections under Dodd-Frank. While the *Digital Realty* decision limits the scope of potential plaintiffs under Dodd-Frank, publicly-traded employers should still note that whistleblowers may have recourse under SOX and state laws. Furthermore, the *Digital Realty* decision may have the undesirable consequence of persuading employees to go directly to the SEC to gain protection under Dodd-Frank, as opposed to taking advantage of internal reporting mechanisms set up by their employers.

***Scott Coghlan** routinely advises and defends employers in whistleblower cases, including those brought under Dodd-Frank and SOX. For more information about the *Digital Realty* decision or other labor and employment issues, please contact Scott (sc@zrlaw.com) at 216.696.4441.

Return to Form: DOL Resurrects and Issues Wage and Hour Opinion Letters

By Jessi L. Ziska*

On January 8, 2018, the U.S. Department of Labor ("DOL") reissued 17 advisory opinion letters that provide guidance on a wide range of issues under the Fair Labor Standards Act ("FLSA"). The DOL's Wage and Hour Division ("WHD") originally issued these opinion letters in January 2009 during the final days of the Bush administration by the former acting WHD Administrator. In March 2009, however, the WHD withdrew them after former President Barack Obama took office. Subsequently, the Obama administration stopped issuing opinion letters altogether. Under the Trump administration, the DOL announced it will return to the practice of issuing guidance for employers by way of opinion letters. In addition to reissuing the previously-withdrawn letters, on April 12, 2018, the DOL issued its first new opinion letters in nearly a decade.

An opinion letter is an official guidance document addressing how a particular law applies in specific circumstances. For instance, an opinion letter would allow the DOL to formally address an employer's specific compliance concern pertaining to the FLSA. These letters also serve as important guidance for other employers faced with similar circumstances and compliance concerns.

The 17 reissued letters cover a wide variety of FLSA topics and provide clarity to the DOL's current position on numerous issues. Eleven of the reissued opinion letters relate to Section 13(a)(1) of the FLSA, a provision that exempts any worker employed in a bona fide administrative capacity from the FLSA's minimum wage and overtime requirements. For example, the letters address questions about the exempt status of the following jobs positions:

- Project superintendents employed by a commercial construction company (FLSA2018-4);
- Community members who coach athletic teams for public schools (FLSA2018-6);
- Client service managers of an insurance company (FLSA2018-8); and
- Consultants, clinical coordinators, and business development mangers of a healthcare placement company (FLSA2018-12).

Two of the opinion letters relating to FLSA Section 13(a)(1) — FLSA2018-7 and FLSA2018-14 — respond to employers' questions about the "salary basis" test to determine exempt status. Other topics addressed include ambulance personnel on-call time and hours worked (FLSA2018-1), regular rate calculation for fire fighters and alarm operators (FLSA2018-15), and job bonuses relating to FLSA Section 7(e) (FLSA2018-9 and FLSA2018-11).

The two new FLSA-related opinion letters address the compensability of travel time and rest breaks. In one letter (FLSA2018-18), the DOL addressed whether required travel on weekends or to various job sites constitutes compensable "worktime" under various circumstances. In the second letter (FLSA2018-19), the DOL discussed whether 15-minute rest breaks required every hour by an employee's serious health condition can be considered unpaid leave under the Family Medical Leave Act (in short, yes). The DOL issued a third letter (CCPA2018-1NA) addressing wage garnishment in relation to the Consumer Credit Protection Act. In addition to the letters, the DOL also issued a "fact sheet" regarding overtime for workers in higher education.

DOL opinion letters are a useful tool for employers seeking to avoid liability. The Portal-to-Portal Act of 1947 amended the FLSA to provide an employer with an affirmative defense that protects it from liability when the employer takes a certain action in reliance upon any written regulation, ruling, or interpretation by the WHD – even if the interpretation later turned out to be wrong. However, for an employer to be protected by this "good-faith reliance" defense, it must have acted in good faith and in conformity with the opinion letter.

Employers should be particularly cautious with the "conformity" prong of this defense. Recently, in November 2017, the U.S. Court of Appeals for the Sixth Circuit, which covers Ohio, Michigan, Tennessee, and Kentucky, decided that an employer could not avail itself of the good-faith reliance defense because the facts underlying the employer's case were not in conformity with the facts in the opinion letter the employer relied upon. *See Perry v. Randstad Gen. Partner (US) LLC*, 876 F.3d 191 (6th Cir. 2017). The Sixth Circuit stated that the opinion letter did not provide "a clear answer to the particular situation" and, therefore, the employer did not receive protection by the affirmative defense.

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Effectively Addressing Workplace Sexual Harassment

By David R. Vance*

In the wake of the numerous workplace harassment scandals receiving national attention, employers are reminded of the importance of implementing effective workplace sexual harassment policies. Beyond establishing an appropriate sexual harassment policy, employers must train managers and supervisors how to appropriately handle these issues. Employers also must implement a reporting mechanism for informing the employer of any instances of sexual harassment.

Sometimes employees are afraid to report instances of sexual harassment and managers and supervisors ineffectively investigate those claims that are made. Accordingly, managers and supervisors must understand how to properly receive and investigate reports of workplace sexual harassment. Finally, employers must take an appropriate course of action based upon the findings of the investigation.

1. Develop a Policy and Train Managers and Supervisors Regarding the Policy and Reporting Mechanism

Employers should take action to prevent sexual harassment in the workplace before it occurs. To this end, the employer must have a sexual harassment policy. The policy should be written in a way that all employees can understand, include clear definitions of harassment, and provide specific examples of prohibited behaviors. The employer also must advise employees how to report instances of workplace sexual harassment. Enabling third parties to report harassment or act to prevent workplace harassment is particularly effective in limiting harassment. Studies have shown that reporting of sexual harassment is more complete and frequent when there is a "zero-tolerance" policy. Therefore, creating the appropriate workplace sexual harassment policy, including a reporting mechanism, is the foundation necessary for effectively addressing workplace sexual harassment.

Following creation of the policy and the reporting mechanism, employers should implement training programs for managers and supervisors so that they can understand how to prevent workplace harassment and respond to allegations. According to research, the most effective training is in person, interactive, and led by a trainer who is positive, encouraging, and engaging. The training should be tailored to the particular workplace and is most effective when performed by a supervisor or an external expert, such as an attorney or other outside professional trainer.

2. Implement a Comprehensive Reporting Mechanism

An employer should provide every employee with a copy of the policy and an explanation of the reporting mechanism and redistribute this information periodically. Other measures to ensure effective dissemination of the policy and complaint procedure include posting them in central locations, incorporating them into employee handbooks, and holding periodic question and answer sessions.

Historically, employees have reported instances of workplace sexual harassment by informally meeting with the human resources department. However, employees may feel intimidated or confused by this process. To address these concerns, mobile platforms have developed, such as Red Flag, AllVoices, or Kendr, which enable employees to report instances of workplace harassment and to engage the human resources department. These platforms specifically permit anonymous reporting. Even in the absence of an anonymous reporting mechanism, employees must understand how to report workplace sexual harassment and must feel comfortable doing so.

3. Investigate Reported Sexual Harassment

When an employee submits a harassment complaint, the employer must choose whether to investigate the complaint internally, or whether to engage a third-party investigator. To make this decision, the employer should consider the seriousness of the allegations. For example, if the allegations are complicated, egregious, and, if true, would expose the company to legal liability, then the employer should consult an attorney to determine the best form of investigation.

When deciding how to address an employee's complaint, an employer also should consider the identity of the alleged harasser. If the employee accuses a lower-level employee, the company's human resources department may be an appropriate choice for handling the matter. On the other hand, if the employee points to an executive or supervisor, employers should consider whether to hire a third party to investigate.

Regardless of the approach taken, any report of workplace sexual

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harassment must be taken seriously and effectively investigated.

4. Undertake an Appropriate Course of Action

In many instances, an employer can avoid liability for workplace sexual harassment if it takes reasonable care to prevent and remedy workplace sexual harassment. This defense, known as the *Faragher/Ellerth* defense, was comprehensively discussed by the United States Supreme Court in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) and *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998). A successful *Faragher/Ellerth* defense involves exercising reasonable care to prevent and promptly correct workplace sexual harassment. Generally, proving an employer took such reasonable care requires establishing, disseminating, and enforcing an anti-harassment policy and reporting mechanism.

If the investigation proves that harassment has indeed occurred, the employer should take immediate corrective action. Further, the employer may choose to take remedial measures even if no harassment occurred (e.g., conduct training; reissue the company's harassment policy). In any event, taking action following the conclusion of the investigation is essential for an effective workplace sexual harassment policy and to avoid potential liability.

Conclusion

Regardless of whether the national media remains focused on workplace sexual harassment, employers must appropriately address any report of workplace sexual harassment. The above tips are a great start for successfully handling such reports. If an employer faces reports of sexual harassment or simply wishes to implement a proactive sexual harassment policy and procedure, then the employer should consider consulting with experienced employment counsel.

***David R. Vance**, an OSBA Certified Specialist in Labor and Employment Law, has extensive experience helping employers investigate and resolve sexual harassment claims. For more information about the tips above or any other employment-related matters, please contact David at drv@zrlaw.com or 216.696.4441.

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The DOL's return to issuing opinion letters is good news for employers, as the letters are valuable resources and provide much needed guidance. However, it is important for employers relying on opinion letters to pay close attention to the particular facts and circumstances at issue in the letter in comparison to their own. If an employer wishes to rely on an opinion letter and is at all concerned whether it applies to their circumstances, it should consult counsel.

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