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Collective Bargaining Law in the Firing Line at the Supreme Court

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By William A. Herbert

By the end of the current term, the U.S. Supreme Court will render a decision with the potential for destabilizing important aspects of collective bargaining law. In *Friedrichs v. California Teachers Association*,[1] plaintiffs have raised a First Amendment challenge to a California statute on the grounds that it requires an employee who is not a union member to a pay an "agency fee" to the union that is the exclusive representative of the employee's bargaining unit.

Under an agency fee arrangement, a non-union member must contribute to the cost of negotiations, contract administration, and representation. The individual, however, does not have to financially support the union's partisan or ideological agenda. The basic principle behind an agency fee is that the non-member cannot be permitted to be a "free rider" by enjoying the benefits of union representation, including the negotiated terms of a contract, without sharing in the financial costs.

An agency fee is also premised on the union's obligation, as the exclusive bargaining representative of a bargaining unit, to fairly represent all unit employees regardless of union membership. Exclusive representation is a core element of public and private sector collective bargaining law. It is administratively convenient for employers by insuring a single collective voice to negotiate with, and to administer the negotiated agreement.

Agency fee mandates, like the one in California, exist or are negotiable under New York's Taylor Law and other state public sector collective bargaining laws. They are also negotiable in the private sector under the National Labor Relations Act (NLRA),[2] with the exception of workplaces located in "right to work" states, and under the Railway Labor Act (RLA).[3]

Close to 40 years ago, the U.S. Supreme Court ruled in *Abood v. Detroit Board of Education*[4] that a negotiated agency fee system did not violate the First Amendment. The court has also upheld negotiated agency fee obligations under the RLA[5] and the NLRA[6] to the extent that the fees are necessary for a union's representation about labor-management issues. Under both public and private sector collective bargaining law, a non-member has a right to object to fees to pay for non-chargeable union activities.

This may all change if the court in *Friedrichs* follows the dicta from majority opinions authored by U.S. Supreme Court Justice Samuel A. Alito Jr. in 2012[7] and 2014.[8] In those decisions, Alito, joined by Chief Justice John G. Roberts and Justices Antonin Scalia, Anthony M. Kennedy and Clarence Thomas, expressed sharp criticisms of the holding in *Abood* and the private sector precedent it was based on. In contrast, the same court majority ruled in *Citizen United v. FEC*[9] that a corporation's free speech rights outweigh shareholders' interests in not being compelled to fund corporate political and ideological causes.

The final outcome in *Friedrichs* is uncertain. Scalia's observation in a 1991 concurring opinion in an agency fee case suggests that he views such fees as being constitutional under the First Amendment: "Where the state creates in the nonmembers a legal entitlement from the union, it may compel them to pay the cost."[10]

What is certain is that there is no such thing as free union representation, to paraphrase Milton Friedman. The overturning of *Abood* will lead to cost-shifting in the workplace, requiring unions and their members to subsidize the representation of non-members. It would result in financially incentivizing non-membership, and it might cause the fracturing of the exclusive representation model. The sustaining of the challenge in *Friedrichs* will also set the stage for similar constitutional challenges to negotiated private sector agency fee arrangements under the NLRA or RLA. Lastly, the possible judicial imposition of a newly discovered constitutional "right to work" would contradict the Supreme Court's prior dictum that the First Amendment "is not a substitute for the national labor relations laws."[11]

Endnotes:

1. Docket No. 14-915.

2. 29 U.S.C. §151, et seq.

3. 45 U.S.C. §151, et seq.

4. 431 U.S. 209 (1977).

5. *Railway Employees' Dep't. v. Hanson*, 351 U.S. 225 (1956).

6. *Communications Workers of America v. Beck*, 487 U.S. 735 (1988).

7. *Knox v. SEIU*, 132 S. Ct. 2277 (2012).

8. *Harris v. Quinn*, 134 S. Ct. 2618 (2014).

9. 558 U.S. 310 (2010).

10. *Lehnert v. Ferris Faculty Association*, 500 U.S. 507, 556 (1991).

11. *Smith v. Arkansas State Highway Employees*, 441 U.S. 463, 464 (1979).

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