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Pending Supreme Court Case Could Affect Collection of Public Employee Union Agency Shop Fees

Recently, the United States Supreme Court commenced a new session with a docket full of interesting cases. One case, *Friedrichs v. California Teachers Association*, is of particular significance to those in the field of public sector labor law. A decision in favor of the plaintiffs has the potential to affect the implementation and regulation of union agency shop fees nationwide.

The case was originally brought by a California public school teacher, Rebecca Friedrichs, who argued that the mandatory payment of agency shop fees violated her First Amendment right to free association and free speech. Currently, public sector employees in New York who choose not to join the union that has been certified as their collective bargaining representative are required under the Taylor Law to pay fees associated with the union's collective bargaining and contract administration costs. These fees are called "agency shop fees."

Agency shop fees may not include any political costs associated with running the union. However, the plaintiffs in *Friedrichs* argue that it is difficult to separate the political costs associated with public employee unions from the collective bargaining and contract administration costs. In their Petition for a Writ of Certiorari to the Supreme Court, the plaintiffs wrote: "In this era of broken municipal budgets and a national crisis in public education, it is difficult to imagine more politically charged issues than how much money cash-strapped local governments should devote to public employees . . . ."

Similar to the issues presented in some of the other cases on the docket this session, the issue of agency shop fees in the public sector has recently been before the Supreme Court. In the 2014 case of *Harris v. Quinn*, the Court addressed the issue of whether the First Amendment prohibits the collection of agency shop fees from Rehabilitation Program Personal Assistants employed by the State of Illinois who choose not to join or support the union. The facts in *Harris* led to a narrow opinion by the Court that the First Amendment rights of the Personal Assistants would be violated by the collection of agency shop fees because the customers (recipients of home care services), rather than the State of Illinois, controlled most aspects of the employment relationship and the scope of the collective bargaining provided by the union on behalf of the Personal Assistants was extremely limited. The Court also noted that the traditional "free-rider" argument that had previously supported agency shop fees in the past was weakening in light of First Amendment scrutiny.

The defendants in *Harris* and in *Friedrichs* both rely on the Supreme Court's 1977 decision in *Abood v. Detroit Board of Education*. In *Abood*, the Supreme Court held that although it was unconstitutional to collect fees from non-member employees to support political or ideological causes, unions have the right to require employees within the bargaining unit who choose not to become union members to contribute to the cost of collective bargaining activities. Notably, unions are also required to provide some sort of notice to all members of the bargaining unit as to what the fees are being used for, in an effort to allow time for any objections by non-member employees to their agency shop fees being contributed to political causes.

What does this mean for public sector employers in New York? The plaintiffs in *Friedrichs* are seeking to overrule the precedent set in *Abood* by either abolishing agency shop fees, or, in the alternative, by creating a system whereby non-member employees must opt in (rather than opt out) of the payment of such fees. Section 208.3 of the Taylor Law provides that each public employee union in New York is entitled to have deducted from the wage or salary of non-member employees within the bargaining unit the amount equivalent to the dues levied by the union against member employees. Section 208.3 also requires, as a condition of this agency shop fee deduction, that the union must establish and maintain "a procedure providing for the refund for any employee demanding the return of any part of an agency shop fee deduction which represents the employee's pro rata share of expenditures by the organization in aid of activities or causes of a political or ideological nature only incidentally related to terms and conditions of employment." If the Supreme Court rules in favor of the plaintiffs, the constitutionality of this provision of the Taylor Law could also be subject to challenge.

In the meantime, stay tuned for further developments regarding this case, and be on the lookout for oral arguments in the next few months.

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Jacqueline Smith, a 2015 law graduate who is awaiting admission to the New York bar, co-wrote this Information Memo

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