

Please continue to check here throughout the day and moving forward for updated information and further guidance on its impact to ensure compliance with the law and existing collective bargaining agreements.

JANUS DECISION

The U.S. Supreme Court released its decision on the landmark *Janus v. AFSCME* case this morning, and the Court has ruled that fair share fees are unconstitutional. OSBA is still reviewing the Court's opinion and assessing how districts will be affected.

This change in the law will trigger a duty to bargain over a mandatory subject for any District with fair share fee payers. If you have fair share language in collective bargaining agreements immediate action is required.

If a district has no fair share fee payers, this decision has no immediate impact on voluntary member dues deductions. However, there could be an impact on dues deductions from voluntary members if the District does not have a written, or copy of a written, authorization to deduct dues from individual members.

Here is a guide on how to proceed:

- Review all collective bargaining agreements for the following language:
 - Fair share provisions:
 - Does the employee pay the same amount as Association members?
 - When are the payments pulled from employees' payroll?
 - Is there a provision that states a deadline when an employee must notify the district about payroll deductions or certification of direct payment of dues?
 - Does the District have language that indemnifies or holds the District harmless in regard to dues payments or fair share specifically?
 - Savings, Separability, or any other articles or clauses related to reopening the collective bargaining agreement if a provision of the contract becomes unlawful during the term of the Agreement.
 - Does the language identify what bargaining process the parties will use?
 - ORS 243.698 90-Day Interim Bargaining Process?
 - ORS 243.702 90-Day Interim Bargaining Process?
 - ORS 243.712 150-Day Bargaining Process?
 - Another defined process based on a specific number of the days?
 - ORS 243.702 states: "In the event any words or sections of a collective bargaining agreement are declared to be invalid by any court of competent jurisdiction, by ruling by the Employment Relations Board, by statute or constitutional amendment or by inability of the employer or employees to perform to the terms of the agreement, then upon request by either party, the invalid words or sections of the collective bargaining agreement shall be reopened for negotiation."

- The ruling by the Supreme Court triggers a duty to bargain over the change in fair share and unless the collective bargaining agreement provides something contrary, the bargaining process defaults to the 90-day interim bargaining process under ORS 243.698.
- OSBA is receiving calls from Districts that they have received notices from the Association demanding to bargain over the change in the law. The Association has the right to demand to bargain and the District has an obligation to respond to such requests.
- Once fair share fee payers are identified and verified for accuracy, fee deductions must cease immediately. OSBA recommends the District mail the local Association leadership notice of the District's change in a mandatory subject of bargaining and recognize the Association's right to demand to bargain. This [link](#) will take you to a sample notice Districts may use as a notice of a demand to bargain.
 - If using the 90-day process, the days begin counting with the date the letter is mailed to the Association.
 - The Association has 14 days to respond with a demand to bargain.
 - If the Association does not respond, OSBA recommends a second notice be sent and include two to three dates the District is available to bargain.
 - If by the 90th day no response has been received from the Association, the District has met its obligation and may proceed with its practice.
- Association Rights:
 - What are the provisions for release time for bargaining unit members participating in negotiations?
 - Is the time paid or unpaid?
 - What are the provisions regarding Association representatives access to on duty employees?
- Review Union Membership Documents:
 - Review filed membership application documents that employees turned in for dues deduction.
 - Is there any language that identifies a revocation date on the document?
 - Membership authorization forms may have changed over the years. Try to review historical documents on file for the same information.
- Identify Union Dues, Fair Share Fees, and Religious or Conscientious Objector Fee Payers:
 - Create a spreadsheet or table and group the different types of fee payers so they are easily identifiable.
 - Have Human Resources and the Payroll Department review the document together to ensure accuracy.

- OSBA has received communications from Districts that have received written communication from the Oregon Education Association (OEA) and Oregon School Employees Association (OSEA) dated June 27, 2018, that request fair share fee deductions cease immediately. Some of these communications have included the Association's own list of fee payers. This information will assist Districts in confirming their list of fee payers is also accurate.
- The District may request to meet with the Association in order to compare lists in an effort to insure accuracy.
- Once the list of fair share fee payers is confirmed, Districts are to cease pulling any additional fees from their payroll.
- If in the next payroll period any fair share fees for the time period prior to June 27, 2018, OSBA supports pro-rating fair share fees up to June 26, 2018. If unsure how to make this calculation, please contact Labor Services at OSBA or the District's attorney. The Association may also contact the District with their own calculation. The District may use the Association calculation at its discretion.
- If any fair share fees have already been included in payroll for time beyond June 26, 2018, the District has no obligation to receive and deposit funds from the Association to forward to the employee. The District may refuse and allow the Association to reimburse the employee directly.
- Communicate with all Supervisors, Managers, and Administrators that:
 - Under ORS 243.672(1)(i) employers cannot encourage or discourage employees from union membership. It is critical no such discussions take place with employees or the District may face unfair labor practice claims.
 - They should direct employees to contact their Association representatives with any questions.
 - Under ORS 243.670(2)(a) Public Employers may not use public funds to support actions to assist, promote, or deter union organizing. OSBA recommends no direct mailing or email be sent to employees regarding the *Janus* decision or impacts.
- While fair share fee payers will no longer pay fees to the Association, they are still considered bargaining unit members of the Association. The *Janus* ruling states that the Association maintains its duty to fair representation as the exclusive (bargaining) representative and must still represent non-paying members, as well as members who voluntarily pay dues. The only difference is that non-paying members will no longer be required to pay fair share fees to the Association.
- Employees who are voluntary dues-paying members are not directly impacted by the *Janus* court decision; however, the District must have written authorization from each individual employee who elects to pay dues to the Association. Therefore, if the District does not have a written authorization or a copy of a written authorization from a member of the Association to deduct the dues, the District should not deduct dues from the employee's payroll until one is received.
- Districts have shared with OSBA that OEA and OSEA have provided lists of voluntary dues-paying members to some school districts. The lists are not sufficient for Districts to use for the purpose of authorizing dues deductions from employees. The following is an excerpt from the *Janus* decision that clearly states a written authorization from the employee is required in order to deduct dues from their payroll:

This procedure violates the First Amendment and cannot continue. Neither 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. By agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed. *Johnson v. Zerbst*, 304 U. S. 458, 464 (1938); see also *Knox*, 567 U. S., at 312–313. Rather, to be effective, the waiver must be freely given and shown by “clear and compelling” evidence. *Curtis Publishing Co. v. Butts*, 388 U. S. 130, 145 (1967) (plurality opinion); see also *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U. S. 666, 680–682 (1999). Unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met. (Slip. opinion at 48)

If the District does not have written, or copies of written, authorizations to deduct dues from each employee, the District may contact the Association and request the written, or copies of the written, authorizations from employees. OSBA does not recommend Districts directly contact Association members at this time. Please click on this [link](#) to take you to a sample letter to the Association requesting written authorization documents that can be sent to the Association.

OSBA suggests allowing until August payroll for the Association to respond. This may impact an upcoming payroll as dues cannot be pulled without the written authorization.

OSBA will be issuing further guidance for members who approach the District and request to withdraw their voluntary dues.

Association Proposals and MOUs

The following link contains a copy of an Association [proposal](#) Districts have received. Some proposals strike all fair share language from the collective bargaining agreement. Prior to striking all fair share language and/or fair share articles, it is important to read the contract language carefully to make sure there are no provisions that were not impacted by the Janus decision. For example, if the current language is combined with Association dues language, and contains indemnification or hold harmless language, the District will want to maintain the current indemnification language.

Some Districts have received Memorandum of Understandings (MOUs) rather than a demand to bargain. The District could agree to sign an MOU with the Association, but some negotiation over the terms of the MOU may still be necessary. The following link is a copy of a [MOU](#) received by Districts.

Districts will want to carefully review any MOU received from the Association. If the MOU addresses any current contract language not impacted by the Janus ruling, the District is not required to bargain nor agree to any MOU proposals that have not been deemed unlawful per the Savings or Separability clauses/articles in the current collective bargaining agreement.

Because each collective bargaining agreement is unique, it is not possible to consider how proposals or MOUs from the Association impact the current contract language. If Districts have any questions on how to respond to proposals or MOUs from the Association, please contact Labor Services at OSBA or the District's legal counsel in order to review proposed and current contract language.

If you have any questions, please contact our Labor Services Department or your District's labor attorney.

Updated Monday, July 30, 2018.

Please continue to check this link for further updates.