



Supreme Court Clarifies Union Fees For Non-Members

Insights

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Today the U.S. Supreme Court handed a victory to employees who choose not to join a union, but who are nevertheless required to pay a fee to the union. Unions are already required to provide a notice to such employees spelling out the specific uses the fees will be put to, and allowing the employee to opt out of paying some of them.

This new ruling holds that a union must provide non-union employees a second notice within the same year should the union choose to issue a supplemental assessment. The Court also determined that the union must provide non-union members the opportunity to object to the supplemental assessment. *Knox v. Service Employees International Union, Local 1000*.

Background

In non-right-to-work states, employees must either join the union representing them, or if they choose not to join, must pay a fee which is the "equivalent" of union dues. This is usually referred to as an "agency fee," or "fair charge" fee, and is intended to cover the expenses incurred related to the union's exclusive collective bargaining duties.

Prior to imposing the fee the union must, on an annual basis, provide the nonmember employees a notice which includes an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decision-maker, and an escrow for the amounts reasonably in dispute while such challenges are pending. This is referred to as a *Hudson* notice, after the name of the case which established the requirement, *Chicago Teachers Union v. Hudson*.

How This Case Arose

The Service Employees International Union (SEIU), Local 1000 is the exclusive bargaining agent for California state employees. Any state employees in the applicable bargaining units who do not join the union must pay a "fair share" fee to the union for its representational collective bargaining efforts.

The union issues the constitutionally-required *Hudson* notice to all nonmembers every June. The notice provides nonmembers the requisite explanation as to the basis of the agency fee. It provides information regarding the union's expenditures from the most recently audited prior year, broken down by major category of expense and then, within each category, allocated between "chargeable"

and "non-chargeable" classifications. "Chargeable" expenses are those that are germane to the union's representational functions, and can be charged to all nonmembers of the union. "Non-chargeable" expenses are those unrelated to the union's representational functions, such as partisan political expenditures or purely ideological issues.

The financial information in the notice forms the basis for calculating the fee to be paid by nonmembers during the ensuing fee year. The notice also provides that for 30 days after the notice is issued, nonunion employees can object to the collection of the full agency fee, and elect instead to only pay a reduced rate during the upcoming fee year based on the percentage ratio of chargeable expenditures to total expenditures. During that 30-day period, nonmembers can also challenge the union's calculation of its chargeable and non-chargeable expenses, to be resolved by an impartial decision maker. The agency fee is effective from July 1 through June 30 of the following 12 months, at which point the agency fee set forth in the union's next *Hudson* notice goes into effect.

The SEIU's June 2005 *Hudson* notice set the agency fee to be extracted from nonmember's paychecks at 99.1% of full union membership dues. Nonmembers who objected to paying for non-chargeable expenses would pay a reduced agency fee, set at 56.35% of full union membership dues. In the Summer of 2005, shortly after the expiration of the period for nonunion workers to object to the June 2005 *Hudson* notice, the union proposed an "Emergency Temporary Assessment to Build a Political Fight-Back Fund." The agenda for a July 30, 2005 union meeting described the purpose of the assessment as follows: "[t]he funds from this emergency temporary assessment will be used specifically in the political arenas of California to defend and advance the interests of members of Local 1000. . . ."

The agenda continued: "These temporary emergency assessments are made necessary by political attacks on state employees and other public workers launched by Governor Schwarzenegger and his allies which threaten the wages, benefits and working conditions of Local 1000 members, and undermine the services they provide to the people of California." The Union contemplated that the "Political Fight-Back Fund" would not be used for the "regular costs of the union . . . such as office rent, staff salaries or routine equipment replacement." Instead, the fund would be used "for a broad range of political expenses."

The Union's June 2005 *Hudson* notice had not mentioned the possibility of a later-enacted temporary assessment.

The Union approved the temporary assessment at the end of August 2005. After passage of the temporary assessment, the Union sent a letter to members and non-members, dated August 31, 2005, informing them that "Local 1000 delegates voted overwhelmingly for a temporary dues increase to create a Political Fight-Back Fund." The letter stated that the funds collected from the dues increase would be used for several political purposes: 1) to defeat two propositions appearing on the November 2005 ballot (Propositions 75 and 76); 2) to "defeat another attack on [the] pension plan" in June 2006; and 3) "[i]n November 2006 . . . to elect a governor and legislature who support public employees and the services [they] provide."

Some nonmembers attempted to object to the temporary assessment. These attempts were denied. Starting in September 2005, the special assessment was levied against all employees working in the applicable bargaining units including the nonmembers. Those nonmember employees who had objected to the June 2005 *Hudson* notice were charged at the 56.35% rate of union employees. Employees who had not objected to the June 2005 *Hudson* notice were charged at the 99.1% rate even if they voiced their objections to the supplemental assessment.

A federal district court determined that the supplemental assessment was unlawful, holding that a union must issue a second *Hudson* notice when it intends to "drastically" depart from its typical spending regime for the purpose of funding non-chargeable activities. On appeal the U.S. Court of Appeals for the 9th Circuit overturned the trial court decision, holding that the Supreme Court's *Hudson* decision approved the use of a single, annual estimated percentage structure, and a single annual objection period, as the only practical manner of instituting "fair share" charges; and if a union substantially changed its spending patterns from year to year, causing some payments by objecting non-union members, to fund non-chargeable expenses, the next annual estimation would quickly refund the objecting non-union members the following year.

The Basis of The Court's Decision

In a 7-2 decision, with Justices Breyer and Kagan dissenting, the U.S. Supreme Court reversed the decision of the 9th Circuit, and held that any time a public employee union issues a supplemental assessment, it must provide a second *Hudson* notice. In coming to this decision, the Court held that the possibility of nonmembers temporarily funding non-chargeable expenses was an impermissible violation of nonmembers' First Amendment Free Speech rights. The court emphasized that the First Amendment protects nonmembers from funding a union's political speech without "a fair opportunity" to consider whether they wish to do so. The court reasoned that supplemental assessments, without a second *Hudson* notice do not give nonmembers such an opportunity.

The Supreme Court also determined that a union cannot, as a default rate, use the same percentage split of chargeable/non-chargeable expenses for the special assessment as it did for the regular, annual assessment. The Court directed that unless the union could evidence with "some degree of accuracy" that a specified split for the supplemental assessment would protect nonmembers from funding non-chargeable expenses, the union must give nonmembers the right to opt out of the entire supplemental assessment. The Court reasoned that if an all-or-nothing proposition leads to opting-out nonmembers paying less than their "fair share" for chargeable expenses, such a result is better than infringing upon the non-members' First Amendment rights.

Finally, in a surprising move, the majority opinion also sent a strong signal in *dicta* that requiring non-members to "opt-out" of non-chargeable expenses rather than asking them to "opt-in" to such expenses may also violate the First Amendment. While previous Supreme Court decisions appeared to have implicitly accepted the practice, though had never specifically examined the question, the majority *Knox* opinion noted, "By authorizing a union to collect fees from nonmembers and

permitting the use of an opt-out system for the collection of fees levied to cover nonchargeable expenses, our prior decisions approach, if they do not cross, the limit of what the First Amendment can tolerate."

The Court also criticized its earlier implicit acceptance of the practice, noting "Indeed, acceptance of the opt-out approach appears to have come about more as a historical accident than through the careful application of First Amendment principles." In a concurring opinion, Justices Sotomayor and Ginsburg declined to follow this part of the opinion as inappropriate.

What Does This Mean For Employees In Non-Right-To-Work States?

Armed with this new decision from the Supreme Court, public employees working in agency shop workplaces who choose not to join the union will no longer be required to lend unions, at 0% interest, a portion of their wages to fund political campaigns the nonmembers do not support, or cannot afford to support monetarily. By distancing themselves from a union's political agenda, these employees may also distance themselves, at least psychologically, from the union itself. This in turn could contribute indirectly to the continuing decline of union representation in the workplace.

For more information contact your regular Fisher Phillips attorney.

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