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# Management Alert

## Divided Supreme Court Finds Fair Share Fees For "Partial-Public Employees" Unconstitutional

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Earlier today the Supreme Court issued its decision in *Harris v. Quinn,* Case No. 11-681 (June 30, 2014), finding in a 5 to 4 decision that the First Amendment prohibits the collection of "fair share," or agency fees from Illinois Rehabilitation Program personal assistants. The Court majority, by attacking longstanding precedent on this issue, raises significant questions as to the application of fair share fees in the public sector generally.

In *Harris*, the plaintiffs provided in-home health care services in Illinois for people with varying levels of disabilities and other health needs. While the State paid the salaries of these personal assistants, provided health insurance, set certain employment qualifications, conducted performance reviews, and described services that assistants may provide, the person receiving the care—the customer—essentially controlled most aspects of the employment relationship, and by regulation was designated as the employer of the personal assistants. As the State was not the sole employer of the personal assistants, at one time they had no collective bargaining rights under the Illinois Public Labor Relations Act ("Act"). In 2003, the Act was amended to designate "personal care attendants and personal assistants working under the Home Services Program" as state employees for purposes of collective bargaining. Some twenty thousand Rehabilitation Program assistants thereafter voted to be represented by the Service Employees International Union (SEIU). The Rehabilitation Program assistants' contract included a union security clause that required all assistants who were not union members to pay their "fair share" of fees for the costs of actual bargaining and non-political contract administration activities. Illinois law permits such fair share fee provisions in collective bargaining agreements.

The plaintiffs (a group of potentially affected employees) sued, challenging the constitutionality of the fair share fee requirement. They claimed that the fair share fee requirement violated the First Amendment by compelling their association with, and speech through, the union. The plaintiffs asserted infringement even though, by paying only "fair share" fees, ostensibly they were only paying for the union's representation of them for bargaining and administrative (not political) purposes. No monies arguably were going towards union political activities.

The District Court and then the Seventh Circuit rejected the plaintiffs' claims. Finding the personal assistants were state employees, at least with regard to collective bargaining, the Seventh Circuit found the union's collection and use of fair share fees was permitted by almost sixty years of prior Supreme Court jurisprudence, especially *Railway Employees' Dep't v. Hanson,* 351 U.S. 225, 76 S. Ct. 714 (1956) (finding Railway Labor Act preempted the state constitution and thus a union shop provision in a contract was lawful), and *Abood v. Detroit Bd. of Educ.,* 431 U.S. 209, 97 S. Ct. 1782 (1977) (holding no First Amendment violation to require non-union public teachers under the "agency shop" clause of their collective bargaining agreement to financially support the union's collective bargaining, contract administration, grievance-adjustment procedures, and other activities "germane to its duties as collective-bargaining representative.").

In reversing the Seventh Circuit, the Court noted that the State of Illinois was seeking to significantly expand *Abood* to apply, "not just to full-fledged public employees, but also to others who are deemed to be public employees solely for the purpose



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of unionization and the collection of an agency fee." The Court examined its earlier reasoning in *Abood*, and found its analysis to be "questionable on several grounds." The Court criticized the decision for, among other reasons, simply assuming that the Court previously had decided such fair share payments were constitutional in the public sector, and for failing to appreciate the difference between core union speech involuntarily subsidized by dissenting public sector employees, where wages and benefits also were political issues, and core union speech involuntarily funded by their private sector counterparts.

Given *Abood*'s "questionable foundations," and because personal assistants are quite different from full-fledged public employees, the Court refused to extend *Abood* to cover what it termed "partial-public employees"—a concept which is novel and undeveloped in public sector employee jurisprudence. (Elsewhere in its decision, the Court also referred to "quasi-public employees.") The Court then analyzed the constitutionality of the payments compelled by Illinois law under applicable First Amendment standards. The Court held that the agency fee provisions could not satisfy the test used in *Knox et al. v. Service Employees International Union, Local 1000,* __ U.S. __, 132 S. Ct. 2277 (2012), specifically that the provision does not serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms. The Court rejected claims that agency fee provisions promoted "labor peace"—in its view, a critical rationale supporting agency fees in the private sector—given the union's status as exclusive bargaining agent was not inextricably linked to such fees, and any threat to labor peace was diminished in this situation given personal assistants do not work at a common facility (with potentially conflicting labor groups) but instead work in private homes. That the union might be an effective advocate for personal assistants further was insufficient to warrant the restriction in employee rights.

The four dissenting Justices argued that *Abood* controlled the outcome of this case and that, as such, the agency fees provision should be upheld. The dissent agreed with the Seventh Circuit that the fact the personal assistants might be jointly employed by both the State and the individual customers should make no difference to the analysis. The dissent considered the terms over which the State exercised control to be primarily those that would be subject to bargaining, and that the fact the scope of bargaining is circumscribed given the customer's authority over individualized employment matters like hiring and firing to be irrelevant—given that states often limit the scope of permissible public sector bargaining.

The dissent further noted that, despite the majority's "potshots" at the decision, even it declined the invitation to overturn *Abood*, and that the Court's "precedent … fairly understood and applied, makes it impossible for this Court to reverse that decision." The dissent spent considerable time explaining why the Court should not overturn *Abood* given it is *stare decisis*, and explained *Abood* was properly decided in the first place.

While *Harris* technically is limited to so-called "partial-public employees, the majority's blistering attack and critique of *Abood* raises questions as to whether the current majority (or at least much of it) would vote to uphold *Abood* if it faced a case involving full-fledged public sector employees. This fear should be of grave concern to public sector unions. Public sector employees constitute almost half of the unionized workforce, even though many states limit or prohibit public sector unions. Indeed, according to the Bureau of Labor Statistics, in 2013 38.7% of the public sector workforce was organized (whether union members or not), a percentage five times higher than the private sector workforce (7.5%). In states where public sector employees are legally permitted to organize they have become very powerful politically. If public sector employees who have been forced to pay fair share fees for years to organizations they do not support are no longer required to pay such fees, it might deliver a critical blow to the clout of public sector unions.

Public sector unions dodged a bullet. The question remains whether they will be able to do so the next time, assuming, of course, the makeup of the Court does not change.

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