



# Protecting Democracy and the First Amendment for Florida Public Employees

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Public employees have a First Amendment right to choose whether or not to join and pay a union. Further, they have the right to ensure that certain things happen before their employers take money from their paycheck and give it to a union. Notably, an employer must have recent and adequate documentation that the employee wants the money to be withheld from their paycheck and then sent to a union.

On June 27, 2018, the United States Supreme Court ruled in *Janus vs. AFSCME*<sup>1</sup> that everything public sector unions do is political, and because of the political nature of their actions, the First Amendment protects public employees' choice of refraining from paying union dues. For states like Florida, which already had a right-to-work law, this part of the decision had little on-the-ground impact. Florida's right-to-work law already stopped unions,

in both the public and private sector, from being able to get a worker fired for not paying them. This part of the decision did strengthen the right-to-work protection public employees enjoyed, elevating it from a status granted by state law to a right guaranteed by the U.S. Constitution.

However, the second part of the decision has a more direct effect on right-to-work states, including Florida.

Attorneys General from right-to-work states such as Indiana<sup>2</sup> and Texas<sup>3</sup> and members of the Michigan Civil Service Commission<sup>4</sup> agree that this second part of the decision applies to public employees in their states and still needs to be implemented.

The court required that “employees clearly and affirmatively consent before any money is taken from them.” In other words, public employees have a right to have their choice protected by making dues deductions contingent on the employer first having received clear and compelling evidence of affirmative consent from the employee.

Writing for the court Justice Samuel Alito noted:

“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.”

Texas Attorney General Ken Paxton explains this second part in his opinion: “The Court in *Janus* emphasized that an employee’s payments to a union impacts the employee’s First Amendment rights, and it made clear that a governmental entity may not deduct funds from an employee’s wages to provide payment to a union unless the employee consents, by clear and compelling evidence, to the governmental body deducting those fees.”<sup>5</sup>

Florida law<sup>6</sup> gives public sector unions the ability to deduct dues, and it also protects the right of public employees to stop dues deduction within 30 days. The law also allows dues deductions to start at the written request of the union, not the employee. A written request from the union to have dues deducted from a public employee’s paycheck is likely to run afoul of the “clear and compelling” evidence standard from *Janus*.

Instead, Florida public employers must protect their employees’ choice by ensuring that the form authorizing dues deductions comes directly from their workers instead

of taking the union's word for it. In addition, employers should confirm public employees' intent to join and pay the union by sending a confirmation email or letter and not deducting dues until it is returned.

Indiana's Attorney General noted, "To ensure the deduction of union dues or fees from an employee comports with the Janus framework and does not occur without clear and compelling evidence that the employee freely consents to the deduction, the State and its political subdivisions must require that employees provide the necessary consent directly to them."<sup>7</sup>

Further, because the Supreme Court recognized the right to stop withholding dues as a First Amendment right, any form signed by public employees must contain language informing public employees they are waiving a constitutional right.

Language similar to the text below is recommended:

I, [payee name], am aware that, as a public employee, I have a First Amendment right, as recognized by the U.S. Supreme Court, to refrain from joining and paying dues or fees to a labor union. I further realize that union membership and payment of union dues are completely voluntary and that I may not be discriminated against for my refusal to join or financially support a union. I hereby authorize my employer to deduct [union name] dues from my payment check in the amounts specified in accordance with [union name] bylaws. I understand that I may revoke this authorization at any time by providing written notice to my

employer and no further debt to the union will accrue.

Finally, the court, in Janus, cited the *Curtis Publishing*<sup>8</sup> case, which held that people cannot waive a constitutional right they do not know they have. Since public employees could not have known that they were waiving a First Amendment right before the Supreme Court decided Janus, any dues check-off forms signed before June 27, 2018, should be updated. Similarly, Alaska Attorney General Kevin G. Clarkson, in his opinion to the Alaska governor on implementing the Janus decision in that state--as well as the opinions from Texas and Indiana--note that waivers of constitutional rights must be contemporaneous, and, much like Miranda rights, can expire.<sup>9</sup> Therefore, not only must any dues check-off forms signed before Janus be renewed with the correct waiver language, but they should also be reconfirmed periodically.

The Indiana opinion continued, "To ensure an employee's consent is up-to-date, as required for it be a valid waiver of the employee's First Amendment rights, an employee must be provided a regular opportunity to opt-in and opt-out."

Similarly, Attorney General Paxton wrote, "A one-time, perpetual consent to a payroll deduction for membership fees or dues is inconsistent with the Court's holding in Janus. A court would likely conclude that consent for one year from the time given is valid and is sufficiently contemporaneous to be constitutional."

Ensuring that Florida is complying with the Constitution and protecting its public employees is, unsurprisingly, popular with

voters. A recent poll of Florida voters by The James Madison Institute and Workers for Opportunity showed that over 70% agree that the “government must get a government worker’s permission to deduct union dues from their paycheck.” This included support from 63% of households with someone in a public sector union. Further, respondents were asked what should happen if a public employee “was not properly informed of their right to refrain from union membership.” Almost 80% would support “giving them a chance to make a fresh decision after being properly informed of their rights.” Agreement was almost as high in public sector union households, at 75%.<sup>10</sup>

### **Ensure school districts are complying with Florida’s recertification law**

Across the country, most public employees have never had the opportunity to vote for the union at their workplace. The 10 largest school districts in Florida were organized by 1975. For example, only 1% of the teachers who were working in 1975 were still working in 2012, according to a Heritage Foundation study, meaning that 99% of those on the job that year never had a chance to vote for the union which represents them.<sup>11</sup>

In March 2018, the Florida Legislature took steps to give teachers a choice and a voice on the union at their workplace. Florida lawmakers passed HB 7055, granting new protections for some unionized public employees.

Each year, unions representing “instructional personnel” (teachers) must

file a report with the Public Employees Relations Commission, showing that at least 50% of the employees in the collective bargaining unit are dues-paying members of the union. If the membership is below 50%, the union must file for a recertification election or it will no longer represent employees in the unit.<sup>12</sup> In order to file for an election, the union would need to collect signatures from at least 30% of teachers in the unit.<sup>13</sup>

Several states, including Wisconsin, Missouri, and Iowa,<sup>14</sup> have passed union recertification laws. Florida, however, is the only state that requires a threshold to trigger the union recertification election. The other states protect union democracy by simply requiring a periodic election. Furthermore, the union recertification laws in other states are broader, applying to most public employees, not only teachers.

Additional issues have arisen with Florida’s recertification law. The Florida Public Employees Relations Commission (PERC) collects the dues-deduction forms and administers certification elections. But it should make changes to the forms it requires unions to submit and ensure accurate reporting.

On the form teachers unions use to register with PERC, they must report “the number of dues paying employees and non-dues paying employees” they have. Instructions on the form warn that “false statements may result in fine and imprisonment. ...”<sup>15</sup>

While the form makes it sound as if PERC will strongly enforce its requirements, it only says that the information a union submits must be based on the “best ...

knowledge and belief” of the signer. It does not call for any additional proof.<sup>16</sup>

An examination of forms unions submitted in 2019<sup>17</sup> shows many of them are hovering just above the 50% membership mark. While union officials may be accurate in their belief that they have met the threshold that triggers a recertification election, PERC should require them to provide valid proof.

Since the requirement went into effect, only two unions have not met the certification threshold. The Jefferson County Education Association was decertified for not submitting the required form. The Santa Rosa Professional Educators, meanwhile, triggered an election after reporting less than 50% of employees in the workplace were dues-paying members. It later petitioned the commission, presenting it with the state-required 30% interest for an election.<sup>18</sup>

PERC has yet to issue sufficient regulatory guidance on how to prove that a union has accurately calculated the number of its dues-paying members in a worksite. The commission should issue guidance requiring stricter proof of dues-paying membership, such as signed dues check-off forms or payments receipts from the preceding pay period (or whenever the most recent dues deduction or payment for the unit was collected). Further, the commission should clarify that dues-paying members should be paying the full amount, not a discounted rate used to inflate membership numbers.

In addition to requiring PERC to strengthen its regulatory guidance, HB 7055 should be expanded to all Florida public

employees, not just school employees. And instead of requiring a threshold for recertification elections, those elections should be held on a periodic basis, just as elections for public offices are.

Voters agree that union democracy in Florida should not be limited to teachers. The JMI/WFO poll showed that over 60% of voters agree that Florida’s union recertification law should be expanded beyond just teachers.<sup>19</sup> Finally, as happens in other states that have passed recertification laws, the Sunshine State should not impose thresholds on when public employees have the right to choose which union represents them. Rather, they should be able to regularly have a say on which union represents them.

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## REFERENCES

- 1 Janus v. American Federation of State, County and Municipal Employees, Council 31, 138 S. Ct. 2448, 2478 (2018).
- 2 <https://calendarmedia.blob.core.windows.net/assets/16b62052-7a22-4aef-8a7d-7aefb7fc1bdc.pdf>
- 3 <https://www.texasattorneygeneral.gov/sites/default/files/opinion-files/opinion/2020/kp-0310.pdf>
- 4 [https://www.michigan.gov/documents/mdcs/SPDOC\\_20-06\\_693193\\_7.pdf](https://www.michigan.gov/documents/mdcs/SPDOC_20-06_693193_7.pdf)
- 5 <https://www.texasattorneygeneral.gov/sites/default/files/opinion-files/opinion/2020/kp-0310.pdf>
- 6 F.S.A. § 447.303 “Any employee organization which has been certified as a bargaining agent shall have the right to have its dues and uniform assessments deducted and collected by the employer from the salaries of those employees who authorize the deduction of said dues and uniform assessments. However, such authorization is revocable at the employee’s request upon 30 days’ written notice to the employer and employee organization. Said deductions shall commence upon the bargaining agent’s written request to the employer. Reasonable costs to the employer of said deductions shall be a proper subject of collective bargaining. Such right to deduction, unless revoked pursuant to s. 447.507, shall be in force for so long as the employee organization remains the certified bargaining agent for the employees in the unit. The public employer is expressly prohibited from any involvement in the collection of fines, penalties, or special assessments.”
- 7 <https://calendarmedia.blob.core.windows.net/assets/16b62052-7a22-4aef-8a7d-7aefb7fc1bdc.pdf>
- 8 *Curtis Publishing Co. v. Butts*, 388 U. S. 130,
- 9 [http://www.law.state.ak.us/pdf/opinions/opinions\\_2019/19-002\\_JANUS.pdf](http://www.law.state.ak.us/pdf/opinions/opinions_2019/19-002_JANUS.pdf)
- 10 <https://workersforopportunity.org/archives/2020/FloridaVotersHandout2.pdf>
- 11 <https://www.heritage.org/jobs-and-labor/report/unelected-unions-why-workers-should-be-allowed-choose-their-representatives>
- 12 FLA. STAT. § 1012.2315(4)(c)
  1. In addition to the provisions under s. 447.305(2), an employee organization that has been certified as the bargaining agent for a unit of instructional personnel as defined in s. 1012.01(2) must include for each such certified bargaining unit the following information in its application for renewal of registration:
    - a. The number of employees in the bargaining unit who are eligible for representation by the employee organization.
    - b. The number of employees who are represented by the employee organization, specifying the number of members who pay dues and the number of members who do not pay dues.
  2. Notwithstanding the provisions of chapter 447 relating to collective bargaining, an employee organization whose dues paying membership is less than 50 percent of the employees eligible for representation in the unit, as identified in subparagraph 1., must petition the Public Employees Relations Commission pursuant to s. 447.307(2) and (3) for recertification as the exclusive representative of all employees in the unit within 1 month after the date on which the organization applies for renewal of registration pursuant to s. 447.305(2). The certification of an employee organization that does not comply with this paragraph is revoked.
- 13 FLA. STAT. § 447.307 (2) and (3)
- 14 Wisconsin, Act 10 passed in 2011 requiring election are every year; Missouri, House Bill 1413 passed in 2018 requiring elections are every three years; Iowa, House File 291 passed in 2017 requiring elections about ten months prior to the end the collective bargaining agreement, generally every two to three years; Florida, House Bill 7055 passed in 2018 requires election elections when membership in the unit drops below 50 percent.
- 15 [http://perc.myflorida.com/forms/Form\\_1\\_-\\_Employee\\_Organization\\_Registration.pdf](http://perc.myflorida.com/forms/Form_1_-_Employee_Organization_Registration.pdf)
- 16 Id. “the undersigned authorized official of the employee organization has examined all of the information submitted . . . and states that it is true, correct and complete to the best of this/her knowledge and belief.”
- 17 According to information provided by Florida Public Employee Relations Commission and school districts in response to public information requests.”
- 18 [https://www.thecentersquare.com/florida/one-florida-teachers-union-decertified-another-faces-vote-to-retain/article\\_c23e82b2-8bd0-11e9-a853-c72c8686dfa8.html](https://www.thecentersquare.com/florida/one-florida-teachers-union-decertified-another-faces-vote-to-retain/article_c23e82b2-8bd0-11e9-a853-c72c8686dfa8.html)
- 19 <https://workersforopportunity.org/archives/2020/FloridaVotersHandout2.pdf>