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Teachers Unions, the Right to Work, and Fair-Share Agreements

By Charles J. Russo, J.D., Ed.D.

The status of collective bargaining in public education has been in an almost constant state of flux over the past few years.

The status of collective bargaining in public education has been in an almost constant state of flux recently. More than 30 states have adopted laws that allow teachers and other public school employees to form unions to bargain collectively with their boards over the terms and conditions of their employment.

Conversely, three jurisdictions prohibit public-sector unions, and another 25 states, with Wisconsin most recently joining the list (Held 2015), have enacted right-to-work laws that bar contracts requiring workers to join unions as a condition of employment.

Amid debates over their status in public education, the Supreme Court has consistently upheld the right of unions to charge fair-share fees even as it limited their scope. Fair-share or agency fees are based on the premise that insofar as nonmembers benefit from union activities, they should have to pay a fair share or percentage of costs associated with bargaining in their districts. However, in light of a case currently before the Court, *Friedrichs v. California Teachers Association* (2015), the future of fair-share fees may be in doubt.

Historical Overview of Unions in the United States

A key to understanding the history of teachers unions is awareness of private-sector labor developments because they set the stage for public education. The National Labor Relations Act (NLRA), the primary federal law regulating private-sector labor relations, has had a major, albeit indirect, effect on labor law in public employment, particularly education, the most highly unionized workforce in the United States. According to the NLRA, “Employees shall have the right to self-organization, to form, join, or assist labor organizations, to

bargain collectively through representatives of their choosing . . .” (29 U.S.C. § 157).

In protecting employees who choose not to join unions, the NLRA maintains that “[n]othing in this [Act] shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law” (29 U.S.C. § 164[b]). In this way, the NLRA acknowledges the legality of state right-to-work statutes in the private sector, a practice that emerged in public employment.

Ironically, Wisconsin, which became the first state to authorize public-sector bargaining in 1959, has come full circle by limiting the practice in an acrimonious process

Norwalk Teachers Association v. Board of Education of the City of Norwalk (1951), a dispute from Connecticut, was the first case upholding the right of public school teachers to organize and bargain collectively. At the same time, the court forbade teachers from striking.

The pace toward teacher unionization quickened in the public sector in 1958 when Mayor Robert Wagner of New York City promulgated an executive order permitting municipal employees to bargain collectively for the first time (Tyler 1976). Ironically, Wisconsin, which became the first state to authorize public-sector bargaining in 1959, has come full circle by limiting the practice in an acrimonious process (Russo 2012).

On January 17, 1963, President John F. Kennedy’s Executive Order 10988 initiated a federal policy of recognizing unions of government employees, thereby advancing

the cause of public school teachers unions. On April 11, 1962, the union movement took a dramatic turn when teachers in New York City voted to go on a short-lived strike lasting a day (Kerchner and Mitchell 1988). However brief, that strike initiated a wave of activism resulting in more than 30 jurisdictions permitting public school teachers to organize and bargain collectively with their boards over terms and conditions of employment.

Right-to-Work Laws and Fair-Share Agreements

Designed to preserve managerial rights, 25 states now have right-to-work laws in place for public employees. Those laws permit employees to choose whether to join unions and pay fair-share or representation fees while allowing states to limit the cost of public education by restricting the reach of unions.

Right-to-work laws typically specify that employees cannot be required to work in closed shops wherein all must join unions.

Proponents of right-to-work laws emphasize how they afford employees opportunities to decide freely whether to join unions while protecting their First Amendment rights not to be forced to engage in compelled speech by paying for union activities with which they disagree. Conversely, union supporters respond that nonmembers should be prevented from being “free riders” who obtain benefits gained through unions efforts through bargaining without paying their fair share of costs.

Right-to-work laws typically specify that employees cannot be required to work in closed shops wherein all must join unions. Those laws still permit bargaining agreements under which employees who elect not to join unions must pay fair shares to offset union costs on

their behalf related to bargaining. In a series of cases, the Supreme Court reviewed disputes in, and outside of, educational settings affecting fair-share fees even as it narrowed their scope by obligating unions to identify the portions of dues used for negotiating salary and benefits as opposed to political and other activities. Now, *Friedrichs v. California Teachers Association* (2015) may bring about significant change.

In *Abood v. Detroit Board of Education* (1977), the Supreme Court upheld the constitutionality of agency fees in bargaining contracts as long as unions did not use those monies to support ideological activities unrelated to negotiations opposed by nonmembers and members. In *Chicago Teachers Union, Local No. 1 v. Hudson* (1986, 1991a, 1991b), the Court invalidated a union’s proposed rebate system because it was concerned that monies from nonmembers might have been temporarily used for improper union purposes.

Lehnert v. Ferris Faculty Association (1991), a case from Michigan, arose in higher education but affects K–12 unions. The Supreme Court identified the specific activities unions may charge nonmembers: program expenditures, costs associated with sending delegates to national conferences, and expenses preparing for strikes. The Court forbade unions from charging nonmembers for public relations and litigation. In *Davenport v. Washington Education Association* (2007), the Court unanimously ruled that “it does not violate the First Amendment for a State to require that its public-sector [teachers] unions receive affirmative authorization from a nonmember before spending that nonmember’s agency fees for election-related purposes” (p. 191).

Ysursa v. Pocatello Education Association (2009a), a dispute from Idaho, placed further limits on unions, albeit not over fair-share fees. The Supreme Court held that

the ban on public-employee payroll deductions for local political activities was constitutional. The Court explained that the ban advanced the state’s interest in separating government operations from partisan politics, noting that school officials did not have a duty to help unions in their political activities.

In a nonschool case, *Harris v. Quinn* (2014), the Supreme Court rendered a judgment with the potential to further restrict the ability of teachers unions to collect fair-share fees from nonmembers. Stopping short of reversing *Abood*, the Court decided that officials in Illinois could not compel health care workers to pay fair-share fees “to subsidize speech on matters of public concern by a union that they do not wish to join or support” (p. 2623).

The status of fair-share fees is in doubt in light of *Friedrichs v. California Teachers Association* (2015). In *Friedrichs*, public school teachers who resigned their union membership, and a nonprofit religious organization representing Christian teachers in public schools, filed suit objecting to having to pay agency fees. After a federal trial court (2013) and the Ninth Circuit (2014) affirmed orders in favor of the union, the Supreme Court (2015) agreed to hear an appeal.

At issue in *Friedrichs* is whether the Supreme Court should overrule *Abood* or allow fair-share fees to remain valid under the First Amendment. A related issue addresses whether nonmembers must object affirmatively, meaning that they must make explicit requests to be excused from paying union fees, or whether they should have to grant their consent to pay affirmatively.

Reflections

The possibility that *Friedrichs* may prevent teachers unions from collecting fair-share fees could result in a major change in labor relations by reducing the amount of revenue labor organizations can devote to

nonbargaining issues. Further, as debate continues over right-to-work laws, the power of public school teachers unions may wane.

As issues associated with right-to-work laws and fair-share fees continue to evolve, school business officials, their boards, and other education leaders should devise policies identifying their positions vis-à-vis the status of nonmember teachers in right-to-work states. Board policies should address two related items concerning new teachers who elect not to join unions or more experienced educators who resign their memberships.

Of course, how collective bargaining proceeds—if at all in some jurisdictions—depends on state laws and board policies.

First, policies need to protect individuals as they consider whether to join unions from being pressured by either side of the debate. Second, regardless of what teachers decide, policies should safeguard them from colleagues critical of their choices.

Of course, how collective bargaining proceeds—if at all in some jurisdictions—depends on state laws

and board policies. Regardless of whether states have adopted right-to-work statutes, boards should consult not just with their own attorneys but also with labor law specialists to more carefully draw up proposals to be presented in the bargaining process. Being aware of the potential impact of *Friedrichs* can help education leaders respond in a timely manner and better manage costs associated with bargaining and resulting salary and benefits issues as they work to ensure ongoing labor peace in their districts.

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Fact Facts: Back to School Statistics

In 2012–2013, there were about 13,500 public school districts with nearly 98,500 public schools, including about 6,100 charter schools. In fall 2011, there were about 30,900 private schools offering kindergarten or higher grades.

Current expenditures for public elementary and secondary schools are projected to be \$634 billion for the 2015–2016 school year. These expenditures include such items as salaries for school personnel, benefits, student transportation, school books and materials, and energy costs. The current expenditure per student is projected at \$12,605 for the 2015–2016 school years.

About 3.3 million students are expected to graduate from high school in 2015–2016, including 3 million students from public high schools and about .3 million students from private high schools.

The percentage of high school dropouts among 16- through 24-year-olds declined from 10.9% in 2000 to 6.8% in 2013. Reflecting the overall decline in the dropout rate between 2000 and 2013, the rates also declined for Whites, Blacks, and Hispanics.

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