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Is The Supreme Court Primed To Create "Right-to-Work" For Public Employees Nationwide?

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State Right-to-Work laws generally allow any employee to opt out of paying union dues completely. As we have previously covered, such laws, which traditionally have been popular in the South, more recently have been adopted by the state legislatures in "rust belt" states traditionally viewed as bastions of organized labor such as Indiana, Michigan, and Wisconsin. In some jurisdictions, even local municipalities have taken to passing such measures, something the NLRB is likely to challenge. In non-Right-to-Work states, public sector employees also have First Amendment protections which allow them to refuse to join a union and refuse to pay dues for the union's political speech (based on the freedom of association and freedom of speech protections in the First Amendment). However, the U.S. Supreme Court has held that public sector employees in these states can still be required to pay "agency" or "fair share" fees to unions for the cost of general collective bargaining and representation. These fees can often be 80 percent or more of normal union dues. Agency fees were first approved by the Supreme Court in *Abood v. Detroit Board of Education* in 1977. Now, a lawsuit filed by California public school teachers that has been taken up by the Supreme Court, *Friedrichs v. California Teachers Association*, could radically alter the landscape for public sector unions, potentially overruling *Abood* and creating "right to work" for all public sector employees nationwide. At issue in *Friedrichs* is whether public-sector union "agency shop" arrangements should be invalidated under the First Amendment. Although public employees cannot be forced to join a union, state and local governments can sign agreements with unions called agency shop arrangements. Under such arrangements, which are a type of union security agreement, employees may refuse to join the union and opt out of dues paid toward political activities or lobbying, but even if an employee elects not to be a member of their union they must still pay an agency fee to cover collective bargaining costs. The plaintiffs in *Friedrichs* argue that even these "agency fee" requirements are invalid under the First Amendment, because all expenses of public employee unions, including regular collective bargaining and contract administration, inherently involve political speech because the benefits, salaries and pensions of public sector employees are paid by taxpayers. They ask the Supreme Court to overrule *Abood* and find that no dues or fees can be required for public employees. Many commentators believe that the *Friedrichs* plaintiffs may succeed in this effort, based on dicta in Justice Alito's majority decision in the 2014 Supreme Court decision *Harris v. Quinn* (which invalidated compulsory dues for certain home-health care workers) which suggests that the Supreme Court is prepared to overrule *Abood.* In *Harris*, the Court had been asked to overrule *Abood*, but declined that invitation and ruled on narrower grounds.

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However, the majority opinion also criticized the reasoning underlying *Abood*, leaving the door open for the arguments made in *Friedrichs*. The *Friedrichs* case will be heard by the Supreme Court during the next term, which begins in October, and a decision is expected by the end of June 2016. If the court chooses to reverse *Abood* and invalidate agency-fee arrangements, it would essentially mean a “right-to-work” type system for public sector unions. That could prove a heavy blow to public sector unions if it were to occur, and because of these high stakes, this case is being closely watched by both public sector employers and unions alike.