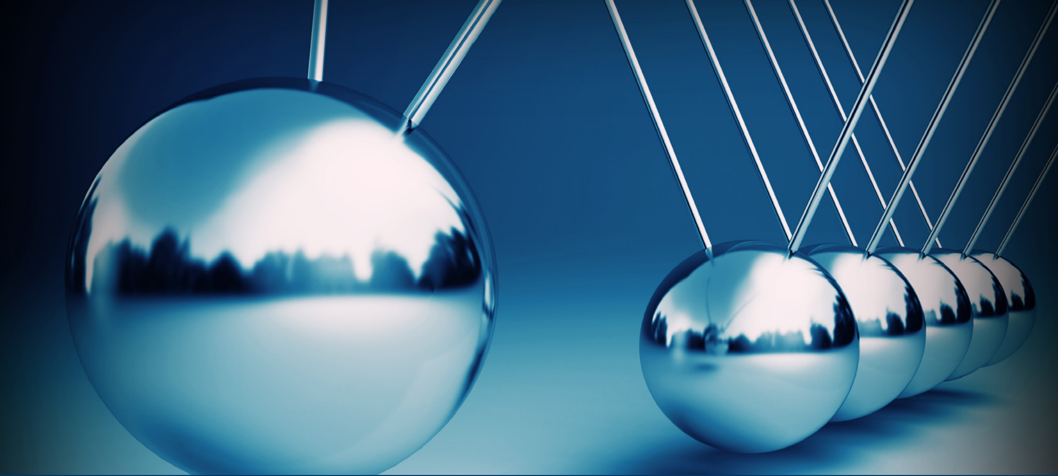

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U.S. Supreme Court Ruling on Mandatory Union Dues: What Impact for New England Employers?

On the last day of its 2013-14 Term, the U.S. Supreme Court issued a potentially important opinion on mandatory union dues. The decision, Harris v. Quinn, invalidated provisions of an Illinois law that required mandatory contributions to unions from Personal Care Assistants paid under that state's Medicaid program. While the direct impact of this decision on New England employers will be somewhere between minimal and non-existent, the Court indicated that dues mandates in the entire public sector may be subject to challenge. This would both weaken unions and give more momentum to state by state "right to work" laws impacting the private sector.

American labor law follows the model of "exclusive representation." When a majority of a particular group of employees selects a union as bargaining representative, the union represents ALL the employees in that bargaining unit, even if an individual employee opposes being represented by the union. In theory, this promotes labor peace and stability by avoiding fights between rival unions. It is simpler for the employer because it needs to bargain over wages and working conditions with only one representative.

Effective union representation costs money. Unions get revenue from member dues payments. Unions use the funds they receive both to provide services directly to a bargaining unit and more broadly for political, social and organizational activities. Some people in a bargaining unit may decide they would prefer not to pay union dues, either because they legitimately object to some or all the union's activities or because they want the benefits of a union without paying for it. Either way, the union may end up with responsibilities to a large number of people who do not want to pay.

Consequently, Unions generally negotiate "Union Security" clauses in collective bargaining agreements. These require the employer to make union membership a requirement of employment. The National Labor Relations Act, which governs labor relations in the private sector, allows such agreements so long as (1) "membership" is limited to payment of that portion of dues related to bargaining costs, rather than political or other union activities; and (2) the workplace is not in a state that has passed a "right to work" law outlawing such arrangements. Years ago, the U.S. Supreme Court held that such arrangements in the private sector do not violate the Constitution because (1) a private employer, not the government, agreed to the union security provision and (2) individuals are not obligated to contribute to the union's political activities.

With the rise of public sector unions, governed by state laws, the situation became more complicated. When the employer is the state or other political entity, then the union security provision, whether it is part of a law or part of a contract, is effectively the government forcing the contribution. Moreover, bargaining for higher wages and benefits for government employees is inextricably linked to political activity. The very act of encouraging the

If you have any questions about the issues addressed here, or any other matters involving Labor and Employment issues, please feel free to contact:

Susan J. Baronoff

Michael Colgan Harrington

Lauren Filiberto Hopwood

William J. Keenan, Jr.

Hugh F. Murray, III

Lissa J. Paris

Rachel Faye Smith

Barry J. Waters

Jennifer A. Corvo

Stella Szantova Giordano

Colleen O'Neill

Monica P. Snyder

Kristen L. Zaehringer

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government to pay more money for a government service is itself political activity. Unlike the private sector, influencing elections can directly benefit a particular bargaining unit. As public sector unions became more prevalent, so too did contract provisions, or even laws, that provided that all members of the bargaining unit pay dues or dues equivalents to the union representing them. In 1977, a group of employees who objected to such payments brought a case to the U.S. Supreme Court, which held that such arrangements in the public sector did not violate the Constitution.

That brings us back to the present and the June 30, 2014 decision in Harris v. Quinn. That case involved "personal assistants" in Illinois who provided care to Medicaid recipients who would otherwise have needed institutional care. The State provided funding to patients, who selected and hired personal assistants. Illinois passed a law that declared that (1) personal assistants were not state employees for any purpose other than collective bargaining and (2) personal assistants could, nonetheless, select a union to represent them in bargaining with the State. The union could not represent the employees' with respect to their relationship with the patients, who were declared the "employers." The State of Illinois entered into a collective bargaining agreement with a union. That collective bargaining agreement provided for mandatory contributions by all bargaining unit members, whether union members or not.

Several personal assistants objected and sued, arguing that the mandatory payments violated the First Amendment. A majority of the Supreme Court agreed, holding that under these circumstances – involving workers who were barely, if at all, "employed" by the State – the justifications for contributions were not sufficient to justify making them mandatory for everyone. The Supreme Court did not rule on the broader question of whether such mandates for "traditional" public sector employees should remain lawful, but the majority strongly criticized the 1977 ruling that allowed such mandates.

For New England employers, the immediate impact of this case will be minimal. Connecticut is one of several states with laws that mirror Illinois' law, and it is almost certain that workers covered by those laws will no longer be compelled to make payments to their union. Outside that narrow category of workers, however, the decision raises two longer term issues for employers.

The first is the potential challenge to public sector dues mandates that the Court majority seemed to invite in this case. If public sector unions could not collect dues from all members of a bargaining unit, union revenue could likely decline precipitously. The combination of good faith objectors and free-loading "free riders" would in all likelihood be a large portion of current union dues payers. Much of the power of unions in certain private sector areas – such as long term care – derives from the strength of the unions in the political arena, which could be quite diminished absent mandatory contributions.

Second, this decision could increase the current push in some states to expand "right to work" laws that prevent such arrangements in the private sector. Michigan and Indiana passed such laws in 2012, bringing the total number of states with such laws to 24. Private sector unionization in right to work states is significantly lower than in states without such a law. Private sector unions – now representing less than 7% of the United States eligible private sector workforce – could become even more irrelevant.

Both these developments are years away and again the immediate impact of the Harris v. Quinn case for New England employers is small. Whether these possibilities come to pass may depend, ironically, on political activity by unions, funded by union dues.

If you have any questions concerning the issues discussed in this article, please contact Hugh F. Murray, III at 860.240.6077 or hmurray@murthalaw.com or Michael C. Harrington at 860.240.6049 or mharrington@murthalaw.com.