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TO: All Cities

FROM: Karen Sutherland, Office of the City Attorney

RE: Agency Fees In Lieu Of Union Dues

OVERVIEW

In *Harris v. Quinn*, a decision issued on June 30, 2014, the United States Supreme Court declined to follow *Abood v. Detroit Board of Education*, the 1977 case that first required public employees who did not want to join a union to pay agency fees. While the *Harris* decision is limited by its primary finding that the personal home care assistants who brought the lawsuit were not full-fledged public employees, a majority of the Court criticized the *Abood* decision, signaling that it is likely to be overturned.

If the *Abood* decision is overturned, it will affect all collective bargaining agreements that have an agency fee provision. Cities may want to address this possibility when negotiating new collective bargaining agreements by including an "if-then" provision in new collective bargaining agreements to avoid the need to bargain the effects of a change in the law if the Court overrules *Abood* in a future decision.

SUMMARY OF *HARRIS* DECISION

The facts of the *Harris* case are that the Illinois Public Labor Relations Act (PLRA) contains an agency fee provision requiring members of a bargaining unit who do not wish to join the union to pay a fee to the union.[1] Illinois law also states that personal home healthcare assistants are employees of the state for the purpose of coverage under the PLRA but not for any other purpose. The applicable collective bargaining agreements require all personal assistants who are not union members to pay a "fair share" of the union dues. The plaintiffs sought to prevent enforcement of the fair share provision and a sought a declaration that the PLRA violates the First Amendment insofar as it requires personal assistants to pay a fee to a union that they do not wish to support.

The U.S. Supreme Court held that *Abood* did not apply because the personal assistants were not full-fledged public employees. A majority of the Supreme Court did not stop there, but want on to identify several grounds upon which the majority felt the *Abood* analysis was questionable; specifically:

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[1] Washington State has a more limited statutory provision regarding nonassociation. RCW 41.56.122 protects the rights of public employees to not join a union if it is based on bona fide religious tenets or teachings of a church or religious body of which such public employee is a member. In Washington, such employees must pay an amount of money equivalent to regular union dues and initiation fee to a nonreligious charity or to another charitable organization mutually agreed upon by the public employee affected and the bargaining representative to which such public employee would otherwise pay the dues and initiation fee.

- Insufficiently analyzing the constitutionality of compulsory payments to a public-sector union;

- Failing to distinguish between the state authorizing the imposition of an agency fee and actually imposing that fee;

- Failing to appreciate the differences between bargaining in the public and private sectors;

- Failing to appreciate the difficulty of distinguishing in public-sector cases between union expenditures for collective bargaining purposes and those that are made to achieve political ends since both collective bargaining and political advocacy are directed at the government;

- Failing to anticipate the magnitude of the practical problems in attempting to classify public-sector union expenditures as either "chargeable" expenditures for collective bargaining or "nonchargeable" expenditures for political or ideological purposes;

- Failing to perceive the practical problems that would face objecting non-members; i.e., the difficulty of coming up with the resources to mount a legal challenge in a timely fashion; and

- Lack of support for the empirical assumption that any principle of exclusive representation in the public sector depended on a union or agency shop.

Having disposed of *Abood*, the *Harris* court analyzed the constitutionality of the agency payments under generally applicable First Amendment standards and held that the agency fee provision violated the First Amendment because the payment did not serve a compelling state interest that cannot be achieved through other means that are significantly less restrictive of associational freedoms. For example, the *Harris* court pointed out that employees in some federal agencies may choose a union to serve as an exclusive bargaining agent for the unit but employees are not required to join the union or pay a union fee.

The *Harris* court also considered whether to apply the balancing test that is used to determine the constitutionality of restrictions on public employees' speech (known as the *Pickering* test) and held that it did not apply because the state was not acting in a traditional employer role, and that even if it did apply the *Pickering* test, the agency fee provision was still unconstitutional.

The *Harris* case is a 5-4 decision. The dissent not only disagreed with the outcome but also criticized the majority for "taking potshots" at *Abood* and provided counterarguments to the arguments the majority made. Among other things, the dissent stated: "The *Abood* rule is deeply entrenched, and is the foundation for not tens or hundreds, but thousands of contracts between union and governments across the nation. Our precedent about precedent, fairly understood and applied, makes it impossible for this court to reverse that decision."

CONCLUSION

Five members of the United States Supreme Court appear willing to overturn the precedent established by the *Abood* case but avoided overruling *Abood* by refusing to expand it to healthcare personal assistants. Thus, the *Harris* case can be read as a message to the drafters of contracts between unions and governments that, if presented with the right facts, a majority of the United State Supreme Court is willing to overrule *Abood*.