Client Alert
July 2018

RECENT SUPREME COURT DECISION ENDS ALL REQUIREMENTS FOR GOVERNMENT WORKERS TO PAY AGENCY FEES

The long awaited Supreme Court decision in *Janus*[1] was finally announced on June 27, 2018, and it is terrible; no longer will public sector unions be able to collect agency fees from non-members without a clearly executed agency fee check-off form. And, if non-members refuse to sign check-off forms the unions must, with some very narrow exceptions, still represent these non-members in disputes with their employers, or face duty of fair representation claims.

The narrow representation exceptions are contained in Civil Service Law Section 208 (the "Taylor Law"). The exceptions, explained below, permit public sector unions to refuse to represent non-members in some cases, including in disciplinary matters if the non-member has the right to be represented by their own attorney.

Public sector unions will likely lose both money and bargaining strength as a result of the *Janus* decision. Increased mobilization of workers could stave off the negative effects.

A 5-4 majority of the Supreme Court held that government employees cannot be required to pay agency fees without their direct consent. In an opinion written by Justice Alito, the Court ruled that requiring workers to pay these fees is to compel speech, and therefore violates their First Amendment rights under the Constitution. All dues and agency fee deductions must now be specifically authorized by the employee. Nevertheless, the union's state law duty of fair representation still exists with certain exceptions.

Under the ruling, public sector workers can enjoy the benefits from union negotiations and protections, without paying anything for them. Many workers may stop paying dues or agency fee equivalents, but will still get the benefits the union provides. We can gauge the likely

[1] *Janus v. American Federation of State, County, and Municipal Workers, Council 31,* __US __ (June 27, 2018).

effects based on the many states that currently have "right to work" laws that make it illegal to require private sector workers to contribute to their bargaining representatives. In the long-term, *Janus* is likely to decrease public sector union membership, reduce wages and benefits and increase the pay disparity that already exists for public sector workers. Because many workers will stop contributing to the unions, unions will have less money, lose strength, and labor-management disputes will increase.

Anticipating this ruling, New York State made changes to the Taylor Law to head off some forms of non-member "free-riding." Because of these changes, public sector unions no longer have the duty of fair representation to non-members in certain narrow situations. Under the law, a duty of fair representation does not exist: (1) when the non-member is questioned by the employer; (2) in statutory or administrative proceedings or to enforce statutory or regulatory rights not based in the contract; and (3) in any stage of a grievance, arbitration or other contractual process concerning evaluation or discipline of a public employee where the employee is permitted to proceed without the union and with their own counsel.

Unions also now have the statutory right to be made aware of new employees being hired and to approach these new workers to discuss union membership during paid working time once the meeting is scheduled with the employer.

There are many questions left unanswered by *Janus* and these recent Taylor Law amendments which will need to be decided by the Public Employment Relations Board and the courts. These include:

- How does the union demonstrate that a non-member has a right to utilize their own counsel in a discipline matter so the union avoids a duty of fair representation claim?

- Must the collective bargaining agreement specifically state that non-members can defend themselves and hire their own attorney in a discipline investigation, grievance and arbitration proceeding; or can the union simply amend its by-laws or make an internal policy to let non-members represent themselves?

- What is the union's duty of fair representation when it comes to representing non-members subject to employer questioning?

- Is this questioning limited to discipline?

- Does it apply to non-discipline situations where the union sometimes plays a roll, such as job bidding, overtime selection, emergency sick leave bank applications, job evaluations, transfers, promotions, workplace harassment and discrimination investigations, sick leave abuse investigations, and criminal investigations?

- Does the questioning and union representation have to be based on a contract right? May the questioning and representation be based on past practice?

With so many legal questions remaining, complying with the duty of fair representation regarding non-members as well as instituting a campaign to keep membership vibrant and strong presents many legal issues that must be carefully navigated. Locals should pursue legal advice that is carefully tailored to their contracts and particular labor relations. With these statutory measures, increased internal organizing and a lot of hard work, New York State will keep its rank as the nation's most unionized public sector.

Immediate Actions Necessary

The union must cease collecting agency fees until it obtains an authorization card from the employee that allow either membership dues or agency fee deductions. Agency fees collected after June 27, 2018 must be returned to the employee unless the employee gives consent for their collection. If agency fees must be separated from dues, escrow the contributions until the proper separation can be made.

Create an easy way for employees to begin paying agency fees where these employees are willing to continue to contribute to the union but not its political activities. Reach out to employees to gain these commitments.

Review and make sure your union membership lists and membership dues deduction authorizations are up to date. These records must be accurate and complete. Unions must continue, or in some cases start, reaching out to all members with a campaign to maintain existing membership and to enroll new hires into the union.

Unions should be prepared for members to call and request membership termination. Train your representatives taking these calls to address the members' concerns and attempt to convince the caller of the importance of the union. Communications should be respectful, measured and professional. Treat every contact as an organizing opportunity. Be sure not to give false information or create unnecessary hurdles to terminating membership—expect that adversarial, anti-union groups may record the phone calls. Make sure careful notes are taken when answering these calls.

Review membership card language to ensure compliance with *Janus* and the Taylor Law.

Consider whether it is a good idea to reopen the collective bargaining agreement and to amend the union's by-laws. Discuss whether your union may refuse to represent some employees in certain circumstances pursuant to the Taylor Law amendments.

This client alert is not intended to provide legal advice with respect to any particular situation, and no decision should be based solely on its content. Please feel free to contact Nathaniel G. Lambright at (315) 422-7111 or nglambright@bklawyers.com, or Jules L. Smith at (585) 232-5600 or jlsmith@bklawyers.com with any questions or concerns regarding the issues raised in this client alert.