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MUNICIPAL LAW ALERT

United States Supreme Court Strikes Down Agency Fees

On June 27, 2018, the United States Supreme Court issued its much awaited decision in *Janus v. American Federation of State, County and Municipal Employees*, addressing the constitutionality of "agency fees" in the public sector, also known as fair share fees. Under the Taylor Law, public sector unions in New York State have long been permitted to charge agency fees (akin to union dues) to those members of a bargaining unit represented by the union who do not join the union. These nonmember employees are commonly known as agency fee payors. Many other states have similar statutory schemes.

Mark Janus is an Illinois state employee in a bargaining unit represented by the American Federation of State, County and Municipal Employees ("AFSCME"), a public sector union. Mr. Janus did not join the union because he opposes many of its positions, including those taken in collective bargaining. He brought suit on constitutional grounds, seeking to be relieved of his obligation under Illinois state law to pay mandatory agency fees to AFSCME. Mr. Janus asserted that agency fees violate his free speech rights under the First Amendment to the United States Constitution. He argued that as a free and independent individual, he cannot be compelled, via involuntary agency fees, to endorse and subsidize the speech and ideas of AFSCME or any other union for that matter.

By a 5-4 decision, with the commonly described conservative members of the Supreme Court in the majority, the Court overruled its 40+ year old decision in *Abood v. Detroit Board of Education*, 431 US 209, and held that agency fees do indeed violate the First Amendment. The Supreme Court rejected arguments by AFSCME and its many amici that agency fees are constitutional because they promote "labor peace" and help prevent "free riders." The Court found those arguments to be unavailing, holding that they do not override the First Amendment rights of nonmembers in the bargaining unit who oppose union speech and, accordingly, cannot be compelled to provide involuntary financial support to the union to advance its viewpoints.

While a full analysis of the majority and dissenting opinions contained in the Court's lengthy decision is beyond the scope of this article, a couple of key points by Justice Alito, who wrote the majority opinion, are worth mentioning. First, a nonmember must now affirmatively consent to any payment to the union, and any waiver argument by the union will fail absent clear and compelling evidence. Second, Justice Alito observed that "[i]t is hard to estimate how many billions of dollars have been taken from nonmembers and transferred to public-sector

unions in violation of the First Amendment. Those unconstitutional exactions cannot be allowed to continue indefinitely." 585 U.S. at 47 (2018). This underscores the likelihood that nonmembers will now bring lawsuits, either individually or in class actions, against their unions seeking both refunds of agency fees exacted by the unions in prior years and attorneys' fees should those lawsuits prove successful.

While there is little doubt that *Janus* will result in some decline in the public sector union ranks in New York, it will be interesting to see now how many public sector union members in New York State —and other states that have permitted agency fees — decide to withdraw from union membership to avoid paying union dues.

Our public sector clients need to be aware of some important new State legislation that was part of the budget bill signed by Governor Cuomo on April 12, 2018 and was intended to protect the public sector unions and their dues revenue stream in anticipation that the Supreme Court would indeed strike down agency fees in *Janus*.

The key provisions of the new law, which is an amendment to Section 208(1) of the State Civil Service Law, part of the Taylor Law, are summarized as follows:

1. The public employer (PE) is now required to start taking union dues deductions from an employee's pay as soon as practical but no later than 30 days after receiving proof of a signed dues deduction authorization card, and to transmit those dues to the union within 30 days of taking the deduction.

2. The union apparently has broad discretion to decide upon the form of the dues deduction card.

3. The union's right to dues deduction must remain in full force and effect in accordance with the terms of the dues deduction card. It can reasonably be anticipated that unions will place conditions on an employee's attempt to withdraw from the union by, among other things, limiting withdrawals to certain defined window periods.

4. If an employee is no longer employed by the PE but is rehired within one year, the union's right to dues deduction is automatically reinstated. In other words, the PE cannot insist on a new dues deduction authorization card.

5. If an employee goes out on unpaid leave, whether voluntary or involuntary, membership in the union is continued and dues deductions must be resumed upon the employee's return to active duty on the PE's payroll.

6. The PE is now required to inform the union of the employee's name; address; job title; employing agency, department, or other operating unit; and work location within 30 days of the employee's initial employment, reemployment, or promotion or transfer into a new bargaining unit represented by the union.

7. Within 30 days of such notification by the PE to the union, the PE must allow a duly appointed representative of the union to meet with the employee "for a reasonable amount of time during his or her work time without charge to leave credits" absent other controlling language in the collective bargaining agreement. The new law states that these meetings must be scheduled in consultation with a designated representative of the PE.

8. The new law permits the union to limit the services it will provide to those employees in the bargaining unit who do not elect to join the union. For example, the union will not be guilty of an improper practice if it does not represent any such nonmember employee in: (i) employer questioning; or (ii) statutory or administrative proceedings to enforce statutory or regulatory rights; or (iii) a grievance, arbitration of other contractual process involving either evaluation or discipline of the employee where the nonmember employee is permitted to proceed without the union and be represented by his/her own advocate. The new law also permits the union to limit its other legal, economic, or job-related services or benefits (such as union voluntary insurance programs) to its bona fide members, to the exclusion of nonmember employees within the bargaining unit.

9. The new law contains "savings clause" language, intended to preserve as much as possible should any of its provisions be struck down by a court of competent jurisdiction.

The new state legislation arguably leaves many unanswered questions for New York's public employers. Please contact our Firm's labor and employment law attorneys with those questions. And please recognize that the above is not intended as legal advice, but is merely informational in nature. Finally, have a safe and relaxing summer!

If you have any questions or would like more information on the issues discussed in this communication, please contact any of the following Hancock Estabrook attorneys:

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