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**Janus and Beyond:
The Demise of Agency Fees**

NYSBA Local and State Government Law Section
2018 Fall Meeting

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**NYSBA State and Local Government
Section Fall Meeting**

- True or false -- everything I ever needed to know I learned at the Fall Meeting?
- True or false – Mayle and Corcoran have access to top secret information about what the Supreme Court Justices were thinking when they addressed the constitutionality of “agency fees” in the High Court’s Janus v. AFSCME decision of June 27, 2018?



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What are Agency Fees?

- Agency fees, also known as “fair share” fees, are statutory involuntary payments exacted by a union from nonmembers in a bargaining unit represented by the union for purposes of collective bargaining.
- The concept of “chargeable” expenses of the union versus “non-chargeable” ones.



A brief history of Agency Fees in NYS

- The Taylor Law was amended in the 1970’s to make agency fees mandatory for NYS employees in state units, and a mandatory subject of bargaining for local governments. The Taylor Law was again amended in 1992 to make agency fees mandatory for all units. Subject to forfeiture, however, if union organizes, supports or condones a strike.



You can observe a lot by just watching.

- Janus v. American Federation of State, County and Municipal Employees, Council 31 ("AFSCME")
- Justices Alito, Roberts, Kennedy, Thomas and Gorsuch were in the majority.
- Justices Sotomayor, Kagan, Ginsburg and Breyer were in the minority.



Who is Janus?

- Plaintiff Mark Janus is an Illinois state employee in an AFSCME bargaining unit. He refused to join the union because he opposes many of its positions, including those taken in collective bargaining.
- The Governor of Illinois started the fight but got tossed out due to a "standing" problem. In comes Janus whose own suit is then viewed by the courts as the operative suit.



How did we get here?

- The federal district court dismissed Janus suit based on Aboud v. Detroit Bd. of Educ., 431 US 209 (1977). Seventh Circuit Court of Appeals affirmed.
- Supreme Court grants certiorari and Freidrichs becomes just a thing of the past. May Justice Antonin Scalia rest in peace.



A nickel ain't worth a dime anymore.

- Janus majority holds that State's extraction of agency fees from non-consenting public sector employees violates the First Amendment on free speech grounds.
- Aboud erred in concluding otherwise and stare decisis cannot support it. Therefore, Aboud ain't even worth a nickel anymore.



NYSBA Rocks!

- Forcing free and independent individuals to endorse ideas they object to raises serious First Amendment concerns. That includes compelling a person to monetarily subsidize speech of other "private speakers", aka the union, on matters of substantial public concern.
- Knox and Harris applied "exacting scrutiny" test rather than more traditional "strict scrutiny" test for First Amendment cases. Majority rules that Janus wins under either standard.



The future ain't what it used to be.

- Court rejected the arguments of AFSCME (and its more than 30 amici) that agency fees promote "labor peace" and guard against the "risk of free riders."
- Court first observed that federal government and 28 states already prohibit agency fees.
- 40 years of experience since Abood shows that public sector unions can be effective without agency fees.



No one goes there nowadays,
it's too crowded.

- And states can avoid "free riders" through less restrictive means than agency fees such as by charging nonmembers for services or by denying representation.
- Court also rejected AFSCME's arguments that agency fees are permissible because: (1) they allow the public employer to bargain with an adequately funded agent; and (2) improve the efficiency of the workforce.



The Fall Meeting is Fun!

- Majority overruled Aboud maintaining that it was poorly reasoned, its reasoning has been recast, it did not appreciate the very different First Amendment issue when the State requires its employees to pay agency fees, it applied the wrong standard, its "chargeable" v. "non-chargeable" expenditures approach to agency fees has proven unworkable, and it is an "outlier" in the Court's First Amendment free speech jurisprudence.



I usually take a two hour nap
from one to four.

- Have the unions truly been napping? Justice Alito said that they should have not relied on Abood due to its uncertainty and lack of clarity.
- And the unions could have better protected themselves with contract language if agency fee provisions were essential to their bargains.
- Janus CBA had a savings clause.



Never answer an anonymous letter.

- Employees must now give affirmative consent and must choose to support the union before anything is taken from them.
- There shall be no implied waiver arguments.



A big wave is coming?

- Justice Alito also wrote 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.”
- The next wave of litigation – suits by nonmembers, individually or class actions, seeking refunds of agency fees and awards of attorneys’ fees?



But let’s not get crazy here!!

- In anticipation of Janus decision, Governor Cuomo signed amendments to the Taylor Law and General Municipal Law on April 12, 2018, as part of State’s FY 2018-2019 budget bill, to protect public sector unions, and their dues revenue streams, here in NYS.
- The new law is now effective. Its key provisions are summarized as follows, and the statutory language is in your printed Fall Meeting materials.



Give a shout out to the Labor and Employment Law Section!

- The public employer (PE) must start union dues deductions as soon as practical and not later than 30 days after receiving proof of a signed dues deduction authorization card. E-signatures are permitted.
- Dues deducted must be paid over to the union by the PE within 30 days of making the dues deduction.



Montreal is beautiful in October!

- Union has broad discretion to decide on the form of the dues deduction card.
- Union's right to dues deduction must remain in full force and effect until employee revokes membership in accordance with the terms of the card. Get ready to see conditions on withdrawals such as window periods! Will this prompt another wave of litigation?



Please thank our Program Co-Chairs!

- If an employee leaves and is rehired within one year, dues deduction is automatically reinstated. PE cannot insist on new card.
- If employee goes out on unpaid leave, voluntary or involuntary, membership in union is continued and dues deductions must be resumed upon return to active duty on payroll.



Meeting or pressure cooker?

- PE is required to inform union of an employee's name, address, job title, employing agency, department or other operating unit, and work location, within 30 days of initial hire, rehire, promotion or transfer into a new bargaining unit.
- Within 30 days of notification, union must be allowed to meet with employee "for a reasonable amount of time" on duty and no charge to leave credits unless contract language controls. Union must consult with named PE rep.



Here comes the bargaining!!

- The Union may now limit services to nonmembers in the unit. No IP if Union does not represent non-member in: (1) employer questioning; (2) statutory or administrative proceedings to enforce statutory or regulatory rights; or (3) grievance, arbitration or other contractual process involving either evaluation or discipline of employee if employee is permitted to proceed without the union and have his/her own representative.



No Soup For You!!

- Union can also limit its other legal, economic, or job-related services or benefits to its bona fide members to the exclusion of the nonmembers.



More Stuff

- PERB has published Notice of Emergency Adoption and Proposed Rule Making to allow for expedited PERB review of issues regarding scope of duty of fair representation owed by unions to nonmembers or members seeking to terminate union membership.



More Stuff

- At Governor Cuomo's direction, State Labor Department has issued Guidance for Public-Sector Employers and Employees in New York State addressing the impact of Janus.
- The Guidance materials are also in your printed Fall Meeting materials.
- Is the Guidance consistent with the recent State law amendments?



Disclaimer

This presentation is for informational purposes and is not intended as legal advice.



THE NEW STATE LAW PROVISIONS

PART RRR

8 Section 1. Subdivision 1 of section 208 of the civil service law, as
9 amended by chapter 503 of the laws of 1971, is amended and two new
10 subdivisions 4 and 5 are added to read as follows:

11 1. A public employer shall extend to an employee organization certi-
12 fied or recognized pursuant to this article the following rights:

13 (a) to represent the employees in negotiations notwithstanding the
14 existence of an agreement with an employee organization that is no long-
15 er certified or recognized, and in the settlement of grievances; and

16 (b) to membership dues deduction, upon presentation of dues deduction
17 authorization cards signed by individual employees. A public employer
18 shall commence making such deductions as soon as practicable, but in no
19 case later than thirty days after receiving proof of a signed dues
20 deduction authorization card; and such dues shall be transmitted to the
21 certified or recognized employee organization within thirty days of the
22 deduction. A public employer shall accept a signed authorization to
23 deduct from the salary of a public employee an amount for the payment of
24 his or her dues in any format permitted by article three of the state
25 technology law. The right to such membership dues deduction shall remain
26 in full force and effect until:

27 (i) an individual employee revokes membership in the employee organ-
28 ization in writing in accordance with the terms of the signed authori-
29 zation; or

30 (ii) the individual employee is no longer employed by the public
31 employer, provided that if such employee is, within a period of one
32 year, employed by the same public employer in a position represented by
33 the same employee organization, the right to such dues deduction shall
34 be automatically reinstated.

35 (c) Should the individual employee who has signed a dues deduction
36 authorization card either be removed from a public employer's payroll or
37 otherwise placed on any type of involuntary or voluntary leave of
38 absence, whether paid or unpaid, such public employee's membership in an
39 employee organization shall be continued upon that public employee's
40 return to the payroll or restoration to active duty from such a leave of
41 absence.

42 4. (a) Within thirty days of a public employee first being employed or
43 reemployed by a public employer, or within thirty days of being promoted
44 or transferred to a new bargaining unit, the public employer shall noti-
45 fy the employee organization, if any, that represents that bargaining
46 unit of the employee's name, address, job title, employing agency,
47 department or other operating unit, and work location; and

48 (b) Within thirty days of providing the notice in paragraph a of this
49 subdivision, a public employer shall allow a duly appointed represen-
50 tative of the employee organization that represents that bargaining unit
51 to meet with such employee for a reasonable amount of time during his or
52 her work time without charge to leave credits, unless otherwise speci-
53 fied within an agreement bargained collectively under article fourteen
54 of the civil service law, provided however that arrangements for such

1 meeting must be scheduled in consultation with a designated represen-
2 tative of the public employer.

3 5. (a) If any clause, sentence, paragraph, or subdivision of this
4 section shall be adjudged by a court of competent jurisdiction to be
5 unconstitutional or otherwise invalid, such judgment shall not affect,
6 impair or invalidate the remainder thereof, but shall be confined in its
7 operation to the clause, sentence, paragraph, or subdivision of this
8 section directly involved in the controversy in which such judgment
9 shall have been rendered.

10 (b) If any clause, sentence, paragraph, or part of a signed authori-
11 zation shall be adjudged by a court of competent jurisdiction to be
12 unconstitutional or otherwise invalid, such determination shall not
13 affect, impair or invalidate the remainder of such signed authorization
14 but shall be confined in its operation to the clause, sentence, para-
15 graph, or part of the signed authorization directly involved in the
16 controversy in which such judgment shall have been rendered.

17 § 2. Subdivision 1 of section 93-b of the general municipal law, as
18 amended by chapter 632 of the laws of 1964, is amended to read as
19 follows:

20 1. The fiscal or disbursing officer of every municipal corporation or
21 other civil division or political subdivision of the state is hereby
22 authorized to deduct from the wage or salary of any employee of such
23 municipal corporation or civil division or political subdivision of the
24 state such amount that such employee may specify in writing filed with
25 such fiscal or disbursing officer for the payment of dues in a duly
26 organized association or organization of civil service employees and to
27 transmit the sum so deducted to the said association or organization.
28 Any such written authorization [~~may be withdrawn by such employee or~~
29 ~~member at any time by filing written notice of such withdrawal with the~~
30 ~~fiscal or disbursing officer]~~ shall remain in effect in accordance with
31 subdivision one of section two hundred eight of the civil service law.

32 § 3. Subdivision 2 of section 201 of the state finance law, as amended
33 by chapter 233 of the laws of 1992, is amended to read as follows:

34 2. The comptroller is hereby authorized to deduct from the salary of
35 any employee of the state such amount as such employee may specify in
36 writing filed in a manner determined by the comptroller for the payment
37 of membership dues in a duly organized association or organization of
38 civil service employees or faculty members of the state university and
39 to transmit the sums so deducted to the said association or organiza-
40 tion. Any such written authorization [~~may be withdrawn by such employee~~
41 ~~at any time upon filing written notice of such withdrawal in a manner~~
42 ~~determined by the comptroller]~~ shall remain in effect in accordance with
43 subdivision one of section two hundred eight of the civil service law.

44 The foregoing notwithstanding, and subject to the provisions of article
45 fourteen of the civil service law, such deductions and transmittals
46 shall be terminated as to one or more such associations or organizations
47 in accordance with the written directions of the director of employee
48 relations, not more than thirty days after receipt by the comptroller of
49 such directions. The deductions and transmittals which were the subject
50 of such directions shall not thereafter be resumed without the written
51 approval of such director.

52 § 4. Subdivision 2 of section 209-a of the civil service law, as
53 amended by chapter 467 of the laws of 1990, is amended to read as
54 follows:

55 2. Improper employee organization practices. It shall be an improper
56 practice for an employee organization or its agents deliberately (a) to

1 interfere with, restrain or coerce public employees in the exercise of
2 the rights granted in section two hundred two, or to cause, or attempt
3 to cause, a public employer to do so provided, however, that an employee
4 organization does not interfere with, restrain or coerce public employ-
5 ees when it limits its services to and representation of non-members in
6 accordance with this subdivision; (b) to refuse to negotiate collective-
7 ly in good faith with a public employer, provided it is the duly recog-
8 nized or certified representative of the employees of such employer; or
9 (c) to breach its duty of fair representation to public employees under
10 this article. Notwithstanding any law, rule or regulation to the contra-
11 ry, an employee organization's duty of fair representation to a public
12 employee it represents but who is not a member of the employee organiza-
13 tion shall be limited to the negotiation or enforcement of the terms of
14 an agreement with the public employer. No provision of this article
15 shall be construed to require an employee organization to provide repre-
16 sentation to a non-member (i) during questioning by the employer, (ii)
17 in statutory or administrative proceedings or to enforce statutory or
18 regulatory rights, or (iii) in any stage of a grievance, arbitration or
19 other contractual process concerning the evaluation or discipline of a
20 public employee where the non-member is permitted to proceed without the
21 employee organization and be represented by his or her own advocate. Nor
22 shall any provision of this article prohibit an employee organization
23 from providing legal, economic or job-related services or benefits
24 beyond those provided in the agreement with a public employer only to
25 its members.

26 § 5. Nothing in this act shall be construed to impede, infringe or
27 diminish the rights and benefits which accrue to an employee organiza-
28 tion through a bonafide collective bargaining agreement.

29 § 6. This act shall take effect immediately.

**THE STATE LABOR DEPARTMENT
GUIDANCE ON JANUS**

Guidance for Public-Sector Employers and Employees in New York State

New York State has a long and important tradition of supporting the organized labor movement and the fundamental right of workers to organize. Public-sector employees play a crucial role in communities across New York State. Each day they work hard to ensure public safety, protect public health, and to provide other critical services to New York residents.

The Supreme Court of the United States issued a decision in *Janus v. AFSCME Council 31*, 585 U.S. _____, 138 S.Ct. 2448 (2018) on June 27, 2018. The *Janus* decision overturned decades of established law and practice relating to the right of a union to receive the payment of fair share agency fees from public-sector employees who decline union membership. As a result, there has been much confusion and this Guidance is intended to provide clarity to employers and employees. The only change under *Janus* is that public employers may not deduct agency fees from a non-member's wages, nor may a union otherwise collect agency fees from a non-member, without the non-member employee's affirmative consent. All other rights and obligations of public-sector employers and employees under state law remain unchanged. For example, unions have, in the past, presented dues deduction cards, or other similar evidence of union membership such as membership lists, to public employers and those employers previously collected union dues from its employees on that basis. The decision in *Janus* does not require a union to obtain new dues deduction cards or obtain other evidence of union membership or remove a public employer's obligation to collect dues from members of a union. Public employee unions are not required to produce dues authorizations cards for members from whom the employer has previously deducted dues.

Collective Bargaining

- Under New York law, the rights of public-sector employees to collectively bargain are unaffected by the decision in *Janus*. Employees maintain the right to:
 - organize;
 - form, join, or assist any employee organization for the purpose of bargaining collectively through representatives of their own choosing on questions of wages, hours, and other terms and conditions of employment; and
 - engage in lawful, concerted activities for the purpose of collective bargaining.
- Employees also continue to have the right to be free from threats, interference or coercive statements when exercising their protected rights to engage in concerted activity.
- Public employers are forbidden from interfering in the formation of a union, discriminating against or terminating an employee based on union membership or activity, and refusing to bargain in good faith with a union.

Union Dues & Agency Fees

- The *Janus* decision does not impact any agreements between a union and its members to pay union dues, and existing membership cards or other agreements by union members to pay dues must be honored. The *Janus* decision only impacts the mandatory collection of an agency fee by individuals who decline union membership.
- Employees who are non-members and paying agency fees may choose to become dues paying union members.
- Employees may pay dues through a payroll deduction.

Member Access & Personal Information

- Under many collective bargaining agreements, and under Civil Service Law § 208, public employers are required to provide in a timely manner, the collective bargaining representative with the names and contact information of any newly hired employees.
- Public employees have the right to keep their personal information protected by their employer. An employee's personal information, such as home address, personal email address, home or mobile telephone numbers, and other contact information is protected from disclosure (with limited exceptions).

Employees who believe their rights have been violated should contact their employer or their union.

Guidance for Public-Sector Employers and Employees in New York State

New York State has a long and important tradition of supporting the organized labor movement and the fundamental right of workers to organize. Public sector employees play a crucial role in communities across New York State. Each day they work hard to ensure public safety, protect public health and to provide other critical services to New York residents.

On June 27, 2018, the Supreme Court of the United States issued a decision in *Janus v. AFSCME Council 31* that overturned decades of established law related to a public-sector union's right to collect union fees from non-union members.

This Guidance is intended to provide clarity to employers and employees about this decision.

What did the *Janus* decision change?

Almost all existing rights and obligations of public sector employers and employees under state law remain unchanged. The only change under *Janus* is that public employers may not deduct agency fees from a non-union member's wages, nor may a union collect agency fees from a non-union member, without the employee's affirmative consent.

What is the definition of a public employer?

Under New York law, a public employer means: (i) the state of New York, (ii) a county, city, town, village or any other political subdivision or civil division of the state, (iii) a school district or any governmental entity operating a public school, college or university, (iv) a public improvement or special district, (v) a public authority, commission, or public benefit corporation, (vi) any other public corporation, agency or instrumentality or unit of government which exercises governmental powers under the laws of the state, or (vii) in the case of a county sheriff's office in those counties where the office of sheriff is an elected position, both the county and the sheriff, is designated as a joint public employer.

Do public-sector employees still have the right to unionize?

Yes. Under New York law, public-sector employees still have the right to:

- Organize;
- Form, join, or assist any employee organization for the purpose of bargaining collectively through representatives of their own choosing on questions of wages, hours and other terms and conditions of employment; and
- Engage in lawful, concerted activities for the purpose of collective bargaining.

Can public employers interfere with public-sector employees right to unionize?

No. Public employers are forbidden from:

- Interfering in the formation of a union;
- Discriminating against or terminating an employee based on union membership or activity; and
- Refusing to bargain in good faith with a union.

What does this decision mean for union members?

The *Janus* decision does not impact any agreements between a union and its members to pay union

dues. Existing membership cards or other agreements by union members to pay dues must be honored. The *Janus* decision only impacts the mandatory collection of an agency service fee by individuals who decline union membership.

Does Janus affect current union members and the deduction of dues?

No. Historically, unions have presented dues deduction cards, or other similar evidence of union membership such as membership lists, to public employers, who collected dues from employees on that basis. The *Janus* decision does not require a union to obtain new dues deduction cards or obtain other evidence of union membership. Public employers still have an obligation to collect dues from union members.

What does this decision mean for non-union members?

Employees who are nonmembers and paying agency fees may choose to become dues-paying union members. Employees may pay dues through a payroll deduction. Employees who do not join the union cannot be required to pay fair-share fees.

Can public employers withhold union dues collected from union members?

No. New York State law requires public employers to transmit dues collected from union members to the union within 30 days of collection.

Will unions still know that public employers have hired new employees?

Yes. Under many collective bargaining agreements and New York law, public employers are required to provide, in a timely manner, the collective bargaining representative with the names and contact information of any newly hired employees.

Can public employers share the personal contact information of their employees?

Generally, no. Public employees have the right to keep their personal information protected by their employer. An employee's personal information, such as home address, personal email address, home or mobile telephone numbers, and other contact information is protected from disclosure (with limited exceptions). Employees who believe their rights have been violated should contact their union.