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INFORMATION MEMO
LABOR AND EMPLOYMENT LAW

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The Supreme Court Rules That Requiring Non-Members to Pay Agency Fees to Public Sector Unions is Unconstitutional

On June 27, 2018, the Supreme Court struck down mandatory "agency" or "fair share" fees for public sector employees who decline to become union members. In the decision, *Janus v. AFSCME*, the Court held that an Illinois statute compelling public employees who choose not to be members of a union to pay agency fees to the union that represents them violates the First Amendment, because it requires those employees to financially support an organization which they did not join voluntarily and whose ideas and speech they may disagree with.

Mark Janus, an Illinois child welfare worker, decided not to join the American Federation of State, County, and Municipal Employees – the union that represents his public sector co-workers. Under Illinois law, however, Janus was still required to pay fees to the union. These fees are known as "fair-share" or "agency" fees, a label which refers to the Illinois law requiring the union to "fairly" represent Janus and all of his co-workers, whether or not they are union members. For this representation, non-union bargaining unit employees like Janus were forced to pay a "fair-share" fee," which is approximately 78 percent of the full union dues. Janus objected to the agency fees that he was required to pay to the Union and pursued his objections all the way to the Supreme Court.

On Wednesday, the Supreme Court ruled for Janus, and in doing so, overturned long-standing precedent allowing compulsory agency fees. The Court based its ruling on the First Amendment principle that "forcing free and independent individuals to endorse ideas they find objectionable" is unconstitutional. Specifically, forcing public sector employees to contribute to unions involuntarily violates their freedoms of speech and association. As such, the Court ruled that "States and public-sector unions may no longer extract agency fees from nonconsenting employees."

The *Janus* decision only applies in the public sector and does not apply to private sector employees. The future impact of *Janus* on private sector employees remains to be seen.

This decision throws the state of the current law in many states, including New York, into flux. There are three main factors contributing to this chaos in New York: (1) the *Janus* decision, ruling that Illinois agency fee laws are illegal under the Constitution; (2) New York legislation passed in March 2018 designed to curb the expected impact of *Janus* (more information about that legislation can be found here); and (3) the fact that the *Janus* holding technically only strikes down the Illinois law compelling agency fee payments. Until the legislature or a court acts to determine otherwise, New York's statutory provision on agency fees has not been formally overruled.

This legal quagmire leaves public sector employers in an untenable position. Challenges to the New York laws are inevitable, but until then, employers must contend with a number of issues, including:

- Should New York public employers stop agency fee deductions immediately based on the *Janus* decision?
- What is the employer's economic exposure if it stops making and transmitting agency fee payments? What is its exposure if it does not?

- What should a public employer that has agreed to deduct agency fees as part of its current collective bargaining agreement do?
- How should public employers respond to employees who are union members, but now decide to revoke their membership and avoid the payment of dues under *Janus*?

We are hosting some presentations on this topic in our Buffalo, Syracuse, and Garden City offices on July 10, 11, and 12 respectively. The presentation in Buffalo on July 10 will be available to be viewed in our Rochester office by video conference as well. More information and a link to register for the presentation you wish to attend can be found here.

If you have any questions about this Information Memo, please contact James Holahan, Theresa Rusnak, any of the attorneys in our Labor and Employment Law Practice, or the attorney in the firm with whom you are regularly in contact.

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