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INFORMATION MEMO
LABOR AND EMPLOYMENT LAW

JUNE 14, 2018

From "Fair Share" to Simply "Unfair" for New York Public Employees

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 is still required to pay fees to the union. These fees are known as "fair-share" 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 members like Janus must pay a "fair-share" fee," which is approximately 78 percent of the full union dues, and in Janus' case, amounts to $23.48 per pay period.

Janus has objected to the payment of this fee, and his case has reached the United States Supreme Court. A ruling by the Court in Janus v. AFSCME will be released very soon, and that ruling is expected to strike down the Illinois "fair share" law and similar state laws (including the law in New York) because they violate the United States Constitution.

The implications of this decision for New York public sector unions could be devastating. New York's government workforce has become more and more unionized since public sector collective bargaining was authorized in 1967. According to the Bureau of Labor Statistics, in 2016, New York had almost 2 million government workers who were union members, accounting for 25.2% of the New York workforce. This is by far the highest percentage of unionized public sector workforce employees among the 50 states.

Given the potential impact that the Janus decision may have on New York unions, the New York legislature has already taken pre-emptive action. The legislature passed Part RRR in March 2018 as one of 80 amendments tacked onto to Budget Bill A-9509. Part RRR amends the Civil Service Law, the General Municipal Law, and the State Finance Law as those laws relate to union dues and the duty of fair representation.

Specifically, Part RRR requires public employers to:

- Notify the relevant union within 30 days of a new employee being hired, rehired, or promoted into a bargaining unit represented by that union;
- Provide the new employee's name, address, and work location to the union;
- Require dues to be reinstated automatically if a union member employee leaves service but is reinstated to a position with the same employer in the same bargaining unit within one year;
- Recognize dues deduction authorizations that are signed electronically; and
- Continue to recognize an employee's union membership during any paid or unpaid leave of absence, voluntary or otherwise.

Part RRR also amends the General Municipal Law and State Finance Law by eliminating the right to revoke dues deduction in writing at any time. Instead, it mandates that the dues authorization shall remain in effect until the employee "revokes membership in writing in accordance with the terms of the signed authorization." The legislation, however, does not establish any limitations or restrictions on the terms that a union may include in its authorization card to restrict revocation of membership or cancellation of dues. This lack of clarity leaves employers and employees unsure of when and how an authorization to deduct union dues from an employee's wages may be revoked.

Perhaps the most aggressive piece of this new legislation, however, is the provision that requires public employers to permit union representatives to meet with new employees for a reasonable amount of time, and without charge to leave credits. As an initial matter, the legislation does not define "reasonable amount of time." More troubling, however, is the implication that because leave credits cannot be charged, the meetings must take place on paid time. This raises several issues, including whether this use of paid time would be an unlawful gift of public funds. Other questions also arise: what if the employee refuses to attend the meeting? Under Part RRR, must that employee be compelled to meet with the union under penalty of discipline? What about the constitutional right of association? These and many other questions will be left to the courts to decide as Part RRR takes hold.

Most of this anti-Janus legislation is directed at improving the unions' chances of persuading employees to join and pay dues voluntarily. There are, however, several provisions that substantially curtail the unions' duty to represent everyone in a particular bargaining unit "fairly." Part RRR limits the unions' obligations to non-members to the negotiation or enforcement of the terms of an agreement with the public employer. This means that, under the law, unions do not have a duty to represent non-members:

- During questioning by the employer;
- In statutory or administrative proceedings or to enforce statutory or regulatory rights; or
- In any stage of a grievance, arbitration, or other contractual process concerning employee evaluation or discipline where the non-member is permitted to proceed without the employee organization and be represented by his or her own advocate.

Finally, Part RRR expressly permits unions to provide union members with legal, economic, or job-related services or benefits better than those provided to non-members. In other words, the legislation invites unions to create opportunities to favor its members over those employees who elect not to join the union or pay dues.

We do not yet know what the Supreme Court will do in Janus v. AFSCME, but there is no escaping Part RRR. It is already in effect, and promises confusion, contentiousness, and cost (in both time and dollars) for New York public employers no matter what the outcome in Janus is.

If you have any questions about this Information Memo, please contact 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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