

# Dues & Don'ts

A guide to discussing the Taylor Law



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## EMPIRE CENTER

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## INTRODUCTION

The New York State Public Employees' Fair Employment Act, commonly known as the Taylor Law, is a uniquely broad statute that ultimately touches nearly every corner of state and local government in New York.

This manual is intended to help New York public employers understand four key points relating to their rights and responsibilities under the Taylor Law in the wake of the Supreme Court's *Janus v. AFSCME* ruling.

Those points are as follows:

- 1. Employers can talk to their employees about collective bargaining issues – including union membership and Janus rights.**
- 2. Union dues should only be deducted for employees who have signed a dues-deduction authorization.**
- 3. Changes made to the Taylor Law since 2018 impose new obligations on New York's state and local employers.**
- 4. Agency fees or similar payments or deductions are unconstitutional.**

Each of the following sections includes recommended actions for public employers. Relevant statutes and caselaw are cited throughout, frequently asked questions are answered (pages 9 and 10), and sample materials are provided (pages 11-13).

## SECTION 1:

### Employers can talk to their employees about collective bargaining issues—including union membership and Janus rights.

Employers have the right to communicate with employees and prospective employees on their terms and conditions of employment as long as the communication is not coercive with respect to the employees' rights to join or participate in a union. Communications should be statements of fact that advise the employee of his/her rights and options. This communication can occur:

1. when interviewing candidates for employment;
2. in an "on-boarding" discussion with a new hire; and
3. in personnel policies and manuals adopted by the employer.

Given the possibility of being charged with an improper practice under CSL §209-a.1 (a), (b), (c) or (f), some public employers may feel overly constrained in their communications with their employees regarding issues such as agency fees, the *Janus* decision and the 2018 Taylor Law amendments, not to mention the law itself. **Such trepidation is misplaced.** It is only communication by public employers that is intended to interfere, restrain, discourage or coerce from exercising rights to join, form or participate in unions that could form the basis of an improper practice charge. Providing employees, even employees represented by a union, with factual information in a non-coercive, non-threatening manner does not violate the law.

Most notably, employers may notify employees (pre-hire and current) specifically about Janus rights. The *Janus* decision makes the issue of agency fee arrangements a prohibited subject of bargaining, so discussing the commonly accepted implications of the decision cannot constitute a violation.<sup>1</sup> An example of a permissible notification letter is included as Handout 1 on page 11.

Furthermore, informing employees of changes in law in a factual manner does not constitute a "direct dealing," another prohibited practice, as a direct dealing charge requires negotiating with an employee for the purpose of reaching an agreement.<sup>2</sup>

Posting the collective bargaining agreement (CBA) between a public employer and a public employee organization online may alleviate some confusion. The CBA is a public document subject to the NYS Freedom of Information Law (Public Officers Law §84, et seq.) and should not be shrouded in secrecy or confidentiality. PERB's rules (4 NYCRR 215.1) require that each public employer provide to PERB a copy of any negotiated CBA under CSL § 205.5 (e). For many years, PERB has made these available online.

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<sup>1</sup> An employer's communications to unit members about the substance of negotiations and mediation where merely informative and not threatening or coercive is not violative of the Taylor Law (*Greenburgh 11 Union Free School District - 32 PERB 3035 (1999)*). An employer's meeting to inform employees of decisions on layoffs and transfers was not a violation (*City of Rochester, 35 PERB 4537 (2002)*).

<sup>2</sup> To constitute a violation, union must show employer dealt with a unit employee on a mandatory subject of bargaining (*City University of New York, 38 PERB 3011(2005)*). Pre- and post-hire discussion of terms and conditions of employment is not a violation even if employer made misstatements as employer was sharing information believed to be accurate (*Town-Village of E. Rochester, 38 PERB 4503 (2005)*).

## What the public employer should do:

1. Notify all current employees in writing about the *Janus* ruling (see Handout 1, page 11).
2. Ensure that communications with applicants and new hires explain that:
  - a. they have the right to choose whether or not to join a union;
  - b. the annual dues rate of their unit's exclusive representative;
  - c. withdrawal of dues-deduction authorization is subject to restrictions; and
  - d. the terms and conditions (e.g. pay and benefits) of their position and title are the same regardless of their membership choice (see Handout 2, page 12).
3. Make all collective bargaining agreements, side letters, and bargaining unit definitions publicly available on the employer's website.
4. Update the employee manual to reflect that:
  - a. the employee has the right to choose whether or not to join a union; and
  - b. terms and conditions of employment (e.g. pay/benefits) are not affected by membership.

### Relevant Law: Civil Service Law (CSL) §209-a (underlined material is new) provides:

Improper employer practices. It shall be an improper practice for a public employer or its agents deliberately (a) to interfere with, restrain or coerce public employees in the exercise of their rights guaranteed in section two hundred two of this article for the purpose of depriving them of such rights; (b) to dominate or interfere with the formation or administration of any employee organization for the purpose of depriving them of such rights; (c) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any employee organization; (d) to refuse to negotiate in good faith with the duly recognized or certified representatives of its public employees; (e) to refuse to continue all the terms of an expired agreement until a new agreement is negotiated, unless the employee organization which is a party to such agreement has, during such negotiations or prior to such resolution of such negotiations, engaged in conduct violative of subdivision one of section two hundred ten of this article; (f) to utilize any state funds appropriated for any purpose to train managers, supervisors or other administrative personnel regarding methods to discourage union organization or to discourage an employee from participating in a union organizing drive; (g) to fail to permit or refuse to afford a public employee the right, upon the employee's demand, to representation by a representative of the employee organization, or the designee of such organization, which has been certified or recognized under this article when at the time of questioning by the employer of such employee it reasonably appears that he or she may be the subject of a potential disciplinary action. If representation is requested, and the employee is a potential target of disciplinary action at the time of questioning, a reasonable period of time shall be afforded to the employee to obtain such representation. It shall be an affirmative defense to any improper practice charge under paragraph (g) of this subdivision that the employee has the right, pursuant to statute, interest arbitration award, collectively negotiated agreement, policy or practice, to present to a hearing officer or arbitrator evidence of the employer's failure to provide representation and to obtain exclusion of the resulting evidence upon demonstration of such failure. Nothing in this section shall grant an employee any right to representation by the representative of an employee organization in any criminal investigation; or (h) to disclose home addresses, personal telephone numbers, personal cell phone numbers, personal e-mail addresses of a public employee, as the term "public employee" is defined in subsection seven of section two hundred one of this article, except (I) where required pursuant to the provisions of this article, and (II) to the extent compelled to do so by lawful service of process, subpoena, court order, or as otherwise required by law. This paragraph shall not prohibit other provisions of law regarding work-related, publicly available information such as title, salary and dates of employment.

## SECTION 2:

### **Union dues should be deducted only for employees who have signed dues-deduction authorizations.**

CSL §208.1(b) entitles a union to automatic dues deduction “upon presentation of dues deduction authorization cards signed by individual employees.”

Most payroll systems came online after New York State mandated agency-fee collection for local governments and school districts in 1992, meaning there was no immediate need to differentiate between dues-paying union members and non-members (agency-fee payers). In the leadup to *Janus*, a review by the Empire Center found nearly three in four public employers could not make this distinction, and that many were deducting dues without first having been presented with a dues-deduction authorization card.

### **If an employee has not signed a dues-deduction authorization card, dues should not be deducted from his or her pay.**

Now that New York State requires public employers to enforce the terms of dues-deduction authorization cards (see section 3, page 6), it is more important than ever that employers possess them. The public employer should review the terms to determine whether they place any burden or responsibility on the employer (e.g. to escrow funds). Since it is unlikely that the union will agree to defend and indemnify the employer from any actions arising from disputes between the member and the union, the employer may want to consider alternate language as a bargaining subject. If a union submits new authorization cards, the employer cannot refuse to acknowledge them on minor technical deficiencies.<sup>3</sup>

### **What the public employer should do:**

1. Immediately verify that any employee for whom dues are being deducted has signed an authorization card.
2. Review membership terms outlined on cards.
3. Consider contract language that will indemnify the employer from any actions arising from disputes between the member and the union concerning dues deductions.

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<sup>3</sup> Evidence sustained a finding by PERB of reasonable cause to believe that city violated CSL §§ 209-a(1)(a), 208(1)(b), 208(3)(b) and 202 when it refused to deduct city employees’ union dues and agency shop fees because of “a few” improperly executed dues-deduction authorization cards; thus, injunction against city was warranted under §209-a(4) pending resolution before PERB, in view of irreparable damage being done to union and its relationship with its representatives. *New York State Pub. Employment Relations Bd. v City of Troy*, 164 Misc. 2d 9, 623 N.Y.S.2d 701, 1995 N.Y. Misc. LEXIS 54 (N.Y. Sup. Ct. 1995). Ruling on the underlying improper practice charge, PERB found the city’s refusal to deduct and transmit fees was linked to its effort to influence the outcome of negotiations and that the city had a longstanding history of dues deduction without question as to the adequacy of dues-deduction authorizations. *City of Troy 28 PERB 3027 (1995)*. Simply put, the problem, as usual in these types of charges, is the finding of an improper motive for the employer’s actions.

**Relevant Law: CSL §208.1 (underlined material is new) provides:**

A public employer shall extend to an employee organization certified or recognized pursuant to this article the following rights: (a) to represent the employees in negotiations notwithstanding the existence of an agreement with an employee organization that is no longer certified or recognized, and in the settlement of grievances; and (b) to membership dues deduction, upon presentation of dues deduction authorization cards signed by individual employees. A public employer shall commence making such deductions as soon as practicable, but in no case later than thirty days after receiving proof of a signed dues deduction authorization card; and such dues shall be transmitted to the certified or recognized employee organization within thirty days of the deduction. A public employer shall accept a signed authorization to deduct from the salary of a public employee an amount for the payment of his or her dues in any format permitted by article three of the state technology law. The right to such membership dues deduction shall remain in full force and effect until:(i) an individual employee revokes membership in the employee organization in writing in accordance with the terms of the signed authorization; or (ii) the individual employee is no longer employed by the public employer, provided that if such employee is, within a period of one year, employed by the same public employer in a position represented by the same employee organization, the right to such dues deduction shall be automatically reinstated. (c) Should the individual employee who has signed a dues deduction authorization card either be removed from a public employer's payroll or otherwise placed on any type of involuntary or voluntary leave of absence, whether paid or unpaid, such public employee's membership in an employee organization shall be continued upon that public employee's return to the payroll or restoration to active duty from such a leave of absence.

## SECTION 3:

### Changes made to the Taylor Law since 2018 imposed new obligations on New York's state and local employers.

Ahead of the *Janus* ruling, Governor Andrew Cuomo and the state Legislature modified long-standing state laws to benefit government unions. Additional changes were made in the FY2020 state budget.

As explained in the previous section, the employer is now charged with enforcing the membership-dues deduction agreement. If a signed card is not possessed, however, it is impossible for the employer to follow the law.

The public employer also should be aware of a new statutory requirement to provide information to the union about newly hired, promoted or transferred employees and to provide a union representative with the opportunity to meet with such employees “for a reasonable amount of time.”

The state Legislature amended CSL §208 to:

1. ensure unions prompt payment of union dues when unions submit dues-deduction authorization cards for new members;
2. require public employers to accept dues-deduction authorizations in additional formats (e.g. electronic records and signatures);
3. provide that the dues-deduction authorization will remain in effect until revoked by the employee *in accordance with the terms stated in the authorization*;
4. ensure that the dues deduction will automatically be restored if an employee leaves the employ of the public employer but returns to the public employer within one year in a position represented by the same union;
5. require new employers to let union representatives meet with employees who are newly hired, transferred or promoted into the bargaining unit; and
6. require employers, upon the union's request, to provide (no more than quarterly) a list of the names, addresses, job titles, employing agencies or departments or other operating units and work locations of all employees of the bargaining unit, unless otherwise specified by a collective bargaining agreement.

#### What the public employer should do:

1. Inform its personnel or human resources director of the requirement to provide information to the union about newly promoted, transferred or hired employees.
2. Develop a standardized form letter so that the responsible employee need only fill in the blanks.
3. Add a step to processing personnel change forms that requires notice to the union in the event of promotions, transfers and new hires.
4. Designate a representative for the union to contact to schedule meetings with new hires or transferred or promoted employees and inform that representative of such requirements (see Relevant Law, page 7).

5. Adopt a procedure that:
  - a. designates the person to receive and review dues-deduction authorization cards;
  - b. informs each union of the name and title of such person;
  - c. requires date-and-time stamped receipts of authorizations and calendars an action item after two weeks to check if deductions have commenced;
  - d. requires prompt review of authorizations, recognizing that electronic records and signatures are permissible and that authorizations may not be rejected for minor issues;
  - e. requires the person responsible for payroll be informed as soon as authorizations are approved so that deductions can be made within the statutorily required 30 days from receipt (if the employer has biweekly payroll, time to comply is effectively reduced); and
  - f. designates a person responsible to receive and review union requests for bargaining unit lists.

**Relevant Law: CSL §208.4 (underlined material is new) provides:**

(a) Within thirty days of a public employee first being employed or reemployed by a public employer, or within thirty days of being promoted or transferred to a new bargaining unit, the public employer shall notify the employee organization, if any, that represents that bargaining unit of the employee's name, address, job title, employing agency, department or other operating unit, and work location; and

(b) Within thirty days of providing the notice in paragraph a of this subdivision, a public employer shall allow a duly appointed representative of the employee organization that represents that bargaining unit to meet with such employee for a reasonable amount of time during his or her work time without charge to leave credits, unless otherwise specified within an agreement bargained collectively under article fourteen of the civil service law, provided however that arrangements for such meeting must be scheduled in consultation with a designated representative of the public employer.

## SECTION 4:

### Agency fees or similar payments and deductions are unconstitutional.

Writing for the majority in *Janus*, U.S. Supreme Court Justice Samuel Alito wrote, “Neither an agency fee nor any other payment to the union may be deducted from a nonmember’s wages, nor may any other attempt be made to collect such a payment, unless the employee **affirmatively consents to pay** (emphasis added).”

Many collective bargaining agreements contain express language recognizing an “agency shop.” An example of such contract language is as follows:

#### ARTICLE XX – AGENCY SHOP.

The (County/City/Town/Village) shall deduct from the wages of those employed in the bargaining unit who are not members of the union, a service fee (agency fee) equivalent to the total annual dues paid by members of the union. Such service fee shall be deducted in the same manner as payroll deductions of dues and transmitted to the union.

Since this provision is now unconstitutional and thus unenforceable,<sup>4</sup> it should be removed from the collective bargaining agreement. Most unions understand this and will agree to remove such language.

Soon after *Janus* was decided, Assemblyman Richard Gottfried of Manhattan signaled he would introduce legislation to help unions “overcome” the court’s decision by permitting direct subsidies to the unions in lieu of agency fees. Such arrangements, if pursued, would also be constitutionally suspect and should be avoided.

#### What the public employer should do:

1. Work with the union to remove the agency-fee language from its contract.
2. Avoid agreeing to any direct subsidies or other *Janus* “workarounds” which could subject the employer to federal litigation.

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<sup>4</sup> *City of Troy*, 28 PERB 3027 at 3064 to the effect that the law controls the agency-shop fee deduction obligations, not the provisions of any contract negotiated at a time when the applicable law was different.

## SECTION 5:

### Frequently Asked Questions

#### What can the employer say to new hires about union membership?

Communication with new hires that is informative and not designed to interfere with or to coerce or discourage union membership or participation is permitted (see Handout 2 on page 12). New hires are entitled to know that union membership is not required in order to gain public employment, that it is entirely the employee's choice whether to join or not to join a union, and that whatever the choice, the employee cannot be discriminated against in the terms and conditions of employment or other employment decisions (e.g. promotions, discipline, assignments, etc.). New employees are also entitled to know how much union dues are, how they will be paid and the frequency of payment. New employees can be told that they are always free to change their minds, and that if they later decide to cancel union membership, New York law says the union's terms for cancellation as stated on the dues-deduction authorization will control the process. It would be advisable to inform them that a representative of the union will likely contact them.

#### What can the employer tell current employees about their *Janus* rights?

Employers may notify employees about the *Janus* ruling. A sample letter is provided as Handout 1 on page 11.

The employer should make it clear that joining the union and authorizing dues to be deducted from pay is not a condition of employment and that the terms and conditions of employment (wages, hours, vacation, holidays, personal and sick leave, health insurance, retirement system participation, etc.) for dues-paying members and non-members are the same within any given bargaining unit and title. It would be helpful for the employer to revise its employee manual to reflect this.

#### What if the payroll office does not possess a signed dues-deduction authorization?

Even before *Janus*, General Municipal Law (GML) §93 required a valid written authorization before a municipal fiscal officer could deduct union dues or agency fee payments from an employee's wages. CSL §208.1(b) also requires a signed dues-deduction authorization for union members, but allows alternate forms (such as e-mail) and provides that once one is received by the employer, the employer must commence withholding and transmittal to the union within 30 days.

CSL §208.3, which pertains to agency-fee payers, gave unions the right to agency-fee payments from non-union bargaining unit members without requiring authorization. This section has been invalidated by *Janus*. For any such employees, the employer should **cease agency fee withholding on notice to both the employee and the employee organization.**

## Does the Taylor Law give the union access to make a presentation to new employees at orientation?

No. The law, as amended in 2018, gives the union the right to information about new hires' names, addresses and work locations so that the union can contact new employees directly. The employer must provide this information within 30 days of the new hire or re-hire, promotion or transfer of an employee. The employer must also allow a union representative to meet with the new employee, on the employer's premises, for a reasonable time, with no charge to the employee's contractual leave time. However, arrangements for such meeting must be scheduled in consultation with a designated representative of the public employer. The employee should be advised of this.

Again, the employer can emphasize that the choice to join the union is entirely the employee's and that the employer cannot and will not discriminate against the employee, regardless of the employee's choice. The employer should also advise the employee that the law states that the union authorization document will dictate the procedure should the employee later decide to withdraw the authorization for union dues deduction.

## What should the employer do if someone asks to stop paying union dues?

A request to withdraw union dues-deduction authorization should be treated seriously and carefully, beginning with date-stamping the request. In many cases, union membership cards explicitly say that consent may be withdrawn by notifying the public employer, in which case there is no question that the deductions must stop immediately.

GML §93 states that the authorizations will remain in effect in accordance with the provisions of CSL §208.1 which are: (1) until revoked in accordance with the terms stated in the authorization or (2) until the employee is no longer employed by the employer. This language, however, does not appear to be consistent with the holding in *Janus*, in which Justice Alito wrote, "neither an agency fee nor any other form of payment to a public-sector union may be deducted from an employee, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay."

While some union membership cards restrict the ability to withdraw dues-deduction authorization to certain time windows or restrictive processes, failing to immediately honor an employee's request to stop dues deduction places the employer at risk of federal litigation.

## SECTION 6: Handouts

### Handout 1: Sample Letter to Current Employees About *Janus*

Download an editable electronic copy at [www.DuesAndDonts.org](http://www.DuesAndDonts.org).

[ORGANIZATIONAL LETTERHEAD]

[Date]

Dear team member,

At the time of your hiring, it is likely that state law required you to pay union dues as a condition of employment. On June 27, 2018, the United States Supreme Court held that compulsory payments to a public-sector union violate a person's First Amendment rights.

The position in which you serve is part of a bargaining unit that has elected to be represented by a union. However, in accordance with New York State law:

- Union membership is not required as a condition of your employment.
- The terms and conditions outlined in your bargaining unit's contract apply to you regardless of your membership choice.
- It is illegal for anyone to coerce or interfere with your right to not join or to join a union.
- It is illegal for anyone to discriminate against you for not being a union member or for being a union member.

Please contact [appropriate office/person] if you have any questions.

Sincerely,  
XXXXX

## Handout 2: Section 202 Notice for Distribution to New Hires and Applicants

Download an editable electronic copy at [www.DuesAndDonts.org](http://www.DuesAndDonts.org).

[ORGANIZATIONAL LETTERHEAD]

### SECTION 202 NOTICE

Per Section 202 of the New York State Civil Service Law:

*Public employees shall have the right to form, join and participate in, or to refrain from forming, joining, or participating in, any employee organization of their own choosing.*

Your position, [TITLE], is part of [EMPLOYER NAME]'s [bargaining unit].

This unit selected [UNION NAME] as its bargaining agent.

The provisions of the agreement between [EMPLOYER NAME] and [UNION NAME] apply to all [EMPLOYER NAME] employees in the [bargaining unit] regardless of their union membership.

This agreement can be viewed here: [web address]

Membership in the union is optional. The dues rate is:

[TABLE]

### Handout 3: Labor Poster

Download an electronic copy at [www.DuesAndDonts.org](http://www.DuesAndDonts.org) or email [info@DuesAndDonts.org](mailto:info@DuesAndDonts.org) to request a printed 11"x17" copy.

## **NOTICE OF NON-DISCRIMINATION WITH RESPECT TO UNION MEMBERSHIP OR NON-MEMBERSHIP**

New York and federal laws have long recognized the rights of public employees to join a union or to not to join a union. However, more recently, New York law required public employees who were not union members to pay "agency-shop fees" in an amount equivalent to union dues and to have such payments withheld from their pay if their job title was in a unit represented by a union. The U.S. Supreme Court found it is unconstitutional to compel non-members to pay "agency-shop fees." In order for union dues to be deducted from your pay, you must affirmatively consent to the deductions.

### **THIS NOTICE IS TO ADVISE YOU:**

1. Union membership is not, and cannot, be required as a condition of your employment with a public employer.
2. While New York law requires that the public employer provide the union with the name and address of employees and requires that the public employer must provide the union the opportunity to meet with promoted, transferred or new employees, it is illegal for anyone to attempt to coerce you to join or to not join a union.

**It is illegal for anyone to discriminate against you because you choose to join or not to join a union.**

# QUICK REFERENCE GUIDE

## Talking About the Taylor Law: Dos and Don'ts

<p><b>You may not say...</b></p> <p>“You should/shouldn't join the union.”</p>	<p><b>What you may say...</b></p> <p>“Membership is optional. State law gives you the right to choose.”</p> <p>“The union is the agent that your bargaining unit voted, at some time in the past, to negotiate a contract for the unit.”</p> <p>“Your membership choice does not affect your contractual benefits. They apply to you regardless.”</p>
<p><b>You may not...</b></p> <p>Refuse to process a membership card with a minor error.</p>	<p><b>You may...</b></p> <p>Publish collective bargaining agreements and side letters on the internet.</p> <p>Publish a plain-English explanation of benefits in the contract.</p> <p>Publish the dues rate and notify employees of increases.</p>

