Dues & Don'ts

A guide to discussing the Taylor Law

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Ken worked with E.J. McMahon to produce the first independent analysis of New York's property tax cap, which demonstrated the cap's effectiveness and boosted efforts to extend the cap and ultimately make it permanent. He also authored *The Janus Stakes*, a quantitative analysis of the influence New York's public-sector unions have over public policy in the Empire State.

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INTRODUCTION

Governor Andrew Cuomo in 2018 pledged to "protect and strengthen" public employee unions after the U.S. Supreme Court ruled the unions could no longer force non-members to pay them.

The decision in *Janus v. AFSCME* ended New York's decades-long "agency-shop" arrangement under which workers who chose not to join a union were charged the same amount they would have paid if they had joined. The end of agency-shop meant it suddenly became optional for upwards of one million New York public employees to continue paying dues that typically range from $400 to $1,400 annually. Tens of thousands of New York public employees have since opted to stop.

Cuomo's policy to "protect and strengthen" the unions involved directing a deluge of misinformation toward both public employees and municipal leaders:

- The state Labor Commissioner, in July 2018, sent factually inaccurate "guidance" directing local governments and school districts to continue deducting union dues even without employee consent. The state's "Local Government Handbook," despite being revised in 2019, still tells employers they must make union deductions from people who choose not to join.
- One major union has presented new hires with a "beneficiary form" for a $10,000 death benefit—which, a reading of the fine print reveals, is actually an agreement to pay union dues.
- State agencies have told new employees, incorrectly, that they won't receive employer-funded benefits unless they sign a union membership card.
- Neither New York State nor the City of New York—the state's two largest public employers—notified their employees about *Janus*. Most of New York's other largest public employers appear to have also failed to tell their workers.
- As of August 2022—more than four years after *Janus*—several state agencies and large municipalities were still distributing employee handbooks falsely indicating that paying a union was a mandatory condition of employment.

Employers understand they should never engage in coercive activity, which includes speaking disparagingly about the union or an employee's involvement with the union. But few understand where those speech restrictions end, and that they are always allowed to give their employees a complete and accurate picture of how state law affects them.

Background: Management's Speech Rights Under the Taylor Law

Managers and elected officials often worry that talking about collective bargaining with their employees will lead to state penalties, either for speech being deemed coercive or threatening or for direct dealing (attempting to negotiate directly with employees rather than the union that represents them).

Few public employers know they enjoy significant speech rights under the Taylor Law, which is enforced by the state Public Employment Relations Board (PERB).

In a key 1984 decision, PERB held an employer's actions—in this case, discussing potential layoffs with union-represented workers—would be improper "only if they were intended or likely to coerce employees into relinquishing rights guaranteed by the Taylor Law, such as the right of the union's membership to decide whether or not to accept or reject a negotiated agreement or the right to take the dispute to arbitration."[1]

This view of employer speech rights has endured:

- PERB in 1999 found that factual, informative communications with employees (in that case, about the status of negotiations) which was not threatening or coercive was also not prohibited by the Taylor Law.[2]
- The announcement or sharing of information with employees, "without any intention to reach agreement as to terms and conditions, or bypass the union, is not prohibited" by the Taylor Law, PERB held in a 2005 case.[3]
- A PERB Administrative Law Judge in 2019 upheld an employer's right to discuss the outcomes of a grievance with employees.[4]

Remember: 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.

THE 5 STEPS EVERY EMPLOYER SHOULD TAKE

1. Make sure new hires understand their rights and who to ask.

New hire orientation sessions often leave out a crucial detail: every New York public employee has the right to join, or not join, the union.

You 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.

A sample notice of non-discrimination, which can be included in orientation packets, is provided in Appendix A.

Watch out for these common sources of confusion:

- If a union administers employee benefits, make sure employees understand these benefits are funded by the employer, not by union dues. For instance, employees sometimes believe they need to pay CSEA dues to receive dental and vision benefits administered by the CSEA Employee Benefit Fund.

[1] 17 PERB ¶ 3068, 17 Off. Dec. of N. Y. Pub. Employee Rel. Bd. ¶ 3068, 1984
[2] 32 PERB ¶ 3035, 32 Off. Dec. of N. Y. Pub. Employee Rel. Bd. ¶ 3035, 1999
[3] 38 PERB ¶ 4503, 38 Off. Dec. of N. Y. Pub. Employee Rel. Bd. ¶ 4503, 2005
[4] 52 PERB ¶ 4537, 52 Off. Dec. of N. Y. Pub. Employee Rel. Bd. ¶ 4537, 2019

- Some employers include a union membership application in their orientation packets. Unless this is explicitly required by a contract, an employer should never distribute union membership applications.
- Employers should designate a member of the management team as the point of contact for questions about anything related to the contract. Employees should never have to ask the union for information about their relationship with their employer.

2. Tell your current employees about the Janus decision.

Janus made agency-fee deductions a prohibited subject of bargaining, which changed the terms and conditions for every unionized employee covered by the Taylor Law. New York, since 1992, had required anyone represented by a union to pay a dues-like fee if they chose not to join that union. That means many, if not most, employees who chose to join the union did so believing they'd have to pay regardless. An example Janus notice is attached in Appendix B.

3. Update your orientation material, employee manual, and job postings.

Educating public employees about their rights begins even before they've accepted the position.

Besides missing an opportunity to tell people about their rights, state and local government employment materials often include outdated information. Most notably, some employee handbooks still indicate payments to the union are mandatory.

Every point of contact with a new hire, from job postings to orientation to the employee handbook, should mention their rights under Civil Service Law §202:

> "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."

4. Update and post your contract online.

The union contract applies to everyone in the bargaining unit, not just union members, so employees should be able to access the contract directly. If your most recent union agreement was a memorandum of understanding, memorandum of agreement, or arbitration award, make sure to update the main contract document to reflect those changes. This makes it easier for your employees (and the public) to understand the terms and conditions of employment.

5. Leave union membership issues to the union.

Tens of thousands of New York public employees have opted to discontinue or otherwise forgo union membership in recent years. If an employee makes a written request to discontinue union dues deduction, cease deductions immediately and notify the union. Forcing an employee to pay a public-sector union against his or her will is a violation of the First Amendment of the United States Constitution. Employers must ensure that a signed membership card exists for any individual on behalf of whom union dues are being withheld.

APPENDIX A: SAMPLE NOTICE OF NON-DISCRIMINATION

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.

APPENDIX B: SAMPLE JANUS RIGHTS NOTICE

[ORGANIZATION LETTERHEAD]

[Date]

Dear team member,

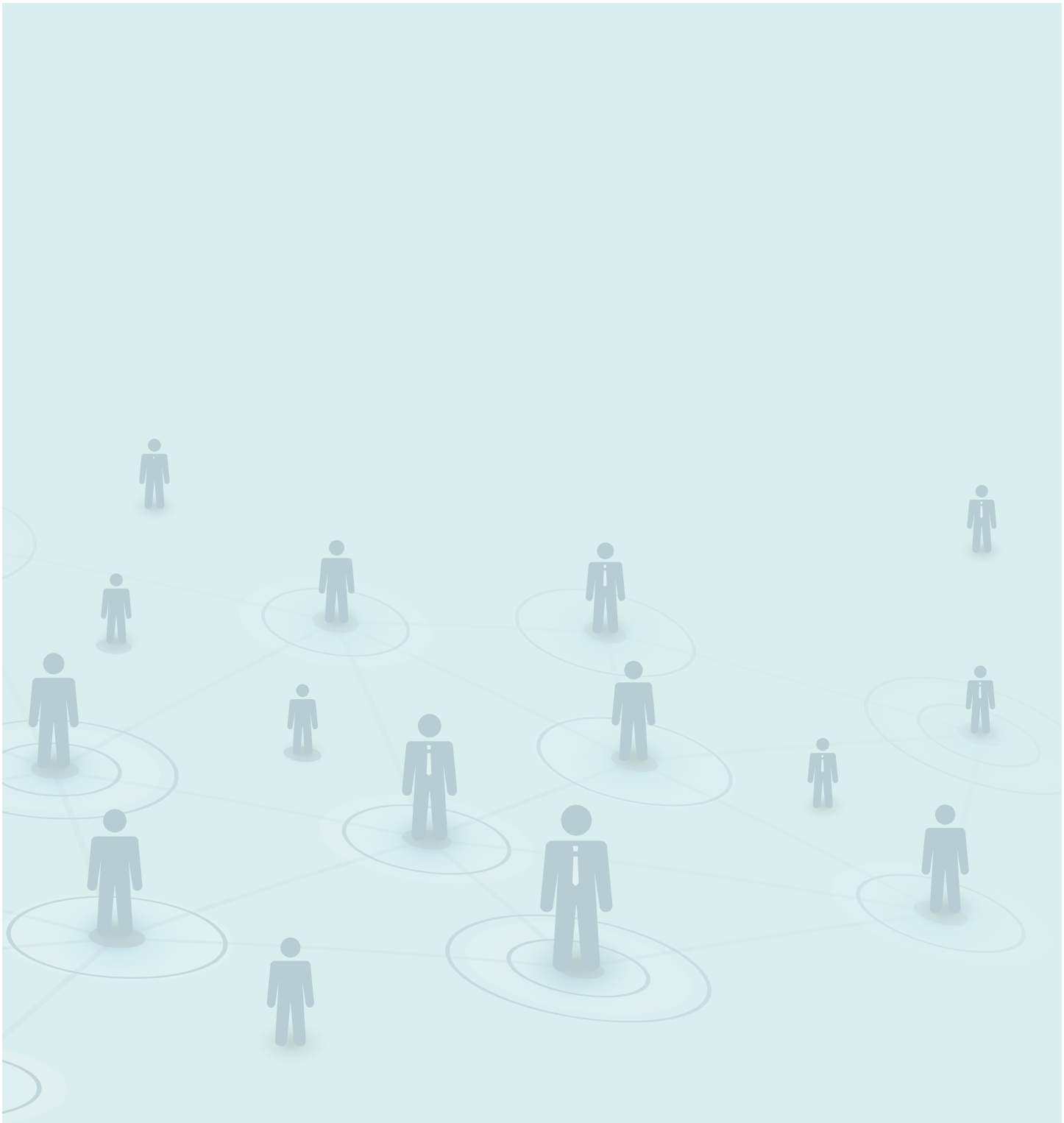
At the time of your hiring, it is likely that state law required you to pay union dues as a condition of employment. On June 27, 2018, the United States Supreme Court held that compulsory payments to a public-sector union violate a person's First Amendment rights.

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



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