New York State
Public Employer Labor Relations Association Inc.

SUMMER 2018

www.nyspelra.org

THE 44TH ANNUAL CONFERENCE IS HERE

Warm welcome to all NYSPELRA members, friends and colleagues. Welcome to the 44th Conference in lovely Saratoga Springs, NY. As usual, our agenda is chock-full of informative, enlightening and current events. Hot off the "bench" from the U.S. Supreme Court is the "Janus" decision; we will learn the history and implications to all of us going forward from here; we will hear from the NYS Division of Human Rights about the changing workforce – diversity, transgender employees, etc., and how to avoid discrimination in our places of work; we will get an update on the happenings at PERB and so much more.

When not in a session or networking, explore Saratoga Springs. There are few places as lovely. To get started, take a look at the City website for happenings, restaurants, culture and more: www.saratoga.org and www.saratoga-springs.org

THE U.S. SUPREME COURT STRIKES DOWN AGENCY FEES AS UNCONSTITUTIONAL

On June 27, 2018, the United States Supreme Court issued its much awaited decision in Janus v. American Federation of State, County and Municipal Employees, Council 31 ("AFSCME") addressing the constitutionality of "agency fees" in the public sector, also known as "fair share fees." Under the Taylor Law, the public sector unions in New York State have long been permitted to charge "agency fees" (akin to the amount of union dues) to those members of a bargaining unit represented by the union who do not join the union. These non-member employees are commonly known as "agency fee" payors. Many other states have similar statutory schemes.

Mark Janus is an Illinois state employee in a bargaining unit represented by AFSCME, a public sector union. Mr. Janus did not join the union because he opposes many of its positions, including those taken in collective bargaining. He brought suit on constitutional grounds seeking to be relieved of his obligation

under Illinois state law to make mandatory, agency fee payments to AFSCME. In short, Mr. Janus asserted that agency fees violate his free speech rights under the First Amendment to the United States Constitution. He argued that as a free and independent individual, he cannot be compelled, via involuntary agency fees, to endorse and subsidize the speech and ideas of AFSCME or any other union for that matter.

By a 5-4 decision, the High Court overruled it 40+ year old decision in Abood v. Detroit Board of Education, 431 US 209 (1977), and ruled that "agency fees" do indeed violate the First Amendment. The High Court rejected AFSCME's arguments, and those of its many amici ("friends of the court" briefs), that agency fees are constitutional because they promote "labor peace" and help prevent "free riders." The High Court found those arguments to be unavailing and concluded that they do not override the First Amendment rights of non-members in the bargaining unit who oppose "union speech" and who, accordingly, cannot be compelled to provide involuntary financial support to the union to advance its viewpoints.

Justice Alito wrote the majority opinion. Much was said but a couple of key points stand out. First, a non-member must now affirmatively consent to any payment to the union and any waiver argument of the union will fail absent clear and compelling evidence of a waiver. Second, Justice Alito observed that "[i]t is hard to estimate how many billions of dollars have been taken from non-members and transferred to public-sector unions in violation of the First Amendment. Those unconstitutional exactions cannot be allowed to continue indefinitely." This underscores the likelihood that non-members will now bring lawsuits, either individually or in class actions, against their unions seeking refunds of agency fees exacted by the unions in prior years and awards of attorneys' fees should those lawsuits prove successful.

It will be interesting to see now how many public sector union members in New York State (and those other states that have permitted "agency fees," decide to withdraw from union membership so as to avoid the payment of union dues. There is little doubt that Janus will result in some decline in the public sector union ranks in New York. However, we must be aware of some important new State legislation that was part of the budget bill signed by Governor Cuomo on April 12, 2018 and which was intended to protect the public sector unions, and their dues revenue stream, in anticipation that the Supreme Court would indeed strike down agency fees in Janus.

The new State law is now effective and is in the form of an amendment to Section 208(1) of the State Civil Service Law, which is part of the Taylor Law. The key provisions of the new law are summarized as follows:

1. The public employer (PE) is now required to start union dues deductions from an employee's pay as soon as practical and no later than 30 days after receiving proof of a signed dues deduction authorization card, and to transmit those dues to the union within 30 days of making the pay deduction.
2. The union has broad discretion to decide upon the form of the dues deduction card.
3. The union's right to dues deduction must remain in full force and effect in accordance with the terms of the dues deduction card. (It can reasonably be anticipated that the unions will place conditions on an employee's attempt to withdraw from the union by, among other things, limiting withdrawals to certain defined window periods.)
4. If an employee is no longer employed by the PE, but is rehired within 1 year, the union's right to dues deduction is automatically reinstated. In other words, the PE cannot insist upon a new dues deduction authorization card.
5. If an employee goes out on unpaid leave, whether voluntary or involuntary, the employee's membership in the union is continued and dues deductions must be resumed upon the employee's return to active duty on the PE's payroll.
6. The PE is now required to inform the union of the employee's name, address, job title, employing agency, department or other operating unit, and work location within 30 days of the employee's initial employment, reemployment, or promotion or transfer into a new bargaining unit represented by the union.
7. Within 30 days of that notification to the union by the PE, the PE must allow a duly appointed representative of the union to meet with the employee "for a reasonable amount of time during his or her work time without charge to leave credits" unless there is other controlling language within the collective bargaining agreement. The new law also states that these meetings must be scheduled in consultation with a designated representative of the PE.
8. The new law permits the union to limit the services it will provide to those employees in the bargaining unit who do not elect to join the union. For example, the union will not be guilty of an improper practice if it does not represent any such non-member employee in: (i) employer questioning; or (ii) statutory or administrative proceedings to enforce statutory or regulatory rights; or (iii) a grievance, arbitration or other contractual process involving either evaluation or discipline of the employee where the non-member

employee is permitted to proceed without the union and be represented by his/her own advocate. The new law also permits the union to limit its other legal, economic, or job-related services or benefits (such as union voluntary insurance programs) to its bona fide members, to the exclusion of non-member employees within the bargaining unit.

9. The new law also contains "savings clause" language intended to preserve as much of the new law as possible should any provision of it be struck down by a court of competent jurisdiction.

In an effort to help NYSPELRA's members find answers to their questions, and to start identifying "best practices" for implementing the new State law, be sure to attend the session on Janus and the State law at our Annual Conference in Saratoga Springs. This article was authored by and the presentation will be by our own John Corcoran of Hancock Estabrook LLP.

"TAYLOR MADE" – MAY 2018 UPDATE

The NYS Empire Center for Public Policy in celebration of the 50th Anniversary of the Taylor Law has published an updated version of "Taylor Made: The Costs and Consequences of New York's Public Sector Labor Laws" (May 2018). This "must read" for anyone and everyone practicing and working in the public sector was written by NYSPELRA's own Terry O'Neil of Bond Schoeneck & King, with E.J. McMahon of the Empire Center. The report provides a history of the development of the Taylor Law, substantive issues we all face on a day-to-day basis and provides recommendations of how the current version of the Taylor Law can be amended to be better suited for today's labor-management environment. In your Editor's opinion, if you have not yet read the report, you should go to the Empire Center's website and download a copy! (www.empirecenter.org)

AMEND YOUR SEXUAL HARASSMENT PREVENTION POLICY

With passage of the NYS budget by the Legislature on April 1, 2018, and enactment of it by Governor Cuomo on April 12, 2018, there is a new law we want to bring to your attention. Among the many enactments, we find the anti-Sexual Harassment in the Workplace initiative. Although many municipalities, school districts, and community colleges ("public entities") have an all-inclusive anti-Harassment Policy and/or stand-alone anti-Sexual Harassment Policy, having the latter is now mandated under several amended state laws. The Law applies to private sector employers as well. The purpose of the legislation, as expressed in the Budget Bill (Part KK, Subparts A-F), is "to combat sexual harassment in the workplace." The various subparts have differing "effective dates." The following is a brief overview, breakdown and explanation of the Law and its effective dates.

SUBPART A

This subpart impacts the private sector entities who bid on State contracts. The subpart amends the State Finance Law to create a new section (Section 139-l). This subpart is not applicable to Public entities; however, if, a public entity (and every private entity) participates in a "bid … made to the state or any public department or agency" of the State, then the entity must affirm that it has a written "implemented policy addressing sexual harassment prevention," and that the entity "provides annual sexual harassment prevention training to all of its employees." **This provision is effective on January 1, 2019.**

SUBPART B

This subpart is applicable to both private and public entities. This subpart amends the NYS Civil Practice Law and Rules (new Section 7515) to prevent the employer from unilaterally mandating that resolution of sexual harassment matters proceed to arbitration; however, if your entity and a Union negotiate that arbitration is the final review step in such a matter, that is permitted under the law. If you now require, for non-union employees, that sexual harassment matters must proceed to arbitration, this unilaterally imposed "arbitration clause" will be set aside as "null and void" pursuant to law. **This provision is effective on July 11, 2018.**

SUBPART C

This subpart is applicable to Public entities only. This subpart amends the Public Officers Law ("POL") by establishing two (2) new sections – one applicable only to the State and the other relevant to other governmental public entities (new Section 18-a). The purpose of this subpart is to have the public entity reimbursed for funds it may have paid out in connection with a sexual harassment in the workplace case. The language is quite direct:

> Any employee who has been subject to a judgment of personal liability for intentional wrongdoing related to a claim of sexual harassment, shall reimburse any public entity that makes payment [to the complainant] for an adjudicated award … resulting in a judgment for his or her proportionate share of such judgment.

The law requires that this reimbursement occur within ninety (90) days of payment by the public entity. Should a current employee fail to reimburse (after the public entity "obtains a money judgment"), the sum owed can be withheld from the employee's compensation. The law also maintains that a former employee remains

liable and is required to make reimbursement to the public entity, and should the former employee fail to reimburse, the law gives the public entity the unfettered right to obtain and enforce a money judgment. **This subpart took effect as of April 12, 2018.**

SUBPART D

This subpart, applicable to both private and public entities, amends the NYS General Obligations Law (new Section 5-336) such that non-disclosure clauses in settlement agreements are prohibited unless sought by plaintiff/complainant; that is, the terms of any settlement or other resolution is subject to disclosure unless the complainant seeks confidentiality. If the complainant seeks confidentiality then they are statutorily granted the right to revocation of same within a certain statutory timeframe. **This subpart becomes effective on July 11, 2018.**

SUBPART E

This subpart is applicable to private and public entities. It amends the NYS Labor Law (new Section 201-g), to set up a joint undertaking by and between the NYS Department of Labor ("DOL") and the NYS Division of Human Rights ("DHR") with a goal to "create and publish a model sexual harassment prevention guidance document and … policy that employers may utilize" to comply with this. The law details what must be included in the guidance and model policy. These requirements likely will be strikingly similar, if not the same, as that which your entity may already include in its existing sexual harassment prevention policy:

1. Prohibited of conduct…give examples;
2. Include information concerning federal and statutory relevant provisions, with remedy options and availability of any local laws;
3. Include complaint form;
4. Inform employees of their rights under the policy and law, as well as processes for addressing concerns/complaints;
5. Detail investigation procedure and the "timely and confidential" nature of it;
6. Point out that engaging in sexual harassment "is considered a form of employee misconduct" subject to discipline for employees, supervisors and managers, as appropriate;
7. Affirmatively state that retaliation is prohibited and, likewise, subject to disciplinary action.

This subpart mandates that every employer either adopt the model policy (once promulgated by DOL/DHR), or establish their own prevention policy that "equals or exceeds the minimum standards" of those established by DOL/DHR.

This Subpart E further mandates Annual Training on the prevention policy and details what components must be included in that annual training; the training must "address conduct by supervisors and any additional responsibilities for such supervisors." **This Subpart becomes effective October 11, 2018.**

SUBPART F

This subpart is applicable to both private and public entities. This subpart amends the NYS Executive Law (which is where we find the NYS Human Rights Laws). This is a very unique addition to the law (new Section 296-d). It mandates that the sexual harassment prevention program your entity designs must include a provision such that:

> It shall be an unlawful discriminatory practice for an employer [in private sector, those with 4 or more employees] to permit sexual harassment of non-employees in its workplace.

The term "non-employees" is fairly encompassing in that it includes contractors, vendors, consultants "or other persons providing services pursuant to a contract … or who is an employee" of such contractor, vendor, consultant, etc. The liability would be established if the employer "knew or should have known that such non-employee was subjected to sexual harassment in the employer's workplace," and the employer, for some reason, failed to take any action ("immediate and appropriate"). As with all matters, these situations are to be reviewed on a case-by-case basis. **This subpart took effect on April 12, 2018.**

We understand that this information is a lot to digest. To ensure that your organization is in compliance with these new laws, it is recommended that you have your current Policy reviewed by counsel for necessary updating in accordance with these new laws. This Article was authored by your Newsletter Editor, Elayne G. Gold, Esq., Roemer Wallens Gold & Mineaux LLP.

Be sure to attend the session on "Preventing Sexual Harassment in the Workplace" at the NYSPELRA Annual Conference. Our presenter will be Howard Miller, Esq. of Bond, Schoeneck & King.

CONTRACTS KEEP SETTLING

City of Buffalo: The Niagara Frontier Transportation Authority (NFTA) approved a 4-year deal with the Buffalo Niagara Firefighters Association covering the term April 1, 2018 – March 31, 2022.

Wages: Effective and retro to 4/1/18: 2.5%
Effective 4/1/19: 2.35%
Effective 4/1/20: 2.35%
Effective 4/1/21: 2.50%

Other Highlights:

Health Insurance: All those hired after 4/1/02 contribute 20% of the monthly premium for either family or individual coverage under the High Deductible Plan "or a replacement plan selected by the Company;" hired before 4/1/02 will continue at the 10% contribution level.

Personal Leave: Increased from 52 to 85 hours and may be taken in 5-hour increments.

County of Yates/Yates County Sheriff: The County and Sheriff entered into a 4-year agreement with its Corrections Unit. The Unit consists of approximately 50 employees – correction officers and a limited number of civilian employees. This group voted down the first tentative agreement.

Term: January 1, 2018 – December 31, 2021

Wages: 2018: Wage freeze (Note: this is the third "zero" in the past four years – negotiated in exchange for Union's desire to maintain the EPO health plan).

2019: 3.5%
2020: 2.5%
2021: 2.5%

Health Insurance: EPO Plan to be maintained for 2018 and 2019 with an individual option to change to HDHP/HRA Plan with HRAs funded by County at $1,700/$3,400 for 2018 only, to be implemented

June 1, 2018. For 2019 only, participants will have "buy-up" option for the EPO Plan. Health insurance for 2020 and years thereafter will be limited to the HDHP/HRA Plan with HRAs at $1,300/$2,600 subject to a maximum accumulation of $6,000.

EPO Plan will be discontinued at end of 2019. New hires after ratification will have only the HDHP/HRA Plan available to them.

Sick Leave: Sick leave management "tool box" – new language:

The Sheriff or his/her designee shall have the discretion to require an employee to present to the Sheriff a physician's certificate for any absence of more than three (3) consecutive days for which sick leave is requested and as a condition of eligibility for such payment. The Sheriff or his/her designee shall also have the right to require an employee to submit a physician's certificate if the County reasonably perceives that the employee is abusing sick leave, has used an excessive amount of sick leave, is exhibiting pattern absenteeism, or under any other set of circumstances calling into question the legitimacy of sick leave use. An employee who uses an excessive amount of sick leave or who exhibits pattern absenteeism, or who otherwise abuses sick leave in any other fashion, may be subjected to progressive discipline by the Sheriff. The Sheriff or his/her designee shall also have the right to order fitness-for-duty medical or mental examination consistent with the provisions of applicable law.

FEDERAL FAMILY MEDICAL LEAVE

Some FMLA clarification for our readers:

Inquiry: Does the FMLA cover leave for step-parents and/or step-children?

Answer: Yes. 29 C.F.R. §825.122(b) defines "parent" in fairly broad terms to include "biological, adopted, step or foster father or mother." See also DOL Fact Sheet #28C.

Answer: Yes. The FMLA also covers leave for step-children. 29 C.F.R. 825.122(c) defines "son or daughter" as a "biological, adopted, foster child or step-child." See also DOL Fact Sheet #28F.

Inquiry: Would one needing FMLA for the birth of a child be required to provide a medical certification?

Answer: Maybe – it will be dependent upon whether the mother has a "serious health condition" related to the pregnancy or is otherwise disabled because of the pregnancy or the birth. In those situations, it is acceptable to require a Medical Certification. The FMLA is silent as to other times that proof of birth will be mandated via a medical certification. In any event, if the relevant CBA or municipal/school district policy would otherwise require an employee to provide a medical note for absence then medical back up can be required in this instance as well.

ENJOY THE CONFERENCE!

Contact NYSPELRA

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Please let us know your thoughts and opinions of the NYSPELRA Newsletter.

In addition, you are encouraged to forward to Jack or to Elayne Gold [egold@rwgmlaw.com] any article, information from your municipality, agency, or school district relating to Arbitration Awards (grievance arbitration, discipline, etc.), Fact Findings, contract settlements, etc. for inclusion in future editions of our Newsletter.

Check our website for the latest NYSPELRA information: www.nyspelra.org