Panel: Legal Issues in Higher Education: Annual Review of Court and Administrative Developments (CLE)

Beth Margolis
Gladstein Reif & Meginniss LLP

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Post- *Janus* Developments in Collective Bargaining

BETH MARGOLIS

GLADSTEIN, REIF & MEGINNISS LLP
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I. AG Guidance
II. State Legislation
III. Post Janus Cases
State Attorneys General Guidance

- Following Janus, 12 State Attorneys General in AL, CT, DC, IL, MA, MD, NM, NY, OR, PA, VT, WA issued advisory guidance to public employers concerning the obligations imposed by Janus and the decision’s effect on state collective bargaining statutes.

- Most clarified that the collective bargaining statutes and existing dues deductions practices remained in effect, but that the Janus decision was limited to invalidating the mandatory collection of agency fees.

- They also clarified that Unions were not required to produce dues authorization cards for members from whom the employer had previously deducted dues.
Examples of AG Statements

- "Connecticut has a long and important tradition of supporting the organized labor movement and the fundamental right of workers to organize. Public sector employees play a crucial role in communities across Connecticut. Each day they work hard to ensure public safety, to protect public health, to educate our children and to provide other critical services to our residents."

- "All other rights and obligations of public sector employees and employers under state law remain. Public employees retain their statutory rights under Washington law to organize, to join unions, and to be represented by such organizations in matters concerning their employment. The Attorney General issues this advisory in affirmation of those rights ..."
Examples of AG Statements

- “The Janus decision overturns decades of settled law and practice regarding the right of public employee unions to require the payment of “fair share” agency fees from public sector employees who decline union membership” (This appears in the vast majority of the AG Statements)

- “Nothing in Janus changes the validity of existing union member employees’ prior authorization of dues deductions or requires existing union members to reaffirm their prior authorization.” Illinois

- “Employees who are nonmembers and paying agency fees as of June 27, 2018 may choose to become a voluntary dues-paying member by contacting the union that serves as the exclusive representative...” Connecticut
Examples of AG Statements

- Most statements made a point of clarifying the Unions’ right to receive contact information for their members and reiterated applicable state law prohibitions against providing public employees’ contact information to third parties.
II. State Legislation

Enacted and/or pending in CA, CT, DE, HI, MD, NJ, NY, OR, RI, WA
Enacted/Pending Legislation:

Access to New Hires/Employee Contact Information:

Provisions typically provide for:

- Mandatory access to new employee orientations and timely advance notice of orientations to Union
- Compulsory arbitration regarding employee access issues that cannot be resolved voluntarily
- Provision to Union of employee contact information, including name, job title, department, work location, work, home, and personal cell phone and email, shortly after hire and at periodic intervals thereafter
- Employer prohibited from sharing employee contact information with third parties
- Employer must meet and confer with Union regarding content of mass communications to employees

CA-SB 866 (June 2018), CA-AB 119 (June 2017); CT-HB 6930 (pending); HI – HB 157 (pending); MD – SB 677 (April 2018); NJ – AB 3686 (May 2018); NY Civil Service Law § 208(4) (April 2018); OR – HB 2016 (pending); WA – SB 6229 (March 2018)
Enacted/Pending Legislation:

Rights of Non-Members to Grieve:
- Only so long as the “adjustment” of grievance is not inconsistent with terms of CBA, AND
- Union is provided with opportunity to be present at the “adjustment”
  OR – HB 2726 (pending); RI – HB 7377 (July 2018)

Limits on Liability for Pre-Janus Fee Remittance:
- Provides immunity for public employers and Unions for requiring, deducting, receiving, or retaining agency fees from public employees if the fees were permitted at the time and paid prior to June 27, 2018
  CA – SB 846 (September 2018); OR – HB 2016 (pending); WA – HB 1575 (pending)
Enacted/Pending Legislation:

**Employer Neutrality:**

- Prohibits employers from deterring or discouraging public employees from becoming or remaining members of a Union

CA – SB 285 (October 2017); CT – HB 6935 (pending); NJ – AB 3686 (May 2018); OR – HB 2016 (pending)
Enacted/Pending Legislation:

**Limits on the DFR to Non-Members:**

Union is not required “to provide representation to a non-member:

(i) during questioning by the employer,

(ii) in statutory or administrative proceedings or to enforce statutory regulatory rights, or

(iii) in any stage of a grievance, arbitration or other contractual process concerning the evaluation or discipline of a public employee where the non-member is permitted to proceed without the employee organization and be represented by his or her own advocate. Nor shall any provision of this article prohibit an employee organization from providing legal, economic or job-related services or benefits beyond those provided in the agreement with a public employer only to its members.” New York NY Civil Service Law § 209-a (2)(c) (April 2018); RI – HB 7377 (Police & Fire) (July 2018)
Enacted/Pending Legislation:

Maintenance of Checkoff:

• Laws clarify check-off deduction rules to balance members’ rights with the Union’s financial stability by prescribing when members can revoke check-off authorization. This legislation either sets by statute the procedures to revoke authorization or explicitly recognizes a signed authorization card as a contract and empowers the Union to set revocation procedures in any way that does not violate federal law.

• Prohibit employers from requiring Unions to provide copies of individual authorizations as long as the Union certifies that it has the authorization and there is no dispute about its existence or terms.

• Requests to revoke authorizations must be directed to the Union.

CA-SB 866 (June 2018); CT – HB 6936 (pending). DE-HB 314 (May 2018); HI-HB 1725 (April 2018); NJ – AB 3686 (May 2018); NY Civil Service Law § 208(1)(b) (April 2018); OR-HB 2016 (pending); WA-SB 5623 (pending)
III. Post Janus Cases

There are three general types of cases proceeding through the courts, numbering in the dozens throughout the country; claims to recover dues paid prior to Janus; challenges to maintenance of checkoff authorizations; and cases challenging the Union’s entitlement to act as the exclusive bargaining representative on behalf of non-members.
Fair Share Related Cases: To date all courts that have addressed the issue of whether agency fee payers are entitled to reimbursement of pre-Janus fees have denied such claims

- Danielson v. Am. Fed'n of State, Cty., & Mun. Employees, Council 28, AFL-CIO, 340 F. Supp. 3d 1083, 1084 (W.D. Wash. 2018) (sustaining union’s good faith defense and dismissing complaint which included, inter alia, claims for damages arising out of fees collected pre-Janus);
- Carey v. Inslee, No. 18-cv-5208, 2019 WL 1115259 (W.D. Wash. March 11, 2019) (same);
Maintenance of Checkoff Cases:
challenges to maintenance of checkoff provisions allowing collection of dues before and after Janus on the theory that membership cards signed prior to Janus are invalid because:

(a) signing a dues card was a waiver under the 1st Amendment,

(b) such constitutional waivers must be “knowing and voluntary”, and

(c) pre-Janus members did not know they had a right not to pay dues and still receive the benefits of the Union, therefore such waiver could not have been “knowing and voluntary”
Maintenance of Checkoff

• **Fisk v. Inslee**, 2019 WL 141253 (9th Cir. January 9, 2019): Former members signed dues deduction authorizations that permitted maintenance of dues for 1 year and 15 day window each year to opt out of dues payments. Plaintiffs resigned before dues authorization elapsed and Union continued to deduct dues. Plaintiffs claimed MOC violated their First Amendment rights. Ninth Circuit affirmed holding that deduction of union dues in accordance with the MOC irrevocability provision did not violate First Amendment rights because “the First Amendment does not preclude the enforcement of ‘legal obligations’ that are bargained for and ‘self-imposed’ under state contract law.” Court analogized the MOC to “common and enforceable” consumer contracts such as gym membership or cell phone contracts.

• **Belgau v. Inslee**, No. 18-5620 RJB, 2019 WL 652362 (W.D. Wash. Feb. 15, 2019): Former members who resigned membership following Janus brought First Amendment challenge to Washington State collective bargaining law and MOC provisions. Members were not required to sign MOC authorizations but could continue to pay dues under authorization with no such provision. Summary judgment granted to union and state defendants; court declined to extend Janus to members who previously consented via contractual agreement to dues deduction. Appeal filed to 9th Cir, Feb 20, 2019.
Exclusive Representation - challenges to a Union representing/negotiating on behalf of non-members.


• Mentele v. Inslee, 916 F.3d 783 (9th Cir. 2019) - state's authorization of union as exclusive collective bargaining representative did not violate publicly subsidized childcare provider's First Amendment rights.

• Uradnik v. Inter Faculty Org., No. CV 18-1895 (PAM/LIB), 2018 WL 4654751 (D. Minn. Sept. 27, 2018) – Minnesota tenured professor unsuccessfully challenged the exclusive representation provisions of Minnesota’s Public Employment Labor Relations Act (“PELRA”) as violation of her First Amendment rights to freedom of speech and freedom of association. Motion for Preliminary Injunction denied. Appeal pending in 8th Circuit.