EDITORS' NOTE

JANUS v. AFSCME, COUNCIL 31 and 2018 TAYLOR LAW CHANGES

On June 27, 2018, the United States Supreme Court issued its opinion in *Janus v. AFSCME, Council 31*. By a vote of 5–4, the Court declared that requiring public employees to pay agency fees (*i.e.*, fees paid to a union by bargaining unit members who are not union members) violates the First Amendment.[1] The *Janus* opinion overturned the Supreme Court's 1977 decision in *Abood v. Detroit Board of Education*,[2] which had found agency fees to be constitutional. In addition, the Legislature in 2018, in anticipation of the *Janus* decision, made a number of changes to the Taylor Law.

Due to the timing of the *Janus* opinion and the statutory changes, neither is fully incorporated into the body of the 2019 update to *Lefkowitz on Public Sector Labor and Employment Law*. The *Janus* opinion directly impacts the treatise's treatment of agency fees under the Taylor Law in Chapters 4, 5 and 9.

The purpose of this Editors' Note is to touch upon the decision and the Taylor Law changes. Both are subject to reasonable differences in interpretation that will likely result in future litigation before the Public Employment Relations Board and the courts. Subsequent editions of the treatise will incorporate and more fully analyze the decision and the statutory changes.

In *Janus*, the Court held that it is unconstitutional to require a public employee in a collective bargaining unit to help finance a union's representational responsibilities by paying an agency shop fee. In reaching its decision, the Court applied an "exacting standard" to an agency fee requirement, concluding that it constituted an unconstitutional form of compelled speech. In reaching its decision, the Court found that labor peace was an insufficient justification for an agency fee requirement and the Court also suggested that all issues raised during public sector collective bargaining constitute issues of public concern under the First Amendment.

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1 138 S.Ct. 2448 (2018).

2 433 U.S. 915 (1977).

The Court provided some guidance on what it deems to be the "consent" needed in order for a public employer to deduct agency fees from an employee's paycheck. It stated that, because these employees are "waiving their First Amendment rights," the consent must be affirmative, freely given and shown by clear and compelling evidence before any money is deducted.

2018 TAYLOR LAW AMENDMENTS

Certain sections of the Taylor Law (specifically, Civil Service Law §§ 208 and 209-a.2) were modified as a part of the legislation accompanying the 2018–2019 New York State Budget Bill. These changes impact the discussion of union rights and responsibilities in Chapters 2, 3 and 4.

I. UNION DUES

Pursuant to the amended Taylor Law, a public employer must now, upon receiving a signed dues deduction authorization card, begin making the deductions "as soon as practicable, but in no case later than [30] days after receiving proof of a signed dues deduction authorization card[.]" The amended law now authorizes dues deduction authorizations to be electronically signed.

The dues must then be transmitted to the respective union within 30 days of the deduction. The dues deduction authorization will remain in full force and effect until one (or more) of the following occurs:

(1) an employee revokes his/her membership in the union, in writing, and in accordance with the signed dues deduction authorization; or

(2) the employee is no longer employed by the public employer (But, if the employee is reemployed by the same public employer in a position represented by the same union within a one-year period, then the right to deduct dues from the employee is automatically reinstated.); or

(3) if an employee who has signed a dues deduction authorization card is either removed from the employer's payroll or otherwise placed on a paid or unpaid voluntary or involuntary leave of absence, the employee's union membership must be continued (and, consequently, the dues deductions must be continued) upon the employee's restoration to the payroll or to active duty.

II. EMPLOYER OBLIGATION TO PROVIDE INFORMATION

The amended law requires that, within 30 days of employment, re-employment, or promotion or transfer to a new bargaining unit, the employer must notify the applicable union, if any, of the following information: the employee's name; address; job title; employing agency, department or other operating unit; and work location.

III. UNION ACCESS TO NEW AND REHIRED EMPLOYEES

Within 30 days of a "public employee first being employed or reemployed or within 30 days of an "employee being promoted or transferred to a new bargaining unit," an employer must allow a "duly appointed representative of the employee organization that represents that bargaining unit" to meet with the employee for a "reasonable period of time" *on working time and without charging the employee's accruals*, unless otherwise specified in a collective bargaining agreement. The arrangements for this meeting must be made in consultation with a designated employer representative.

Importantly, the law does not define what constitutes a "reasonable period of time or what constitutes "reemployed." Some collective bargaining agreements already include provisions for paid periods of time during which a union can meet with new bargaining unit employees The procedure by which these meetings occur, including how the union should request the meetings (e.g., by e-mail, phone call, or written letter and to whom the communication should be addressed) and the timing and duration of the meetings (e.g., during an employee's paid 15-minute break) are all mandatorily negotiable.

IV. DUTY OF FAIR REPRESENTATION

The amended law redefines a union's duty of fair representation Specifically, a union's duty of fair representation to bargaining unit employees who are not union members is now limited to contract negotiations and enforcement of a collective bargaining agreement's terms. Expressly excluded now from a union's obligations is providing representation to non-members in the following circumstances: (1) during employer questioning; (2) in statutory/administrative proceedings to enforce statutory or regulatory rights (e.g., Education Law § 3020-a or Civil Service Law § 75 hearings); and (3) "in any stage of a grievance, arbitration or other contractual process concerning the evaluation or discipline of [an] employee where the non-member is permitted to proceed without the employee organization and be represented by his/her own advocate." The amended

law also permits a union to exclude non-members from receiving any non-contractual (i.e., non-collective bargaining agreement-based) legal, economic or job-related services or benefits it provides to its members.

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LEFKOWITZ ON PUBLIC SECTOR LABOR AND EMPLOYMENT LAW

2019 REVISION

VOLUME I

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DEDICATION TO THE FOURTH EDITION

The Fourth Edition of Public Sector Labor and Employment Law is dedicated to Jerome ("Jerry") Lefkowitz. For over three decades, Jerry was the principal guiding hand and editorial overseer in the development and publication of this Treatise. While many others made important and noteworthy contributions as editors, researchers, and writers, Jerry's leadership role as its Editor-in-Chief was central in the research, development, and the editing of prior editions and supplements.

In honor of Jerry's inspiring and devoted service, the New York State Bar Association Labor and Employment Law Section decided in 2015 to rename the Treatise as *Lefkowitz on Public Sector Labor and Employment Law*.

For most of his 57-year legal career, Jerry worked in the area of labor and employment Law. As an Assistant Attorney General, he represented the State of New York in appeals related to New York's private sector labor law. Between 1961 and 1965, Jerry was Counsel to the New York State Department of Labor, and then its Deputy Industrial Commissioner from 1965 to 1967. In those positions, he helped draft amendments to New York's private sector collective bargaining law and handled other private sector issues under New York law.

As part of his responsibilities with the New York State Department of Labor, Jerry had a hand in drafting the Taylor Law following the historic 1966 transit strike. From 1967 to 1987, Jerry served as Deputy Chairman of the Public Employment Relations Board (PERB) under Chairmen Bob Helsby and Harold Newman. As part of his duties at PERB, Jerry drafted agency decisions, its first Rules of Procedure, and proposed legislation, and also helped to develop agency policies concerning conciliation matters.

In 1987, Jerry left state service and for 20 years, served as a public sector labor law practitioner before PERB, the courts, and in arbitration. In 2007, Jerry was nominated to be, and confirmed as, the fifth PERB Chairperson, and served as a PERB Board member until 2015.

During his illustrious career, Jerry mentored and taught by example many practitioners working in the field of New York public sector labor relations. As a role model, he taught the importance of humility, intellectual vigor, and integrity. He authored numerous scholarly articles and book chapters, taught at Columbia Law School, and lectured widely on public labor and employment law. He is a former Chair of the New York

State Bar Association Labor and Employment Law Section. He was also active in the American Bar Association Labor and Employment Law Section's State and Local Government Bargaining and Employment Law Committee, and the New York City Bar Association. In 2011, Jerry was awarded NYSBA's Award for Excellence in Public Service, and the ABA's Arvid Anderson Public Sector Labor and Employment Attorney of the Year Award.

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INTRODUCTION TO THE FIRST EDITION

The need for a treatise on the Taylor Law was first noted in 1978 by Ida Klaus, then a member of the Public Employment Relations Board. Having had an extensive background in the practice of labor law under the National Labor Relations Association, she knew the value of several fine works dealing with that statute, especially *The Developing Labor Law*, a product of the Labor Section of the American Bar Association. She indicated that such a research tool would be very helpful to lawyers in New York State. Those with active public sector labor practices could be expected to have comprehensive files of their own and would have access to the PERB reports. Even so, they would benefit from a systematic and thorough presentation of the interpretations of the Taylor Law. Furthermore, the general practitioner who has an occasional public sector case would find such a presentation invaluable.

PERB's Chairman, Harold R. Newman, was persuaded by this suggestion and sought to have such a treatise prepared. He found, however, that its preparation would exceed PERB's resources. It was, therefore, a matter of satisfaction to PERB and to practitioners generally when the Labor Section of the New York State Bar Association decided, independently, to undertake this project. This decision was made at the initiation of Section President John D. Canoni, who appointed a balanced and knowledgeable editorial committee.

One of the first decisions of the Editorial Committee was to make an ambitious project even more ambitious. Not only would the treatise deal with the Taylor Law, but it would also cover all other aspects of the law of public employment in New York State. These included matters related to Taylor Law negotiations such as contract enforcement and the arbitration process. They also included unrelated by important issues such as Civil Service Law, Retirement Law and federal and state statutory protections.

The task of preparing this treatise has been huge. Dozens of members of the Labor Section have submitted valuable contributions. The Editorial Committee has forged these separate contributions into fifteen integrated chapters. The accuracy of these chapters, especially those dealing with the Taylor Law, has been checked by attorneys employed by New York State agencies who administer the respective programs. In this connection, particular thanks is owed to PERB's Chairman Harold R. Newman and the entire PERB legal staff for their cooperation and effective efforts in insuring the comprehensiveness and accuracy of the core of this book, its coverage of the Taylor Law.

Much credit is also due to the Section presidents during the preparation of this book, John D. Canoni, Jules Smith, Carl R. Krause, John E. Sands and Joel C. Glanstein. They have all made the preparation of this book a high priority of the Section and, where necessary, have prodded Section members for contributions. Their encouragement and assistance in finding Section members to help when help was needed was invaluable.

Finally, I want to thank the staff of the New York State Bar Association. Catherine Schunk, who was a staff attorney when the project started, was helpful. Dan McMahon, the Publication Supervisor, has provided outstanding service to the Editorial Committee. His staff worked hard on our project, with special thanks going to Melody VanAlstyne. Other Association staff members whose work is appreciated are Leslie Scully, Theresa Gregg and Brendan J. Keane.

My work on this book has been very satisfying to me. I appreciate the confidence reflected in my appointment as editor-in-chief. We, the members of the Editorial Committee, hope that our work will be useful and used by our fellow attorneys.

Jerome Lefkowitz
Albany, New York
December 9, 1987

About the Editors

William A. Herbert, Esq.

William A. Herbert is a Distinguished Lecturer at Hunter College, City University of New York and the Executive Director of the National Center for the Study of Collective Bargaining in Higher Education and the Professions. Prior to joining Hunter College, Mr. Herbert was Deputy Chair and Counsel to the New York State Public Employment Relations Board (PERB). Before his tenure at PERB, Mr. Herbert was Senior Counsel at CSEA Local 1000, AFSCME, AFL-CIO, where he litigated labor and employment cases in federal and state courts, administrative agencies and in arbitration. In addition, he is a former supervising attorney with the New York City Commission on Human Rights.

Mr. Herbert is a former Chair of the New York State Bar Association's Labor and Employment Law Section and a former Co-Chair of the ABA Labor and Employment Section's Technology in the Practice and Workplace Committee. He is a co-author of Labor, Employment and Workers' Compensation Law, part of the New York State Bar Association's Practical Skills Series. In addition, he has authored a number of law review articles and lectured on labor and employment topics including public sector labor law and history, workplace privacy, the application of the First and Fourth Amendments to public employment, employment discrimination, and whistleblower and retaliation issues.

Mr. Herbert is a graduate of the Benjamin N. Cardozo School of Law, Yeshiva University, and the University of Buffalo.

Philip L. Maier, Esq.

Philip Maier is an arbitrator and mediator in both public and private sector labor disputes. He was the Regional Director of the New York State Public Employment Relations Board where he was an Administrative Law Judge and Mediator from 1991-2012. From 2012 until June 2015 he was the General Counsel and Deputy Director of the New York City Office of Collective Bargaining. He is the author of The Taylor Law and the Duty of Fair Representation and Impasse Resolution Under the Taylor Law, the latter published by the New York State Bar Association. Additionally, he is a frequent lecturer on employment and labor law issues and has published numerous articles on a variety of labor and employment law issues.

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Richard K. Zuckerman is a partner at Lamb & Barnosky, LLP of Melville, where he concentrates his practice in representing management in all public and private sector labor and employment law areas. He served as Chair of the New York State Bar Association's Labor and Employment Law Section and is currently the Vice-Chair to the Municipal Law Section's Executive Committee. Mr. Zuckerman is a Fellow of the Governors of The College of Labor and Employment Lawyers and a Fellow of the American and New York Bar Foundations. He is also a past President of the New York State Association of School Attorneys.

Mr. Zuckerman was a member of the Editorial Board of the American Bar Association's treatise *Discipline & Discharge in Arbitration* and a contributing author to ABA's Elkouri & Elkouri, *How Arbitration Works,* 6th ed. He has been repeatedly included in *Best Lawyers in America©, Super Lawyers* in New York Labor and Employment Law and *Who's Who* in Long Island Labor Law. Mr. Zuckerman has presented at numerous programs sponsored by national, New York State and local entities. He has published articles on topics of interest to the profession and appeared on television and radio programs regarding labor, employment and education law and on behalf of clients. He is a 1984 graduate of Columbia Law School.

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Additionally, this Third Edition is dedicated to Melvin H. Osterman, Esq. (1934–2005), who was an Editor-in-Chief of this book and was instrumental in its creation and development. Among his many accomplishments, Mr. Osterman was counsel to the Taylor Committee and was called upon to be a draftsman of the Taylor Law.

His talents and professionalism are greatly missed.

In recognition and gratitude for their ongoing work, below are listed the Editors-in-Chief and Contributing Editors from the Second and First Editions:

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