

The *Janus* Case: Now What? A Preliminary Guide to Compliance and Implementation

The U.S. Supreme Court's holding in the *Janus* case has been reviewed, critiqued and debated nationally since it was issued yesterday morning. RLS has undertaken a comprehensive analysis of the decision and how it will impact our association clients. As we alluded to in our initial alert, the degree of impact will vary.

The *Janus* decision primarily concerns agency shop provisions in collective bargaining agreements and the rights of non-members (fair share fee payers) to avoid paying agency shop fees.

Clients with current agency shop agreements need to act immediately. Those associations without agency shop will also need to closely examine their specific set of circumstances to determine the effect of the *Janus* decision on their legal obligations to their members.

The decision presents all of our clients the opportunity to revisit their legal obligations to both members and non-members. Our Collective Bargaining Practice Group stands ready, willing and able to present training for the elected leaders of our union clients. To help ease immediate concerns, we have developed a preliminary list of issues (formatted in Q&A) that are set forth below. The following represents a very general and broad approach to some of the duties and responsibilities of employee organizations. We strongly recommend that association leaders contact their designated RLS attorney or labor representative to determine whether further efforts should be undertaken to ensure compliance with *Janus*.

Janus Q&A

Q: When is the *Janus* decision effective?

A: Immediately as of June 27, 2018.

Q: I thought the *Janus* case arose in another state. Does the *Janus* decision apply to agency shop/fair share fee arrangements established under California public employee collective bargaining laws like the Meyers-Milias-Brown Act?

A: The *Janus* decision declared all agency shop/fair share fee arrangements authorized by state collective bargaining laws to be unconstitutional.

Q: Is the *Janus* decision retroactive? In other words, are non-member agency shop/fair share fee payers entitled to refunds of their agency shop/fair share fees?

A: There is no indication the *Janus* decision is retroactive or that non-members of a union who paid agency shop/fair share fees are entitled to refunds of previously paid agency shop/fair share fees.

Q: Are unions (with or without agency shop provisions in their MOU) required to obtain new opt in authorization forms from their voluntary members in order to collect regular membership dues?

A: Union members who previously completed voluntary membership cards and affirmatively authorized their employers to deduct regular union membership dues are not required to obtain new opt in authorization forms from their voluntary members. New employees and existing non-members would need to affirmatively join the union and authorize the deduction of dues going forward. The authorization forms will need to specifically state that the member affirmatively consents to pay the full union dues.

Q: Are unions with agency shop/fair share fee arrangements, obligated to notify members and/or non-members of the *Janus* decision and its implications?

A: Non-members who are agency shop/fair share fee payers should be notified that the union will not collect any additional agency shop/fair share fees and will instruct the employing agency to discontinue all agency shop/fair share fee deductions on its behalf.

Q: Are unions without agency shop/fair share fee arrangements, obligated to notify members and/or non-members of the *Janus* decision and its implications?

A: There is no requirement that current members who are voluntarily paying dues through payroll deduction be notified of the *Janus* decision as long as the authorization on file clearly states that they are “voluntarily” paying full union dues.

Q: Are unions with agency shop/fair share fee payers obligated to notify the employing agency to stop deducting agency shop/fair share fees from the agency shop/fair share fee payers?

A: The continued deduction of agency shop/fair share fees from non-authorizing employees is prohibited by the *Janus* decision. Unions should notify the employing agency to discontinue all agency shop/fair share fee deductions from such employees until and unless they authorize the deduction of such fees. Most agency shop/fair share fee arrangements in labor contracts contain hold harmless and indemnification clauses making the union ultimately responsible for any agency shop/fair share fees that are unlawfully collected from employees. For this reason, unions should immediately notify the employing agency to stop withholding agency shop/fair share fees from non-authorizing employees.

Q: What should unions do if the employing agency continues deducting agency shop/fair share fees from non-authorizing employees after the *Janus* decision?

A: Unions should separate any agency shop/fair share fees collected and received from non-members after the *Janus* decision so that they can be returned to the employee. Adequate records should be maintained to show what the union received from each non-member and that the amount was returned to the employee. This likely will require coordination with the employing agency's payroll department.

Q: Will unions need to change their voluntary membership application and dues authorization forms?

A: Unions will need to ensure that membership application forms clearly indicate that employees voluntarily desire to become members of the union and that they are authorizing the employing agency to deduct the regular dues and fees required of voluntary members. Such forms should also state that employees have the right not to become members of the union.

Q: Does *Janus* require that union bylaws identifying rights and benefits of "members" such as long-term disability, optional insurance coverage and perhaps legal defense, mandate that those benefits are to be offered to non-members?

A: Any individual that declines to pay full union dues and is therefore a non-member will not enjoy any of the union rights or benefits of the dues paying members. The *Janus* case does not extend a right to anyone who does not pay full dues to benefits that are only offered through the union and are not part of the collective bargaining relationship with the employer. Some unions have varying classifications of members and those classifications will need to be reviewed to determine what benefits, if any, an individual is entitled to.

Q: What obligations do unions have to non-members under the Duty of Fair Representation?

A: Unions will continue to have a duty of fair representation to all employees within the represented bargaining unit, including those non-members who are not paying dues. The extent to which an association must represent all employees within the represented bargaining unit is governed by existing laws that for the most part have not been impacted by the *Janus* decision. Each association must carefully consider how they respond to requests by non-members for representation in individual grievances and disciplinary matters. This of course must be examined on a case-by-case basis with each association having different collective bargaining agreements and bylaws.

Q: If a union MOU has an agency shop agreement with the employer, does the union have to negotiate with the employer to modify or eliminate the agency shop provision from any collective bargaining agreement?

A: Each association will have different forms of agency shop provisions in their respective MOU. There will most likely need to be a modification, if not elimination, of the provision from the contract. The union should request a formal meeting with the employer to discuss the impacts of *Janus* and how the parties will comply with the holding of the Supreme Court.