

# Post-*Janus*: A Checklist of Steps For Public Transit Authorities



## *A Legal Analysis from APTA's General Counsel*

On June 27, 2018, the United States Supreme Court decided *Janus v. American Fed'n of State, County and Mun. Emps., Council 31* ("*Janus*"). In *Janus*, the Court held that public sector employees who choose not to join a union could not be compelled to pay any form of union dues as a condition of employment. Any payment of dues by non-union- member employees must be authorized by the employee freely and without coercion. Public Transit Authorities must take steps to determine how they will respond to *Janus*, both its express holding and the implications that flow from that holding. This memorandum is intended to provide a checklist of steps to take along with recommended best practices that you and your attorney may want to consider. Of course, the checklist and recommendations are not legal advice for your circumstances and do not take the place of consultation with counsel as to the proper course of action for you.

### ✓ A. Understand the Scope of *Janus*

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1. *Janus* only applies to unionized public employees. *Janus* has no application to the employees of private contractors your agency may utilize.
2. *Janus* arose under Illinois law, which, like that of many other states, allowed employees to be required to either: (a) join the union and pay full union dues; or (b) not join the union and pay a portion of the union dues (called an agency fee) that allegedly reimbursed the union for its activities on behalf of the represented employees.
3. *Janus* does not impact the employees who voluntarily choose to become union members and pay full union dues. Instead, it impacts only those employees who have chosen not to join the union but are currently required to pay an agency fee to the union.
4. *Janus* does not prohibit deductions of agency fees from employees who voluntarily consent to such deductions.
5. *Janus* only impacts dues payment, not representation. Public employees who choose to not pay union dues and agency fees are still represented by the union and covered by the collective bargaining agreement.

### ✓ B. Determine Whether You Are Withholding Dues and Why

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1. Payroll deductions for union dues or agency fees, whether from union members or non-union members, should be supported by written authorization. If you do not have written authorization to deduct union dues from persons electing to become union members, you should attempt to obtain such documentation. For these union members, you may want to consider allowing the union and the employee 30-60 days to provide you with written authorization

for the deduction of union dues. Note that this is not a *Janus*-based issue, simply a good rule of thumb for all payroll deductions other than mandatory taxes. For non-union-member employees, *Janus* does create issues, as discussed below.

2. Payroll deductions for non-union members making agency fee payments can be continued if the impacted employee voluntarily consented to such deductions. If nothing in the law or the relevant collective bargaining agreement required the payment of an agency fee, the employee's prior authorization for the deduction of such fees should continue in effect.
3. For non-union-member employees who signed authorizations for the deduction of agency fees and who were required, either by applicable law or by a collective bargaining agreement, to agree to such fees as a condition of employment, *Janus* does not say whether the deductions should be ceased. Although reasonable people could have differing opinions, our guidance is that the employee and the union should be notified that agency fee deductions will cease as a result of *Janus*, but that they will be recommenced upon receipt of a valid, freely-given authorization from the employee. Whether advance notice to the union and the employee is given may depend on your particular state law and circumstances.

## C. Revocations of Prior Voluntary Authorizations by Employees

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1. More difficult questions arise if an employee who was not required by state law or a collective bargaining agreement to pay either union dues or agency fees, but who voluntarily agreed to make such payments, wishes to cease doing so.
2. Employees who wish to cease making payments to the union should be told to make those requests in writing.
3. Employers should review the authorizations for deductions previously signed by these employees. If the revocation complies with the terms of those authorizations, as well as relevant state law, the revocation should be honored.
4. The most difficult issue arises if an employee wishes to cease union dues or agency fee payments and the authorization form or relevant state law places a limit on his or her ability to do so promptly. For example, New York law only allows public employees to resign from a union during a specified window of time each year. *Janus* does not expressly address these restrictions, and unions have made clear that they will fight (via grievances and/or charges with state labor boards) to enforce them. Again, reasonable people could differ about the proper course, but at this point, and while the matter should be carefully considered, we lean toward allowing the employee to revoke his or her authorization and notifying the union that this is occurring as a result of the exercise of *Janus* rights. What is clear is that an employee who revokes should not be terminated for failing to pay dues or agency fees.

## D. The Impact of *Janus* on the Contract as a Whole

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1. *Janus* prohibits contracts that require employees to pay union dues or agency fees as a condition of public employment. If your collective bargaining agreement contains such a requirement, that provision is no longer enforceable.

2. What this means for the remainder of the collective bargaining agreement likely depends on your circumstances and the language of your particular agreement.
  - a. Some contracts require that the entire agreement or portions thereof be reopened for negotiation if any provision is declared unenforceable. If you have such language, you should comply with the reopener language.
  - b. Some contracts contain severability or savings clauses that state that the invalidity of one provision of the agreement does not impact the validity of the remainder of the agreement. If you have such language, the remainder of your agreement continues in effect.
  - c. Other contracts contain neither reopener nor severability language. In those instances, state law will determine the impact of *Janus* on the remainder of the agreement. Most states do not invalidate entire contracts because one provision is declared illegal or unenforceable, even absent a severability clause, unless that provision was integral to the contract's main purpose. While it is impossible to predict exactly what will occur, we believe the better argument is that the clauses at issue do not meet this description.

## E. Publicizing *Janus* to Unit Employees

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1. Supervisors should be trained about three aspects of *Janus*.
  - a. First, questions about *Janus* should be referred to the employer's labor relations or human resources department.
  - b. Second, the decision to pay or not pay dues or agency fees is one the employee gets to make without coercion from the union or the agency.
  - c. Third, employees must not be rewarded or punished based on their decisions.
2. The Supreme Court did not impose a duty on unions or employers to notify employees of their *Janus* rights. However, and while the answer is unclear, we believe that the better practice may be to do so. Included in a notice to employees should be a statement that the employer is neither encouraging nor discouraging employees from exercising or not exercising their *Janus* rights. The exact crafting of a notice would depend on your particular circumstances, goals, and state law.
3. If you do choose to issue a notice, notify the union of what you are planning to do and provide them an advance copy of the notice with an opportunity to comment. Some state laws (e.g., California) require this and even provide that, if the company and union cannot agree on a joint communication, the agency must distribute any union rebuttal communication.

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APTA would like to acknowledge Cliff Godiner from  
Thompson Coburn, LLP for the excellent research and drafting.