

# Right to Work for Public Employees

## Introduction

PA 349 of 2012, commonly referred to as the “Right to Work” Act for public employees, went into effect in March 2013. Among other things, PA 349 amended Section 9 of the Public Employment Relations Act (“PERA”), which gives public employees the right to do the following: Organize together or form, join, or assist in labor organizations; engage in lawful concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection; or negotiate or bargain collectively with their public employers through representatives of their own free choice. PA 349 amended Section 9 and provides that public employees had the right to refrain from doing any of the above. Other key provisions of PA 349 follow.

## Key Provisions

### Unlawful Force, Intimidation, or Compulsion (Section 9(2) of PERA)

No person shall by force, intimidation, or unlawful threats, compel or attempt to compel any public employee to do any of the following:

- Become or remain a member of a labor organization or bargaining representative or otherwise affiliate with or financially support a labor organization or bargaining representative or;
- Refrain from engaging in employment or from joining a labor organization or bargaining representative or otherwise affiliating with or financially supporting a labor organization or bargaining representative; or
- Pay to any charitable organization or third party an amount that would be in lieu of, equivalent to, or any portion of dues, fees, assessments, or other charges or expenses required of members of or employees represented by a labor organization or bargaining representative.

### Condition-of-Employment Prohibition (Section 10(3) of PERA)

The law prohibits an individual from being required, as a condition of obtaining or continuing public sector employment, to do any of the following:

- Refrain or resign from membership in, voluntary affiliation with, or voluntary financial support of, a labor organization or bargaining representative or;
- Become or remain a member of a labor organization or bargaining representative or;
- Pay any dues, fees, assessments, or other charges or expenses of any kind or amount or provide anything of value to a labor organization or bargaining representative; and
- Pay to any charitable organization or third party an amount that is in lieu of, equivalent to, or any portion of dues, fees, assessments, or other charges or expenses required of members of or employees represented by a labor organization or bargaining representative.

### Prohibited Agreement

An agreement, contract, understanding, or practice between or involving an employer and a labor organization that violates this prohibition is unlawful and unenforceable. The law applies only to an agreement, contract, understanding, or practice which takes effect, or is extended or renewed, after March 2013.

### **Violations of the Act—Civil Fine and Remedy**

A person who violates the Act is liable for a civil fine of up to \$500. Except for actions required to be brought in the Court of Appeals (actions challenging the validity of sections 3, 4 or 5), a person who suffers an injury as a result of a violation or threatened violation could bring a civil action for damages, injunctive relief, or both. A court also could award court costs and reasonable attorney fees to a prevailing plaintiff. These remedies would be independent of, and in addition to, other penalties and remedies prescribed by the Act.

### **Exceptions to the Act—Police and Fire**

Police and fire department employees are exempt from the protections set out in Section 10(3). The condition-of-employment prohibition does not apply to police or fire department employees that are PA 312 eligible, or to state police troopers or sergeants. As is the case currently, the law permits a local government to make an agreement with the union (for these exempted employees only) that all employees in the bargaining unit would share fairly in the financial support of the union. The fee may be equivalent to the amount of dues uniformly required of members of the labor organization or exclusive bargaining representative.

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## Update on PA 349 of 2012 - Right to Work for Public Employees

In March 2013, Michigan joined the ranks of being a “right to work” state. For public employees, that outcome arose by the passage of PA 349 of 2012. The Act extends to most public-sector employees in the state and, as to most employees, prohibits the financial support of unions from being a condition of employment. There have been no changes to PA 349 since its inception. There has, however, been a new development that relates to PA 349. That development is the decision this past June by the U.S. Supreme Court in *Janus v AFSCME*, holding that public-sector workers who are not union members cannot be forced to pay “agency fees” that cover the cost of collective bargaining.

### Public Sector Right-to-Work Pre-*Janus*

Among other things, PA 349 amended Section 9 of the Public Employment Relations Act (“PERA”). Section 9(1)(A) of PERA gives public employees the right to: organize together or form, join, or assist in labor organizations; engage in lawful concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection; or negotiate or bargain collectively with their public employers through representatives of their own free choice. PA 349 amended Section 9 and provided that public employees also have the right to **refrain** from doing any of the above. PA 349 further amended PERA by adding a “Condition-of-Employment Prohibition.” That provision provides that an individual cannot, among other things, be required as a condition of obtaining or continuing public sector employment, to “pay any dues, fees, assessments, or other charges or expenses of any kind or amount or provide anything of value to a labor organization or bargaining representative.” This is the heart of any right-to-work statute.

PA 349 did not, however, apply to all public-sector employees. Pursuant to Section 10(4) of the Act, the condition-of-employment prohibitions were not applicable to police or fire department employees who are subject to the provisions of PA 312, or to state police troopers or sergeants. Thus, as was the case before PA 349 went into effect, a local government was permitted to make an agreement with a union (for these exempted employees only) that all employees in the bargaining unit would share in the financial support of the union by paying a fee that was equivalent to the amount of dues uniformly required of members of the labor organization or exclusive bargaining representative, a/k/a an agency shop fee.

### The *Janus* Decision and Its Impact

In June, by a 5-4 decision in *Janus*, the Supreme Court wiped out the public safety carve-out described above. In *Janus*, the Court upheld Illinois state worker Mark Janus’ bid to overturn the standard set in the 1977 ruling known as *Abood v Detroit Board of Education*, which allowed public employers to require nonunion workers in union-represented bargaining units to pay agency shop fees to cover the cost of collective bargaining and contract administration, so long as the workers were not forced to pay for a union’s political or ideological activities. *Abood* was, in essence, a compromise created by the Court to balance the fact that unions have to represent all employees in their bargaining units equally, with the employees’ constitutional rights to not financially support causes they disapprove.

In *Janus*, the Court’s reversed *Abood* by holding that *Abood* was not well-reasoned. While doing so, the majority ruled in favor of Janus and held that it is a violation of the First Amendment for public-sector employees to be forced to pay agency fees if they have not given consent. In fact, the Court went beyond agency fees saying that the First Amendment is violated any time money is taken from a nonconsenting employee and directed to a public union, and that employees must choose to support the union before anything is taken from them. The Court further held that “neither an agency fee nor any other payment to the [public-sector] union may be deducted from a non-member’s wages, nor may any other attempt be made to collect such a payment, unless the employee **affirmatively consents to pay.**” (Emphasis Added)

Given the *Janus* decision, the exception to PA 349 that applies to certain public safety employees has effectively been nullified as to non-union members. It remains to be seen whether the Michigan legislature will amend PA 349, but PA 349 must nonetheless yield to the Court’s constitutional application.

In any event, Michigan public sector employers face a litigation risk (violation of an employee's First Amendment rights) if they deduct money from a worker's pay that is directed toward labor unions without a specific indication of the employee's affirmative consent for the deduction. There may also be litigation over union limits on how employees may opt-out of unions or cancel fee paying arrangements already in place via individual authorizations. For this reason, union dues deduction provisions and forms should be reviewed by counsel so that the extent that employers will be pulled into these cases may be minimized.

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