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# Hemmed Out

## Why Legislative Employees Can't Unionize Under the Taylor Law

Ken Girardin

KEY TAKEAWAYS

- New York's sweeping public-sector collective bargaining law was never meant to apply to the Legislature.
- Lawmakers and legislative employees have another option: the Senate and Assembly could each recognize an association of legislative employees and agree to confer with them on issues of concern.

Union advocates have argued that employees of the New York State Legislature are covered by the Taylor Law, the 1967 state law that requires state and local public employers, including state agencies, municipalities, and school districts, to recognize and bargain with employee unions.

In a July letter to Senate Majority Leader Andrea Stewart-Cousins, the New York State Legislative Workers United wrote, "we are already included within the definition of 'public employer' under the Taylor Law."

This was a notable change in approach from two years earlier, when Assemblyman Dan Quart (D-Manhattan) introduced a bill specifically applying the law to the Assembly and Senate—a tacit acknowledgement that it did not already.

*City & State*[i] reported in early December that 25 of the 63 senators elected to serve in the 2023-24 term had signed a "statement of solidarity" in which they "strongly supported" the effort.

An online version of this paper can be found at:
https://www.empirecenter.org/publications/why-legislative-employees-cant-unionize-under-taylor-law

Even without the Taylor Law, Senate employees have every right to join a union and to petition their employers for better pay, benefits, and working conditions. Public employee unions existed in New York, and successfully lobbied state lawmakers on workplace-related issues, for decades before the law's adoption.

However, applying the Taylor Law to the Senate, the Assembly, or individual members of either house would raise numerous practical and constitutional issues, and any attempt to enforce a contract negotiated under the Taylor Law would likely be voided by state courts.

Simply put, the law's text and history indicate state lawmakers did not intend for it to apply to the Legislature.

## WHO IS "THE STATE"?

Much of the argument for applying the Taylor Law to the Legislature hinges on the statute's reference, in Civil Service Law §201, to "the state of New York" as a "public employer" to whom the law applies. This broad phrasing, advocates argue, covers the Senate and Assembly.

The strongest evidence in support of extending the Taylor Law to legislative employees comes from the 1970 state appellate court decision in McCoy v. Helsby. The case centered on whether the Taylor Law applied to judicial branch employees, following a 1968 strike by probation officers.

State court leadership and the state Public Employment Relations Board (PERB), which administers the Taylor Law, disagreed about whether PERB had jurisdiction to sanction the strikers.

The court held that, since the judicial branch's powers to administer its workforce had been delegated to it by the Legislature, the Legislature could modify that arrangement by making the judicial branch comply with the Taylor Law.

Judge Lawrence Cooke, writing for the five-judge panel, however married that reasoning with a sweeping comment about legislative branch employees:

> The Legislature clearly intended that the statute apply to the judicial branch. The Governor's Commission on Public Employee Relations, which drafted the legislation, specifically noted that the term "State employees" included, not only persons employed by the 20 State departments, **but also those employed by the legislative and judicial branches** (Final Report [March 31, 1966] of the Governor's Commission on Public Employee Relations, p. 13). ***[emphasis added]***

Here, the court appeared to take some liberties in addressing the question of legislative employees.

For one thing, the law's applicability to the Senate and Assembly was never argued. Neither party raised the question in its briefs; more importantly, neither chamber's leadership was involved in the litigation.

Cooke's reference to the findings of the 1966 Governor's Commission on Public Employee Relations, also known as the Taylor Report, comes from the following paragraph:

> Who are the public employees and how are their conditions of employment now determined? "State employees" constitute one category which, in the

> main, comprises employees of 20 state departments. The basic conditions of employment for classified employees in the executive departments (the large majority of employees of the State) are determined by provisions of the Civil Service Law as administered by elected and appointed State officials.' Other terms of their employment are specified by other legislation. **There are also State employees in the legislative branch**, a relatively small number, and in the judicial branch, comprising a larger number of employees. In the judicial branch, both wage and nonwage conditions are determined either by the State Judicial Conference or by a local government. Other "State employees" work for public authorities having more than local but less than statewide jurisdiction. ***[emphasis added]***

Nothing in the report, however, actually suggested that the Legislature would be bargaining with its own employees. In fact, there are multiple indications that the commission had the exact opposite thought in mind and that it had only executive branch agencies in mind.

Just two pages after mentioning legislative employees, the committee referred specifically to "executive agencies" as the employer in state government (page 15). The Legislature was not listed in the report among the more than 8,600 "governmental employing entities" expected to utilize the forthcoming law—but "20 State Departments" and "the State University" were (page 55).

When the Court of Appeals affirmed McCoy in a short opinion, the justices referred only to "nonjudicial employees of the unified court system," not the lower court's expansive language that included the Legislature.

Why didn't the Legislature explicitly exclude itself, or for that matter join the litigation in McCoy? Likely because lawmakers didn't think it was necessary.

## EXCLUDED ALREADY

The legislative workforce in 1967 was considerably smaller than it is today, in part by necessity: most lawmakers working in the state Capitol had no direct reports beyond a secretary shared with other members. This changed in 1972 when the Legislative Office Building opened and legislative payrolls expanded to fill the new space. But when

the Taylor Law was adopted, the legislative workforce was small enough to escape consideration when lawmakers were spelling out where the law would and would not apply.

There are other indications that the Legislature didn't intend to apply the Taylor Law to itself, and reasons why members may have felt an explicit exclusion unnecessary:

- The Legislature never passed implementing legislation that would be necessary for the Taylor Law to apply; it has never, through the Legislative Law, the state Constitution, or either chamber's rules, designated either individual lawmakers or legislative leaders as the "chief executive officer" responsible for negotiating with a union. After McCoy, the Legislature designated the chief administrative judge as the "chief executive officer" for Taylor Law purposes (Judiciary Law §212(e)).
- The Taylor Law is officially part of the Civil Service Law—from whose most prominent provisions legislative employees are already exempt ("unclassified"). It is unlikely that the Legislature would exempt itself from merit requirements, discipline procedures, and other rules but subject itself to a more onerous collective bargaining mandate.
- The Taylor Law text itself includes indications that lawmakers did not imagine the law applying to their respective chambers. Civil Service Law §205(5)(b) refers to the "state department or agency" for which a state employee works — statutory terms that do not encompass the Legislature, either chamber, or an individual lawmaker's office.
- The Taylor Report acknowledged "professional and confidential employees" would be excluded from the collective bargaining model lawmakers ultimately assembled, a category in which legislative employees fall. The Legislature in 1971 formally excluded policymaking employees from unionizing under the Taylor Law. It bears noting that the employee duties related to the Legislature that are furthest removed from policymaking—for instance, maintenance of the Legislative Office Building—are performed by an executive branch agency (the Office of General Services).
- The Legislature in other instances has been explicit when subjecting itself to employment rules (for example, members of the Legislature are listed as employers covered by the state Human Rights Law).

Finally, there are the many practical issues that would arise in applying the Taylor Law to the Senate or Assembly:

- Could a union contract pre-empt a legislative chamber's ability to conduct normal business; for instance, could it limit a chamber's hours of operation, the way teacher union contracts control the length of the school day?
- Would the Legislature potentially lose its right to hire contractors for services now performed exclusively by its employees?
- Would a lawmaker or legislative leader inherit a union contract signed by his or her predecessor?
- If a lawmaker signed a union contract, resigned, and was re-elected, would he or she still be bound by that contract?
- In a dispute between PERB and one or more lawmakers, could a judge enforce the Taylor Law without violating the Legislature's constitutional prerogative to manage its own affairs?

## IF NOT THE TAYLOR LAW, THEN WHAT?

The Taylor Law was not intended to cover legislative employees. Even an amendment to explicitly make it apply would likely run into constitutional issues, since each house's powers to "determine the rules of its own proceedings" are protected by the Constitution (Article III, §9). Subjecting a legislative body to the jurisdiction of an executive branch agency (PERB), or to a binding union contract in general, would face a high legal hurdle that union advocates are unlikely to meet.

Lawmakers and legislative employees have another option: the Senate and Assembly could each, instead, recognize an association of legislative employees and agree to meet and confer with them on issues of concern.

These consultation privileges would be akin to those enjoyed by federal government employees and would address some of the basic concerns presented by union advocates about working conditions and the lack of uniformity across legislative offices.

This arrangement could be created through internal rules changes, tailored to match the intent of each legislative chamber. The Legislature's constitutional prerogative gives them this right—the same way it would shield them from the Taylor Law.

**Endnotes**

[i]Lewis, Rebecca C. "New York senators sign onto their staffers' unionization effort," City & State, 8 Dec 22. cityandstateny.com/politics/2022/12/new-york-senators-sign-their-staffers-unionization-effort/380618