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Aftermath of the Janus v. AFSCME Decision

Originally published in *The Authority,* California JPIA Newsletter Issue 78

The dust is settling in the wake of *Janus v. AFSCME*,[1] prompting public sector unions and public agencies to make significant changes to the way they operate moving forward. This article is intended to provide public agencies with a brief summary and reminder of their new legal obligations after *Janus* and to offer practical insights and recommendations for navigating the post-agency fee world.

Background and Procedural History of Case

Prior to *Janus*, California law permitted public agencies to enter into "agency shop" arrangements with its employee organizations. These arrangements typically required employees, as a condition of employment, to either (1) join the union and pay dues or (2) refuse to join the union and pay the union a service fee, commonly known as an "agency fee."

Historically, this "agency fee" was justified as a "fair share" payment to the union for the costs associated with representing all employees, based on the premise that the employees who chose not to join the union nonetheless benefitted from the union's collective bargaining efforts (*i.e.*, no free riders).

The constitutionality of "agency fee" was challenged by the employee in *Janus.* The key issue in the *Janus* was whether the union's requirement that employees either join the union or pay a "fair share" fee equal to approximately 78% of the normal union dues amount, violated the First Amendment. The primary argument being that "fair share" fees are a form of compelled speech and association that requires employees to support a union which they have not chosen to join.

The U.S. Supreme Court issued its decision in *Janus* on June 27, 2018. The U.S. Supreme Court ruled 5 to 4 to overturn *Abood v. Detroit Bd. Of Ed* (1977) 431 U.S. 209, which was the U.S. Supreme Court decision that previously found such agency fees to be constitutional. The *Janus* case was reversed and remanded to the lower court. The *Janus* decision's key holdings are as follows:

- Mandatory agency fees are unconstitutional because they

violate the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern.

- Payments to unions may not be deducted from a nonmember's wages, nor may any attempts be made to collect such payments, unless the employee affirmatively consents to pay.
- Employees who affirmatively consent to pay waive their First Amendment rights.
- The waiver must be given freely and shown by clear and convincing evidence.

SB 866: New Legislation in Wake of Janus

SB 866 was a fast-track omnibus bill in response to the *Janus* decision.[2] The bill was signed by Governor Brown on the same day as the *Janus* decision, and took effect immediately upon signing. The bill applies to virtually all employers covered by PERB and has enacted the following changes to the law:

- Employers must allow for payroll deductions for union dues.
- Any employee request to begin or cancel dues deductions must be made to union, not the employer.
- Unions are responsible for providing employers with information regarding dues deduction amounts.
- Employers shall rely on the information provided by the unions and the unions must indemnify employers for any claims made by employees for deductions made in reliance on that information.
- Unions may certify to employers that they maintain written authorizations from employees to deduct dues without providing copies of the written authorizations to the employer, unless a dispute arises regarding the existence or terms of the written authorizations.
- Dues deductions may only be revoked pursuant to the terms of the employee's written authorization.

Additionally, California law now requires the following with respect to communications from employers to employees:

- If employers choose to disseminate mass communications to its employees or applicants concerning their rights to join or support unions, or to refrain from joining or supporting unions, employers must meet and confer with the exclusive representatives regarding the content of the proposed mass communication.
- If the parties cannot reach agreement on the content of the

proposed mass communication and the employer still decides to disseminate the mass communication, the employer must also allow the union to disseminate its own communication of reasonable length at the same time.

- Employers are prohibited from disclosing the date, time, and place of a new employee orientation to any individual other than employees, the exclusive representatives, or a vendor contracted for purposes of conducting or facilitating the orientation.

Revisions to Current Prohibitions against Deterring or Discouraging Union Membership

As a reminder, Government Code Section 3550 prohibits employers from deterring or discouraging employees from becoming or remaining members of a union.

Government Code Section 3550 was amended with SB 866 to additionally prohibit employers from deterring or discouraging employees from "authorizing representation by an employee organization, or from authorizing dues or fee deductions to an employee organization."

Accordingly, regardless of the agency's intent, any official response or statement that has the effect of convincing employees to withdraw from their unions or withhold dues deductions may violate California law.

Practical Insights and Reminders

1. Your Agency May Rely on the Information Provided by Your Recognized Employee Organizations Regarding Employee Dues Deductions

If your unions have not already provided your agency with information regarding dues deduction authorizations and/or employees who have affirmatively consented to make such payments, you should request this information immediately. This information is essential to identify which employees are affected by the *Janus* decision.

Under the new laws, unions may certify to your agency that they maintain written authorizations from employees to deduct dues without the need to provide copies of the written authorizations, unless a dispute arises regarding the existence or terms of the written authorizations.[3]

In return, your agency is permitted to rely on the information and representations made by unions that the identified employees have affirmatively consented to deductions when processing or

administering your payroll. Furthermore, your agency's reliance on this information will require unions to indemnify your agency against any claims made by employees for deductions made in reliance of that information.

As a reminder, employee requests to begin or cancel dues deductions must be made to unions directly. The law now prohibits public agencies from discussing these matters directly with employees and from processing any employee request to cease or start deductions in the absence of union participation and/or approval. Your agency should be mindful of engaging in any acts that deter or discourage union membership and your employees should be directed to their unions for questions. It is also recommended that your agency meet and confer with your unions regarding how the parties will deal with future employee requests.

2. Review and Verify Your Payroll Deduction and Authorization Procedures

It is recommended that your agency review applicable payroll practices, policies and procedures to ensure that agency fee deductions have been stopped or can be stopped immediately upon request, as required by the *Janus* decision. If your agency is aware of any agency fee deductions that have not or cannot be canceled or stopped, you should immediately contact the union of the affected employee to discuss issues related to reimbursement or refunding of any scheduled or completed deductions.

3. Update Applicable Collective Bargaining Agreements or Memoranda of Understandings and Meet and Confer with Unions

If your agency has not already, it is recommended that your agency conduct an audit of the operative collective bargaining agreements or memoranda of understandings in place to determine what amendments or modifications are necessary as a result of the *Janus* decision. Many of the clauses or provisions in your negotiated agreements may trigger additional actions or obligations. For example, many "indemnification" clauses or provisions typically found in negotiated agreements are tied to "agency shop" or "agency fee" agreements, which are now unconstitutional. Accordingly, the *Janus* decision will likely require your agency to meet and confer with your unions and your agency should be prepared to field requests for negotiations or meet and confer obligations.

4. Educate Your Supervisors and Establish Agency-Wide Approved Communications

If your agency has not already issued communications in response to *Janus*, it is recommended that your agency develop and adopt a

consistent Agency-wide official response or statement. However, the response or statement should adopt a neutral stance and should be carefully drafted to eliminate any appearance of bias or influence and should avoid any language that may be interpreted as discouraging union membership or activity. As a reminder, your agency will be required to meet and confer with your unions prior to communicating with employees. If the parties cannot reach an agreement on a mutual communication, your agency can decide to send out a communication anyways, but must allow your unions to also provide a communication at the same time.

Alternatively, your agency may choose to communicate only with your unions regarding the *Janus* decision. At a minimum, we recommend that communications with unions reaffirm your agency's intent to remain neutral on employee decisions concerning union membership by continuing to direct and refer all employees to the unions for any questions regarding union membership or dues deductions.

In conjunction with developing your agency's official response or statement, your supervisors, managers, and directors should be educated on the *Janus* decision and instructed to refrain from discussing the outcome with their employees. This includes refraining from discussing any potential lawsuits or litigation filed against your unions as a result of *Janus*.[4] Establishing a consistent response or message amongst your agency's management employees may help protect against potential claims of unfair practices or breach of neutrality.

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[1] https://www.supremecourt.gov/opinions/17pdf/16-1466_2b3j.pdf
[2] https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB866
[3] SB 866 does not provide significant detail on what the appropriate course of action would be if an employer wished to challenge the information provided by a labor union. We anticipate that new regulations may provide additional guidance on this issue in the future.
[4] In the wake of *Janus,* several lawsuits have been filed by employees against unions seeking reimbursement for mandatory service or agency fees.
