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LEGAL UPDATE

May 11, 2018

To: **Superintendents, Member School Districts (K-12)**

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Subject: **Preparation for *Janus v. AFSCME* Decision**
Memo No. 11-2018

As you are likely aware, the United States Supreme Court will issue a decision in the union agency fees case *Janus v. AFSCME* by the end of June 2018. You may have received letters from employee organizations regarding the case that request your cooperation should the Court hold that "agency shop" fees are unconstitutional. This legal update seeks to clarify the implications of the *Janus* case, and provide some guidance regarding how Districts should prepare for the upcoming decision.

Janus Overview

In *Janus*, a public sector employee is challenging the constitutionality of "agency shop" fees (also called "fair share" or "agency" fees). An agency shop fee arrangement occurs when employees are required to pay certain compulsory "fair share" union fees as a condition of employment, regardless of whether the employee is a member of the union. In California and many other states, state laws and regulations authorize agency shop fees for public sector employees. Employees who opt out of the union and only pay agency shop fees are often called "fee payers."

The Court is presented with the question of whether it should overturn its decision in *Abood v. Detroit Bd. of Education*[1] and hold that public sector agency fee arrangements are unconstitutional under the First Amendment as a violation of free speech. The Supreme Court was faced with this question

[1] (1977) 431 U.S. 209.

recently in a case out of California, *Friedrichs v. California Teachers Association.*[2] However, that case ended in a four-to-four split following the death of Justice Scalia, which affirmed the Ninth Circuit decision allowing for agency fees.[3] With Justice Gorsuch now on the Court, most journalists, industry analysts and legal scholars are predicting that the Court will overturn *Abood* and hold, by a five-to-four vote, that compulsory agency shop fees for public employees are unconstitutional.

Please note that the Court has not issued a decision in *Janus*, and we cannot predict exactly how the Court will rule, or how limited or expansive its holding might be. As soon as the Court issues its decision, we will notify our clients and provide up-to-date guidance based on the Court's specific holding.

Implications of *Janus*

Currently, California law requires public school employers to deduct agency shop fees from public school employees who decline to join the union, but are within a unit for which an exclusive representative has been selected.[4] An employee who declines to join a union which is certified as the exclusive representative for a unit cannot decline to pay these agency fees. However, agency fees can only cover the costs of employee organization activities that are germane to its function as the exclusive bargaining representative; for example, the costs of negotiations, contract administration, and processing grievances. Agency fees cannot be used for some union lobbying activities.

If the Supreme Court holds that agency shop fee arrangements are unconstitutional, state law allowing for agency fees will be invalidated immediately following the Supreme Court's announcement of its ruling.[5] As such, public school employers need to have a plan in place to stop deducting agency shop fees from the paychecks of any employees who are not union members. Another anticipated consequence of the *Janus* decision is that many public school employees may seek to leave the union. Please note that public employers should not encourage union members to leave their union.[6]

How You Can Prepare for *Janus* Ruling

Public school employers must be ready to stop deducting agency shop fees from current fee payer employees as soon as *Janus* is decided.

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[2] (2016) 136 S.Ct. 1083.
[3] Please see Legal Update 09-2016.
[4] See Government Code section 3546 for public school employers covered by the Educational Employment Relations Act ("EERA") (including public school districts, county offices of education, charter schools that have declared themselves public school employers, community colleges, and certain joint powers agencies). The corresponding California Department of Education ("CDE") regulations for deduction of agency shop fees for these public school employers can be found in Section 32990-32997 of Title 8 of the California Code of Regulations.
[5] Supreme Court opinions are legally effective as soon as they are first announced; however, only the bound volumes of the United States Reports contain the final, official text of the Court's opinions which can be published several years after the original opinion announcement. (*See Information About Opinions*, SUPREME CT. U.S., http://www.supremecourt.gov/opinions/info_opinions.aspx (last visited May 5, 2018); Richard J. Lazarus, The (Non)finality of Supreme Court Opinions, 128 Harv. L. Rev. 540, 543 (2014).)
[6] See Senate Bill 285, codified at Government Code sections 3550 et seq.

To prepare for the possibility that *Janus* will overturn agency fee shop arrangements, we recommend that your agency take the following steps:

1. Determine who your service fee payers are.
   - Work with your human resources department, payroll department, and/or union representatives to obtain an accurate, up-to-date list of all service fee payers. We recommend doing this legwork in advance of the *Janus* decision to ensure the agency can quickly implement changes to employee deductions upon the Court's ruling.

2. Prepare your payroll system.
   - Relevant public school personnel should understand their payroll system and plan in advance to stop agency fee deductions from service fee payer paychecks if needed.
   - Explore whether your payroll system allows for fee deductions to be modified or prorated within a pay period, or whether your system only allows for an "all or nothing" deduction. Work with your business and payroll office to explore your options. Identify the date by which the agency must know in order to make a change to the payroll system to implement any changes during that pay period.
   - Have a plan for how you will handle payroll if *Janus* is decided in the middle of a pay period, or after the date by which the system allows for changes for that pay period.

3. Prepare to adjust the fee payment to the union.
   - The business office staff should plan in advance how it will stop monthly agency fee payments to the union. Determine when fees are paid to unions each month, and the staff responsible.
   - Determine in advance how the agency will make the adjustment to the fee amount paid to unions.

4. Review collective bargaining agreements.
   - Your agency should review your collective bargaining agreements (CBAs) to determine whether they include an agency shop or other wage deduction arrangement, and any provisions that correspond to these fees (for example, the amount, timing, and frequency of when fees are deducted).
   - Depending on the holding in *Janus*, your agency should be prepared to bargain over any negotiable effects of the decision. In addition, agencies may have to negotiate the elimination and/or amendment of language in their CBAs to be in compliance with *Janus*. Having familiarity with the provisions in your CBAs that could be impacted by *Janus* will help you be ready for negotiations following the decision.

Please note that we do not necessarily agree with the position of at least one exclusive representative that the union is entitled to the dues accrued during the pay period up until the date of the *Janus* decision. In other words, depending on the specific holding in *Janus* and

assuming agency fee arrangements are held unconstitutional, our office position is that it is likely legally defensible to assert that the union is not entitled to *any* agency fees accrued during the entire pay period in which the Court issues its decision. However, it is very likely that employee organizations will challenge any employer that decides to withhold fees for the entire pay period rather than prorate the fees, which is what many exclusive representatives are requesting in advance of *Janus*. There is at least one bill currently under consideration by the California legislature (AB 2049) that would entitle *classified* employee organizations to five (5) days' notice in advance of processing a revocation request. We will keep you updated on this and any other relevant legislation concerning the implications of *Janus*.

Communication with Employees

We advise all public school employers to use extreme caution and good judgment when communicating with employees about the *Janus* decision and its effects. Under Government Code sections 3550 et seq, public employers are prohibited from deterring or discouraging public employees from becoming or remaining members of a union. Understandably, unions are anxious about what *Janus* could mean for their funding and their membership, and are threatening public school employers with legal action should employers take any steps the unions consider discouraging to union membership.

However, following the *Janus* decision, it would be appropriate to inform "fee payer" employees that there will be a change in their paychecks, what the change is and why. It would not be appropriate to inform all employees (union members and fee payers alike) that if they choose to leave the union, they would no longer be obligated to pay agency shop fees; this communication could be seen as discouraging union membership in violation of Government Code sections 3550 et seq, and put the employer at risk for a legal action.

Note that our office believes that exclusive representatives have been misinforming public employers as to their rights and obligations to communicate with their employees regarding *Janus* and its implications. Particularly when agency staff are approached by employees, we believe it is permissible to communicate objectively and in a fact-based way about the impacts of the *Janus* decision on public employees.

Responding to California Public Records Act Requests

Employee organizations have approached some of our clients about its preferred responses to possible requests for information from third parties addressed to school entities following the *Janus* decision. These organizations are concerned that third parties will attempt to seek personal information about union members through requests under the Public Records Act ("Act"), which might then be used to encourage public employees to not pay "fair share" contributions voluntarily, or drop union membership. Employee organization letters have emphasized that at least some personal information about union members cannot be provided in response to such a request, and are urging public entities to voluntarily resist other requests, contending that such requests can be denied under various exemptions to the Act. At least one organization has even offered (unspecified) financial assistance to public entities that follow its advice.

The following section will discuss specific categories of information and whether they should be provided in response to a public records request.

Government Code section 6254.3 prohibits disclosure of several categories of personal information of public employees. Subdivision (a) of that statute provides: "The home addresses, home telephone numbers, personal cellular telephone numbers, and birth dates of all employees of a public agency shall not be deemed to be public records and shall not be open to public inspection." The statute then provides a number of exceptions, such as disclosure with the consent of the employee, or to an employee organization, or to a health care provider. Thus, those records should not be disclosed without the specific consent of an employee.

Government Code section 6254(c) exempts the disclosure of "Personnel, medical, and similar files, the disclosure of which would constitute an unwarranted invasion of privacy." Past court decisions interpreting this statute have concluded that it sets up a "balancing test" — namely, it requires that a public entity balance the public interest in disclosure against the public interest in withholding the records sought. As most public employees are probably aware, since 2007, a series of court decisions have found subdivision (c) did not bar the release of public salary information, including all components of income (wages, salaries, cash-in-lieu of benefits, overtime, vacation buy-outs, etc.) Despite resistance from unions and from public entities, therefore, wage and salary information is one example of "personnel" information that the courts have nevertheless concluded can be released without that disclosure constituting an "unwarranted invasion of personal privacy."

To our knowledge, at least one employee organization has argued that, under Government Code section 6255, public entities could refuse to release two categories of information: work e-mail information and the date, time, and place of New Employee Orientation meetings (at which employee organizations will try to encourage either union membership or voluntary payment of "fair share" contributions"). Like Government Code section 6254(c), section 6255 essentially creates a balancing test, and the burden is on the public entity to show that the public interest in refusing to disclose information outweighs the public interest in disclosing it.

Each school district or county office of education must ultimately decide for itself whether it will want to rely on section 6255 to refuse the disclosure of work e-mail addresses. Some public entities list employee e-mail addresses on their websites, and if they do so, such entities will likely not be able to successfully argue that there is a privacy interest that justifies keeping such information private. On the other hand, for those entities that do not routinely disclose individual employees' e-mail addresses, there are at least two reasonable bases to continue to refuse to do so. First, refusing to disclose such information prevents outside e-mails, which sometimes have malware and other malicious software embedded in them or in attachment, from being inadvertently "clicked" by employees, thereby exposing their entire e-mail system to an attack. Second, once e-mail addresses are public, this can increase the volume of e-mail and act as a distraction from work responsibilities. As long as such entities have a "general" e-mail address or an e-mail "portal" that does not permit sending e-mails directly to specific employees but only to the organization, that likely satisfies the entity's obligation to permit e-mail contact and using section 6255 to deny a request for work e-mail likely would be upheld by a court.

As to whether the date, time, and place of holding New Employee Orientation meetings should be kept confidential, employee organizations may well have a point that these are intended as private meetings between new employees and the employee organization to have a chance to convince employees of the value of either union membership or at least offering a union financial support. There does not appear to be a strong public interest in permitting the date, time, and location of such meetings to be publicized, particularly because third parties would not be entitled to attend such meetings. Accordingly, districts would have discretion to refuse to provide records showing the date, time, and place of such meetings under section 6255.

Lastly, we provide advice on whether public school employers should either provide or refuse to provide employee information in the following categories, if such information is requested:

- Employee names: There is no defensible privacy interest here, just as there is not in an employee's salary information. *Such information should therefore be disclosed*.

- Employee position/job title: There is no privacy interest here, as with salary information. *This information should be disclosed*.

- Employee work site: There is no general privacy interest in this information. Employees nevertheless should be notified if a district receives a request for this information, however, because some employees may have restraining orders or other personal situations that would meet the "nondisclosure" part of the records request. *Districts may want to consult with legal counsel about such requests*.

- Employee work telephone number: This may or may not be information that can be withheld, depending on whether the information is otherwise available online. *We recommend that you consult legal counsel if you receive such a request.*

- Employee e-mail address: Like work telephone numbers, this may or may not be information that needs to be disclosed (or that districts will want to disclose). *We recommend consulting legal counsel if you receive such a request*.

- Employee home address: *Such requests should be denied*. See Govt. Code section 6254.3.

- Employee's personal telephone or cell number: *Such requests should be denied*. See Govt. Code section 6254.3.

- Employee date of birth: *Such requests should be denied*. See Govt. Code section 6254.3.

- New Employee Orientation meetings' date, time, and location: *Such requests should be discussed with legal counsel, in the event that districts or county offices receive such a request.*

Our office will be publishing a Legal Update promptly following the *Janus* decision that will include more specific analysis and recommendations in consideration of the specific holding of the case.

Please contact our office with questions regarding this Legal Update or any other legal matter.

The information in this Legal Update is provided as a summary of law and is not intended as legal advice. Application of the law may vary depending on the particular facts and circumstances at issue. We, therefore, recommend that you consult legal counsel to advise you on how the law applies to your specific situation.