SCLS
SCHOOL & COLLEGE LEGAL SERVICES
OF CALIFORNIA

A Joint Powers Authority serving school and college districts throughout the state.

5350 Skylane Boulevard
Santa Rosa, CA 95403

Tel: (707) 524-2690
Fax: (707) 578-0517
santarosa@sclscal.org
www.sclscal.org

General Counsel
Carl D. Corbin

Attorneys
Ellie R. Austin
Monica D. Batanero
Sarah Hirschfeld-Sussman
Nancy L. Klein
Damara L. Moore
Jennifer E. Nix
Steven P. Reiner
Loren W. Soukup
Erin E. Stagg
Frank Zotter, Jr.

Of Counsel
Robert J. Henry
Margaret M. Merchat
Patrick C. Wilson

LEGAL UPDATE

June 28, 2018

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

From: **Ellie R. Austin, Assistant General Counsel** ERA
Sarah Hirschfeld-Sussman, Schools Legal Counsel SHS

Subject: ***Janus v. American Federation of State, County, and Municipal Employees*, No. 16-1466, 585 U.S. _____ (June 27, 2018)**
Memo No. 14-2018

The long-awaited Supreme Court decision in the matter of *Janus v. AFSCME* was issued on June 27, 2018. In a 5-4 decision, the Court held that compelling public-sector employees to pay mandatory agency (or "service" or "fair share")[1] fees to public-sector unions as a condition of employment violates employees' First Amendment rights.

I. Summary

Janus prohibits the mandatory "extraction" of service fees from public-sector employees to support public-sector unions as a condition of employment.

In response to *Janus*, Governor Brown signed into law Senate Bill ("SB") 866, which attempts to mitigate some of the anticipated effects of *Janus* on public-sector unions by limiting public employers' ability to process changes or cancellations to payroll deductions, and placing restrictions on public employers' ability to transmit "mass communications" to employees on union issues.

The first item of business is to determine whether your agency has any service fee payers.

In light of *Janus* and SB 866, public employers *with service fee payers* have two options:

[1] An agency shop fee arrangement occurs when employees are required to pay certain compulsory "fair share" or "service" fees to the union as a condition of employment, regardless of whether the employee is a member of the union. These service fees are meant to fund the union's collective bargaining, contract administration, and grievance representation activities, but *not* the union's "political and ideological projects." (*Janus*, slip. op. at 3.)

(1) Take no action to stop service fees from being transmitted to employee organizations unless and until the employer receives notice from the employee organization that an employee has *opted out* of paying the service fee. In other words, maintain the status quo until receipt of notice from the employee organization that employees have opted out of payroll deductions.

(2) Effective with the July 2018 regular payroll, stop all service fees deductions unless and until the employer receives notice from the employee organization that an employee has *opted in* to paying the service fee. We recommend providing advance notice to the union(s) of the employer's intent to pursue this option, giving the employee organization until the 15th of each month[2] to notify the employer that an employee has "affirmatively" opted in to paying the service fee.

At this time, we believe option (1) is the most legally defensible course of action because SB 866 requires all employee requests to make, cancel or change a union fee deduction to go through the employee organization rather than the public employer. [3] Some legal scholars have noted that this provision of SB 866 may violate *Janus* by compelling employees to *opt-out* of paying service fees rather requiring an employee to affirmatively *opt-in*, as *Janus* appears to require. Even so, we recommend complying with SB 866's mandate that employers wait to make any changes to existing fee deductions until they receive notice from the employee organization that an employee has requested a change.

In the following sections, we will discuss the impact of the *Janus* decision on local educational agencies ("LEAs"). Please also reference Legal Update 03-2018 (CC) or 11-2018 (K-12) regarding how LEAs should prepare for *Janus*.

II. What did the Court hold in *Janus*?

In *Janus*, a public sector employee challenged the constitutionality of mandatory "agency shop" or "fair share" fees. Employees who opt out of the union and only pay agency shop fees are often called "fee payers."

The Court held that the extraction of agency fees from nonconsenting public-sector employees violates the First Amendment by compelling individuals to subsidize the speech of private speakers (i.e., unions) which they may find objectionable. (*Janus*, slip. op. at 7-48.)

The Court held:

> Neither an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay.
>
> (*Janus*, slip. op. at 48; emphasis added.)

[2] Or whatever date by which the employer's payroll system requires notice in order to change deductions for that month's payroll.
[3] Codified at Cal. Educ. Code § 45060(e).

It is uncertain at this time whether this language applies to the payment of (union) membership dues to employee organizations. We will keep you updated on this issue as it develops.

III. State Legislative Action Effects on Labor Relations

SB 866, which was signed into law by Governor Brown on June 27, 2018, as part of the 2018-19 Budget trailer bill, significantly modifies the application of *Janus* to public-sector employees in California by restricting employers' ability to (1) process employee requests to stop payroll deductions to public-sector unions, and (2) communicate with employees about public employees' rights to join or support or refrain from joining or supporting an employee organization. We detail these restrictions in the following sections.

A. Employee requests to cancel or change payroll deductions[4] must be processed through the employee organization.

SB 866 mandates that employee requests to cancel or change authorizations for payroll deductions for employee organizations be processed through the employee organization rather than the employer.[5]

> *Example:* When an employee submits a request – in writing, in person, or through any other means – to the LEA to cease payroll deductions to the employee organization, *the employer must direct the employee to the employee organization and may not process the request*.[6]
>
> *Example:* The employee organization notifies the LEA that John Smith has authorized payroll deductions. The LEA may not demand a copy of John Smith's payroll deduction authorization, *unless a dispute arises about the existence or terms of the written authorization*.[7]

Note – SB 866 may be in violation of *Janus* to the extent it does not require employees to affirmatively *reauthorize* payroll deductions to the employee organization. We will keep you apprised of further guidance and interpretations of SB 866 in the aftermath of *Janus*.

B. Employers must meet and confer with the exclusive representative regarding the content of "mass communications" to public employees or applicants concerning union involvement.[8]

Prior to communicating with more than one employee, employers must meet and confer with the exclusive representative regarding the content of such communication relative to employees' or

[4] We interpret SB 866 to apply to payroll deductions for both union dues *and* agency fees.
[5] Cal. Educ. Code §§ 45060 (e) & 45168(a)(6).
[6] *Id.*
[7] Cal. Educ. Code §§ 45060 (f) & 45168(a)(7).
[8] Cal. Gov't Code § 3553.

applicants' rights to join, support, or refrain from joining or supporting, an employee organization.

Under SB 866, a "mass communication" is any written document, script, or message that is intended for delivery to multiple public employees (i.e., any communication, to include verbal and email communications, from the employer to more than one employee regarding joining, supporting, or refraining from joining or supporting a union).[9]

In the event an agreement is not reached with the exclusive representative on the content of the employer's mass communication, the employer may transmit its message, but must, *at the same time as it transmits its own message*, distribute a communication from the exclusive representative.[10]

We recommend that any mass communication regarding *Janus* comply with the above limitations.

C. Employers may not disclose the date, time, and place of new employee orientations to anyone other than the employees, the exclusive representative, and any vendor providing service at the orientation.

Finally, SB 866 would prohibit disclosure of the date, time, and place of new employee orientations to anyone other than the employees, the union, and any vendor providing service at the orientation.[11] This measure is likely aimed at preventing anti-union organizations from accessing new employees in an attempt to deter them from joining the union.

We anticipate that this provision may be challenged on open government public advocacy organizations. We will keep you updated on any developments.

IV. Bargaining Issues

A. Review the savings provision in the CBA.

Review the savings provision in your collective bargaining agreement(s). Does it provide for an automatic reopener in the event a section of the contract is invalidated by a court, or does it simply state that that provision is no longer in effect? If the latter, any section of the contract invalidated by *Janus* will be null and void without further negotiation.

Consider whether reopener negotiations are necessary to address the organizational security, association rights, and/or maintenance of membership sections of the contract in light of *Janus* and SB 866.

[9] Cal. Gov't Code § 3553(e).
[10] Cal. Gov't Code § 3553(c).
[11] Cal. Gov't Code § 3556.

B. Negotiate reimbursement issues.

We recommend negotiating the reimbursement process with the employee organization.

Questions to be addressed as part of these negotiations include:

- how will service fee payers be reimbursed?
- if a fee payer opts to stop paying service fees on a date after which the fees have already been sent to the employee organization, what is the procedure the LEA should follow to reimburse the employee?

Different employee organizations advocate different reimbursement procedures. For instance, at least one employee organization requests that the LEA reimburse the employee, and submit an invoice to the employee organization for reimbursement to the LEA. Another employee organization requests that the LEA let the employee organization reimburse the employee directly.

These issues are negotiable and we recommend meeting and conferring with the employee organization in the interest of clarity and consistency.

Note that SB 866 protects employers when they rely on information from an employee organization regarding dues deductions. If an employee disputes a deduction made by their employer, SB 866 requires the union to indemnify the employer if the employer made the deduction because it relied on information from the employee organization.[12]

C. Addressing employees who want to leave the union.

Review the maintenance of membership[13] and/or organizational security/association rights section(s) of your collective bargaining agreement(s). Does the contract language limit when employees may opt to leave the union?

Recall that SB 866 requires requests to cancel or change authorizations for payroll deductions for employee organization to be directed to the employee organization rather than the employer. The parties may wish to negotiate specific language into the collective bargaining agreement for purposes of clarity and consistency.

> *Example:* A union member approaches HR and requests to leave the union. HR should direct that employee to the employee organization to submit and process his/her request. The employee organization should then notify the LEA to cancel or change the employee's payroll deduction.

[12] Cal. Educ. Code §§ 45060 (e)-(f) & 45168(a)(6)-(7).
[13] Maintenance of membership provisions address when and how an employee chooses to join the union and the time period in which they may leave the union (e.g., within the 30-day period following expiration of the agreement).

V. Status of Employees Going Forward

A. What is the status of employees who opt out of paying service fees?

While the ranks of employees who opt out of paying service fees may grow after *Janus*, unless and until the *union* is decertified by the Public Employment Relations Board ("PERB"),[14] all employees in the *unit* continue to be subject to the collective bargaining agreement. Unions have a legal duty of "fair representation" to represent all employees within the *unit*, regardless of membership status.[15]

> *Example:* A teacher stops paying service fees to the union. The teacher is not a *union member*. However, he/she is still in the certificated *unit* and his/her employment is still governed by the certificated CBA.

> *Example:* A classified unit member leaves the union. The unit member files a grievance against the LEA under the classified collective bargaining agreement. This is permissible. Whether or not the Association represents the employee is governed by the terms of the collective bargaining agreement. Unions may desire to renegotiate these provisions to clarify their representational duties to non-member, non-service-fee payers.

B. What about religious objectors?

The *Janus* decision does not appear to impact employees who opt out of paying *union dues* based on a bona fide religious objection. LEAs should continue to implement the status quo with regard to these employees.

However, LEAs with contract provisions allowing religious objectors to direct *service fees* to third party (non-profit) organizations should review the contract language carefully to ensure accurate application in light of *Janus*.

VI. Communication Issues

A. Employers are permitted to communicate viewpoint neutral, factual information to employees.

Employers are permitted to communicate directly with employees in a factual and accurate way regarding employees' rights after *Janus*. Any such communications should remain neutral as to union membership.

Despite one union's admonition that employers are not permitted to discuss the *Janus* decision with employees without first conferring with the union, employers *are* permitted to discuss the

[14] A union may be decertified by either of (1) 30% of the employees in the unit submitting a petition to PERB seeking to remove the exclusive representative, which initiates a voting process; or (2) by another employee organization seeking to replace the current exclusive representative, which initiates a voting process. A union *cannot* be decertified by any action of the employer.
[15] See Cal. Gov't Code § 3544.9.

impacts of the decision in a fact-based, neutral, and accurate way, without first conferring with the local or statewide Association. However, in doing so, LEAs must comply with the requirements in SB 866 with regard to conferring with the union prior to any "mass communications." (See Section III.B above.)

B. Employers may not deter, discourage, or threaten reprisals on employees for becoming or remaining union members.

Employers are prohibited from deterring or discouraging employees from becoming or remaining union members, or from threatening reprisals on employees for the same. Likewise, employers may not promise or offer benefits to employees in exchange for joining or not joining the union.

Communications from LEA staff should remain factual, accurate, and neutral as to union membership to avoid an unfair labor practice charge, and should comply with SB 866 to the extent applicable.

C. LEAs should follow their policies and procedures regarding communications between third-party organizations and employees.

We are aware that LEAs have received requests from a number of unions to take certain actions in response to anti-union communications directed to LEA employees.

The LEA should follow its policies and procedures regarding communications from third-party organizations, and should not block or censor anti-union communications unless the LEA would do so for another third-party organization under its applicable policies and procedures. The goal is to ensure consistent application of the LEA's policies and procedures without regard to the content of the communication. The LEA should not discriminate against communications from third-parties based on the viewpoints espoused (either pro- or anti-union).

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