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Janus v. AFSCME and Related California Legislation

PUBLIC EMPLOYER/EMPLOYEE RELATIONS TOOLKIT

Prepared By

Lozano Smith's
Labor & Employment and
Local Government/Special Districts
Practice Groups

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TOOLKIT INDEX

JANUS V. AFSCME

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OVERVIEW & NEXT STEPS

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In a 5-4 decision, the United States Supreme Court has held that non-union public employees may no longer be required to pay mandatory agency fees on the grounds that such fees violate the First Amendment. In so holding, *Janus v. AFSCME* reverses 40 years of legal precedent. *Janus* may be one of the most significant decisions to affect the labor relations landscape in decades and will have an immediate impact on public sector labor relations through the country, including California.

BACKGROUND

Petitioner Mark Janus is a State of Illinois employee whose unit is represented by the American Federation of State, County and Municipal Employees (AFSCME). Janus refused to join AFSCME on the basis that he opposed many of the union's positions in bargaining. Janus sued AFSCME, challenging the constitutionality of the state law permitting the union to collect fees from non-union members.

The Supreme Court held that permitting a union to collect agency fees from a non-member violates the First Amendment unless the employee clearly and affirmatively consents. The Court noted that requiring non-members to pay agency fees was akin to "forcing" public employees to "subsidize a union, even if they choose not to join and strongly object to the positions the union takes in collective bargaining and related activities." The Court further stated that "[c]ompelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command, and in most contexts, any such effort would be universally condemned."

In ruling that non-union members could not be required to pay agency fees, the Supreme Court overturned *Abood v. Detroit Board of Education*, which was decided in 1977. *Abood* upheld public sector unions' collection of mandatory agency fees from non-members, provided that the agency fees did not support unions' political or ideological activities. In *Janus*, the Supreme Court has now made clear that unions can no longer collect agency fees from non-members for any purpose, unless the employee "clearly and affirmatively consents to pay" the agency fees.

In overruling *Abood*, the Court rejected the notion in *Abood* that mandatory agency fees were required to ensure "labor peace" (i.e., avoidance of conflict and disruption that would occur if employees were represented by more than one unit). The *Janus* Court noted that unions could be effective without mandatory agency fees, and that a union's designation as the "exclusive representative" conferred many benefits, such as the exclusive right to

speak for all employees in collective bargaining. *Janus* noted that a designation as exclusive representative "results in a tremendous increase in the power" of the union. *Janus* also noted that unions representing nonmembers even without collective agency fees furthered the union's interests and not just the nonmembers' interests because the union was able to keep "control of the administration of the collective-bargaining agreement."

In rejecting the argument that not requiring non-members to pay agency fees would result in a "free-rider" system in which non-union members could enjoy the benefits of union representation without shouldering the costs, the Court noted that non-members could potentially be required to pay for certain union services, such as union representation in disciplinary proceedings.

NEXT STEPS AND CONSIDERATIONS FOR EMPLOYERS

1. Stop agency fee deductions

The Court's decision in *Janus* is effective immediately, meaning employees who are non-members cannot be charged agency fees. Accordingly, employers must stop deducting agency fees from the paychecks of public employees. Going forward, an employer may not deduct fees unless an employee clearly and affirmatively consents to the deduction before it is implemented.

SB 866 creates a layer of potential complication because it modifies the law to require public employers to rely on the representations of the union regarding an employee's deduction authorizations. This likely leaves public agency employers with at least three potential options: (1) stop agency fee deductions immediately without communication with union leadership; (2) stop the agency fee deductions after providing a notice to union leadership as to the employees who the public agency believes to be agency fee payers and whose deductions will be halted with the July paycheck; or (3) stop the fee deductions after the union and public employer agree to the list of employees whose fee deductions will be halted, and rely on the new provisions of SB 866 requiring the union to defend and indemnify the employer in the event a fee payer brings suit to recover fees deducted subsequent to the issuance of the *Janus* decision.

To avoid future lawsuits, public agencies are encouraged to have their human resources and payroll departments work collaboratively with union leadership to identify employees who are agency fee payers and develop a strategy to ensure prompt compliance with *Janus*. For many public school district employers, working closely with their county office of education will be critical to accurately updating payroll records to ensure employees are no longer charged agency fees going forward.

2. Implement a communication plan

Public agency employers who have agency fee provisions in their union agreements should develop a communication plan to address the likely questions that will come from employees and unions in the days and weeks following this decision. Specifically, taking steps to identify a single point person to respond to questions regarding the impacts of the *Janus* decision will ensure cohesive and clear messaging and avoid the potential for managers and supervisors to inadvertently run afoul of laws prohibiting discouraging or deterring union membership. In developing these communication strategies regarding whether, and how, to communicate the *Janus* decision to employees, employers should remain neutral and mindful of applicable law, including SB 285, which prohibits employers from deterring or discouraging public employees from becoming or remaining members of a union, and SB 866, which restricts a public employer's ability to communicate with employees about the *Janus* decision.

Specifically, under SB 866, any "mass communication" sent to employees or applicants concerning their rights to join or support or refrain from joining or supporting their union requires a meet and confer process with the ap-

plicable union. "Mass communication" means a written document, or script for an oral or recorded presentation or message, that is intended for delivery to multiple public employees" under the new Government Code section 3553(e). Any mass communication concerning the *Janus* decision will likely fall within this provision and requires the parties to attempt to craft a mutually agreeable content, or follow the alternate process of distributing two sets of mass communication: one from the employer and one from the union.

Public agency employers are further encouraged to provide an update on the case to their unrepresented managers and supervisors, along with governing board members, and to provide talking points in the event they are faced with questions about the *Janus* decision.

To assist our clients, we are developing a communication template. If you are interested in receiving this, please contact one of our offices.

3. Examine Collective Bargaining Agreements

After these immediate next steps are in place, in consultation with legal counsel, public agency employers should review their collective bargaining agreements to determine how the Court's decision impacts current contract language, assess what articles are impacted by *Janus*, and determine whether any immediate action or negotiation is required.

While the Court's decision may not immediately impact current dues-paying union members, some members could choose to opt out of union membership in the future as a result of the Court's decision, in accordance with applicable collective bargaining agreements and membership agreement. To the extent membership in a union and attendant dues deductions are premised on an opt-out article or practice, wherein the employee is automatically in the union and automatically charged union dues unless he or she ops out, such provisions will need to be negotiated with the union to comply with *Janus* so that an employee clearly and affirmatively consents to union membership.

RELATED BILLS

In addition to SB 866, please be aware that there are other bills pending in the California Legislature that address union dues and labor relations. Lozano Smith is tracking all of these pending bills and will provide updates if any are adopted by the Legislature and signed by the Governor.

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SB 866 OVERVIEW

FIRM OVERVIEW

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California lawmakers have approved a budget trailer bill that imposes new obligations on public sector employers related to deducting union dues and fees from workers' paychecks. Governor Jerry Brown signed Senate Bill (SB) 866 on the same day the United States Supreme Court barred the collection of mandatory agency fees that cover unions' cost of providing services, which the Court deemed a violation of workers' First Amendment free speech rights.

The Governor signed the bill, which combines the language of several other pieces of pending legislation intended to protect public agency unions, on June 27, 2018. Like all budget bills, the provisions in SB 866 became effectively immediately.

DUES PROCESSING

SB 866 standardized dues processing requirements across public agency unions, including county, city, and state employees. SB 866 also expanded the requirements to include employees of the Judicial Council, and also public transit district employees who are not already covered by a specific collective bargaining law.

SB 866 imposes explicit requirements on public agency employers and generally makes unions responsible for portions of the dues collection process. Specifically, the bill:

- Authorizes employee organizations, bona fide associations and both current and retired public agency employees to request payroll deductions and requires employers to honor such requests.
- Specifies that revocation of an authorization must be determined by the terms of the authorization and requires public employers to direct employee requests to cancel or change deductions to the employee organization.
- Clarifies the period in which payroll deductions commence after the employee organization notifies the public employer that it has written authorization for the deductions.
- Bars a public employer from requiring an employee organization to submit a copy of a written authorization before commencing payroll deductions, unless a dispute arises about the existence or terms of the authorization.
- Requires unions to indemnify public employers against claims regarding dues deductions made in reliance on information provided by the union.
- Permits public agencies to recover, from the dues and fees transmitted to the union, the actual reasonable cost of making the deductions.

NEW EMPLOYEE ORIENTATION

Additionally, the bill makes the date, time and location of new employee orientation sessions confidential. Under SB 866, only invited employees, union representatives and vendors contracted to provide services for the sessions may be given date, time and location information for orientation sessions. These new provisions are in furtherance of AB 119, which mandated union access to new employee orientation sessions and became effective on January 1.

EMPLOYER COMMUNICATION

The bill restates existing law that took effect January 1 that bars public employers from discouraging or deterring public employees or applicants from becoming or remaining union members and additionally prohibits public employers from discouraging or deterring employees or applicants from authorizing union representation or the deduction of union dues or fees.

SB 866 also subjects to the meet and confer process any mass communication regarding public employees' right to support or join, or to refrain from supporting or joining, a union. Under the new Government Code section 3553(e), "mass communications" means a written document, or script for an oral or recorded presentation or message, that is intended for delivery to multiple public employees. This would include email correspondence. At least one union appears to interpret "mass communication" as a communication to more than one employee. If an agreement about the content of the communication is not reached, public employers must include a communication of "reasonable length" from the union representative with any communication they send regarding this right.

The Public Employment Relations Board (PERB) is granted jurisdiction for enforcing the bill's provisions.

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FREQUENTLY ASKED QUESTIONS

Q. WHAT IS *JANUS*?

A. *Janus v. AFSCME* is a lawsuit filed by Mark Janus, an Illinois state employee, contesting the lawfulness of mandatory or involuntary agency fees he was assessed by AFSCME, the union his position was part of but that he opted out of joining. Like California, Illinois has an agency fee system in place, requiring public employees who choose not to be part of the union to pay an "agency fee" or "fair share fee" to the union for the benefit of the union's representation of the position. This case made its way to the U.S. Supreme Court in 2017. A similar lawsuit, *Friedrichs v. California Teachers Association*, was argued before the Court in 2016 and resulted in a 4-4 split decision due to Justice Scalia's death, leaving intact the propriety of agency fees.

Prior to *Janus*, the case that controlled agency fees was *Abood v. Detroit Board of Education*, a 1977 U.S. Supreme Court decision holding that agency fees were constitutional. This has been binding law until now as *Janus* overrules *Abood*. The Court in *Janus* held that mandatory or involuntary agency fees violate employees' First Amendment free speech rights.

Because involuntary agency fees are now unconstitutional, as of the date of the Court's decision in *Janus*, agency fee payers can no longer be charged such fees with their express consent.

Q. WHAT ARE AGENCY FEE PAYERS?

A. Agency fee payers are employees who work in bargaining unit positions who have opted out of the union. While agency fee payers cannot be compelled to pay for the political activities of the union, these employees are required to pay the costs associated with collective bargaining, grievance processing, and contract administration, among other things. The amount paid as an "agency fee" is lower than the amount paid to become a union member. At least 22 states, including California, have laws that provide for agency fees. Under *Janus*, these involuntary agency fee statutes are no longer constitutional.

Q. WHAT ARE DUES PAYERS?

A. Dues payers are employees who choose to join the union and pay dues to the union to cover activities, including the political and ideological activities of the union. *Janus* does not impact the lawfulness of union dues, but does require nonunion members to consent to any sort of fees to the union prior to such deduction being made. To the extent your memorandums of understanding provide that employees are automatically union members and dues payers unless they opt out of the union, such provision will need to be renegotiated with the union to comply with *Janus*, to demonstrate employees in the union have affirmatively consented to union membership.

Q. WHAT SHOULD I DO NOW?

A. The most immediate concern is ensuring that agency fee deductions are immediately stopped for employees designated as agency fee payers as of the decision's date. This will likely require working with the union to identify all agency fee payers and working with payroll to stop any agency fee deductions In contrast, for those employees who are dues payers and who have expressly consented to join a union or to pay union dues, employers are still required to deduct these employees' union dues.

However, it is possible that current dues payers may no longer wish to be part of the union, which will require

a more nuanced response given the recent passage of SB 866 limiting how an employer is able to respond to requests to change dues deductions. Specifically, for any employee who wishes to change their deduction authorization (i.e., become a union member or no longer be in the union) such requests are required to be processed by the union and the employer must implement any changes in deductions based on the representation of the union as to the employee's deduction authorization. Unless there is a dispute about the employee's deduction authorization, the union is not required to supply the employer with the employee's written authorization. It is important to recognize that the union may rely on SB 866 and refuse to provide employers with any tangible evidence of employee consent to union membership and fees deduction—like an authorization form. It is too early to determine whether the Legislature will pass cleanup legislation addressing this apparent conflict between SB 866's requirement that employers rely on a union's representation as to an employee's deduction authorization and *Janus*' requirement that non-members affirmatively consent to any fee paid to a union or consent to union membership.

Also, employees may have questions for administrators and management regarding the *Janus* decision, which will require careful navigation to ensure compliance with labor laws including recent amendments to the Education Code and Government Code under SB 866. You may also need to work with your County Office of Education. We have outlined these issues in our Implementation Checklist.

Q. WHAT IF I CANNOT IMMEDIATELY STOP AGENCY FEE DEDUCTIONS?

A. Depending on payroll processing, from a logistical standpoint it may not be possible to immediately stop agency fee deductions particularly for the month of June as most payrolls locked prior to the *Janus* decision being issued. In this situation, we recommend stopping any agency fee deduction as soon as possible for only those employees designated as agency fee payers as of the decision's date. For any agency fee deductions made after the *Janus* decision, it is the obligation of the union to reimburse employees for any fees improperly withheld. Many memorandums of understanding contain language that the union will defend and indemnify the employer for any claims related to an organizational security provision, including agency fee deductions Therefore, employees should be directed to contact the appropriate union for any reimbursement.

Q. WE HAVE A CLOSED CONTRACT (MEMORANDUM OF UNDERSTANDING), DO I NEED TO ASK THE UNION IF WE CAN RE-OPEN THE CONTRACT TO MAKE CHANGES TO ALIGN WITH THE *JANUS* RULING?

A. Probably not. Many memorandums of understanding contain a severability clause stating that if any provision of the agreement is held invalid by operation of law or by a court, the remaining provisions shall remain in full force and effect. If your agreement does not have this language, you may need to meet and negotiate the agreement to align with *Janus*. Also, as discussed above, given the affirmative consent requirement under *Janus*, a contract article that provides for an opt-out system, wherein employees are automatically in the union and dues payers unless they opt out, will need to be renegotiated.

Q. HOW DO I COMMUNICATE WITH EMPLOYEES ABOUT *JANUS*?

A. To begin with, there is no requirement that an employer communicate with employees about the *Janus* decision. Any communication with employees about *Janus* will need to be carefully crafted in order to comply with new and existing labor laws. While employers do possess free speech rights, they are not unlimited and have recently been further limited by SB 866. Under SB 866, a public employer is required to meet and confer with the union on the content of any mass communication concerning public employees' rights to join or support a union or to refrain from doing so. If the parties are unable to agree upon content of the mass communication, the employer may disseminate the communication but must, at the same time, distribute the union's own mass communication.

Q. DOES *JANUS* IMPACT COLLECTION OF UNION DUES?

A. Not in most cases. Aside from holding that involuntary agency fees are unlawful, the Court in *Janus* also made clear that membership in a union (and associated deduction of union dues) will not be implied and must be affirmatively consented to. Therefore, so long as the employee has expressly consented to join a union or to pay union dues, employers are required to deduct union dues. Most unions use a dues deduction authorization form that, depending on the language on the form, may already satisfy this requirement. If an employer is unsure as to whether union members have given this affirmative consent, we recommend the employer continue deducting dues but contact the union and ask for verification. If an employee challenges the decision, the union is required to indemnify the public agency for defending such challenges. If the union provides verbal verification that employees have given required written authorization we recommend that you confirm that verification in writing to the union. While a public employer must rely on representations by the union, it is best to confirm the representation in writing. We cannot require the union to provide a copy of the written authorization under SB 866 absent a dispute. Although an employer could theoretically halt dues deductions until it received evidence of affirmative consent to be in the union, this is risky and may result in a legal challenge from the union without any required indemnification by the union in such legal action.

Q. HOW DOES *JANUS* IMPACT NEW EMPLOYEES WHO DESIRE THE JOIN THE UNION OR NOT?

A. In *Janus*, the Court made no distinction between new employees and existing employees as it pertains to dues deductions, agency fees, and related affirmative consent. Again, if the employee chooses to join the union, the employer must honor that decision and commence dues deduction. Similarly, if an employee does not want to be in the union, the employer must honor that decision. For both, the employer is required, under SB 866, to rely on the representation of the union as to the employee's status as union member or nonmember. The sooner the employer obtains verification from the union, the sooner it can start deducting dues for new employees who have chosen to be in the union. It is possible that if an employer waits an unreasonable amount of time to begin deducting dues after the union has represented that the employee is in the union, the union may challenge such action and claim back dues are owed from the date verification of consent was provided. However, prior to verification by the union the status of employees as union members cannot be presumed. With this in mind, an employer might consider reaching out to the union and asking that notification verifying an employee's choice to be in the union or not be given to the employer as soon as possible or within a certain time prior to the date payroll is processed after the union obtains verification from the employee.

Q. CAN A UNION REQUIRE A UNION MEMBER TO REMAIN IN THE UNION FOR A SPECIFIC PERIOD OF TIME?

A. The *Janus* decision does not address this issue. However, it appears that an employee could consent to a commitment to remain in the union; however, a firm requirement that the employee commit to a specified lengthy period of time may raise First Amendment questions as to whether the consent given is sufficient. As a practical matter, this is an issue between the member and the union, as the employer must honor the representations made by the union as to an employee's deduction authorization status under SB 866.

Q. ANYTHING ELSE I SHOULD KNOW?

A. In anticipation of the *Janus* decision, labor unions throughout California lobbied legislators to obtain more protective and union friendly laws on the books in order to acquire and retain more dues payers. AB 119, requiring public employers to give unions access to new employee orientations and onboarding, is an example of these lobbying efforts that have translated into new law. In addition, SB 285, signed into law in October 2017, makes it unlawful for a public employer to "deter or discourage public employees from becoming or

remaining members of an employee organization."

As mentioned earlier, SB 866 will have a significant impact on public employers in California. Under SB 866, public employers are not able to obtain an employee's written authorization for payroll deductions to a union unless a dispute arises about such deductions. This could significantly hamper the ability to properly process payroll if the employer does not have up-to-date payroll records of who is an agency fee payer. The bill does provide for indemnification by the union for any disputes related to deductions but does not require the union to also defend the employer in those disputes. This means that the employer will need to defend any such claim and only after doing so would be entitled to indemnification by the union. Employers should review their memorandums of understanding, which may require the union to both indemnify and defend the employer in disputes related to deductions.

This bill also modifies AB 119, by providing that the time, place, and location of new employee orientations are confidential and can only be shared with the employee(s), union, and any vendor contracted to provide services for purposes of the orientation.

Finally, as discussed above, SB 866 provides that before a public employer distributes to employees any mass communication concerning their rights to join or support a union, or to refrain from doing so, it must confer with the union. This is significant and alters public agency operation above and beyond *Janus*.

There are likely to be a number of questions that arise. At each of our eight offices, we are here to help you navigate the complexities of the post-*Janus* world.

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IMPLEMENTATION CHECKLIST

BACKGROUND

On June 27, the United States Supreme Court decided the *Janus v. AFSCME* case. As a result, public employees may not be compelled to pay mandatory agency fees, or "fair share" fees, to public-sector unions, because such involuntary fees violate the First Amendment of the United States Constitution. The *Janus* decision immediately affects laws impacting public agencies that currently allow public sector unions to charge and collect agency, or "fair share" fees, and provides that neither an agency fee nor any other form of payment to a public-sector union by a non-member may be deducted from the employee unless the employee clearly and affirmatively consents before any money is taken from them. It follows that for an employee to waive his/her First Amendment rights by becoming a union member, an employee must consent to joining the union as waiver of such rights cannot be presumed under *Janus*.

In light of this monumental decision, the following checklist is designed to provide public agencies with a first set of considerations for implementing the *Janus* decision.

Phase One: Stop Agency Fee Deductions and Execute Your Communication Plan

AGENCY FEE DEDUCTION AND IMPACT

☐ ***Timing***

The Court's decision in *Janus* is effective immediately, meaning employees who are non-union members cannot be charged agency fees. Accordingly, employers must stop deducting agency fees from the paychecks of employees. Please see below for three practical options to do so.

☐ ***Identification***

Employers should have their human resources and payroll teams work collaboratively with the union leadership to identify employees who are agency fee payers and develop a cohesive strategy to ensure immediate compliance with *Janus*.

☐ ***Impact of SB 866***

California's newly adopted Senate Bill ("SB") 866 creates an added layer of potential complication in implementing the *Janus* decision, because it modifies the law to require public employers to rely on the representations of the union regarding an employee's deduction authorizations. This likely leaves public agency employers with three options: (1) stop agency fee deductions immediately without communication with union leadership; (2) stop the agency fee deductions after providing a minimal amount of notice to union leadership as to the employees who the employer believes to be agency fee payers and whose deductions will be halted with the July paycheck; or (3) stop the fee deductions after the union and employer agree to the list of employees whose fees will be deducted and have the union defend and indemnify the district if fees are deducted prior to reaching agreement.

☐ ***Updates***

For many public employers, it will be critical to accurately update payroll records to ensure impacted employees are no longer charged agency fees going forward.

COMMUNICATION

☐ ***Plan***

Implement a communication plan to address the likely questions that will come from employees and unions in the days and weeks following this decision.

☐ ***Central Contact***

Consider identifying a single point person that can respond to questions regarding the impacts of the *Janus* decision.

☐ ***Tone***

In developing these communication strategies regarding whether, and how, to communicate the *Janus* decision to employees, employers are encouraged to remain neutral and mindful of applicable law, including Senate Bill 285, prohibiting employers from deterring or discouraging public employees from becoming or remaining members of a union. If the agency wants to transmit a mass communication to employees concerning *Janus*, depending on the content, it may be obligated to meet and confer with labor partners over such communication under SB 866.

☐ ***Internal Updates***

Provide ongoing updates regarding the case and corresponding impacts to district managers and supervisors, as well as governing board members.

☐ ***Talking Points***

Disseminate key messages to approved spokesperson(s) in the event they are faced with questions about the *Janus* decision.

Phase Two: Bargaining Options Post-*Janus*

The following list outlines immediate and representative areas of considerations and questions that your agency will need to contemplate. Given the uniqueness of memorandums of understanding, SB 866 and the *Janus* decision will have varying and individual impacts for public agencies. The following common clauses in MOUs now merit review:

☐ ***Recognition***

How does my MOU apply to union members and non-union members? Does it need to be clarified?

☐ ***Union Rights***

How does this decision impact access to employees and prospective employees?

☐ ***Severability/Savings***

Do I have a severability clause in my MOU that renders any provisions contrary to *Janus* and/or SB 866 severable from the remaining valid provisions of the MOU?

☐ ***Opt-Out Provisions***

Do they comply with this ruling?

☐ ***Religious Objection Clauses***

Are these still relevant?

☐ ***Hiring Forms***

How will I need to modify the form? Do we have employees fill out the form? Am I required to bargain any modifications?

* These guidelines provide a quick desk reference for California municipal agencies to use in response to the Janus decision. Municipal agencies should review their own policies and adopt practices in accordance with those terms. This is not an exhaustive summary of applicable law and should not be construed as legal advice.

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LEGISLATIVE UPDATE
PENDING BILLS RELATING TO *JANUS*

BILL NUMBER/DESCRIPTION (June 27, 2018)

AB 2017. Public employers: employee organizations.

Public employers are prohibited under existing law from deterring or discouraging public employees from becoming or remaining members of an employee organization. This bill broadens the definition of "public employer." This bill would also prohibit public employers from deterring or discouraging *prospective* public employees from becoming or remaining members of an employee organization.

AB 2154. Public Employment: Labor Relations: Release Time.

This bill specifies requirements for paid release time for union representatives for certain specified activities. The bill would require the exclusive representative to provide reasonable notice requesting such an absence.

AB 2577. Personal income taxes: deductions: labor organization dues.

This bill, for a specified period of time, would authorize as a deduction from gross income the amount paid or incurred during the taxable year for member dues to a labor organization paid by a taxpayer.

AB 3121. Evidentiary privileges: union agent-represented worker privilege.

This bill provides that, in general, a union agent and a represented employee or represented former employee would have a privilege to refuse to disclose confidential communications between the employee or former employee and the union agent which were made when the union agent was acting in his or her representative capacity. The bill provides that a represented employee or represented former employee would generally also have a privilege to prevent someone else from disclosing such a privileged communication. This bill describes additional waiver provisions and also states that this privilege would *not* apply in criminal proceedings.

SB 1085. Public employees: leaves of absence: exclusive bargaining representative service.

This bill would require, when requested by the exclusive representative of an employee, that a public employer grant leaves of absence, without loss of compensation or other benefits, to allow employees to serve as stewards or officers of the exclusive representative, or of any statewide or national employee organization with which the exclusive representative is affiliated.

Further, as provided in this bill, the steward or representative would have reinstatement rights at the end of this leave. Specifically, they would have a right of reinstatement to the same position and work location held before the leave, or if this is not feasible, a substantially similar position without loss of seniority, rank, or classification.

The bill would require the exclusive representation or employee organization to reimburse the public employer for all compensation paid to the employee on this type of leave, unless otherwise agreed to. The bill would also provide that a public employer is not liable for acts, omissions, or injuries by employees that occur during this type of leave.

Assembly Concurrent Resolution (ACR) 185. Unions.

This measure would declare that the Legislature recognizes unions and their efforts to represent workers. Among other declarations, the measure would declare that the Legislature supports the organizing of workers who continue to fight for union rights.

SAMPLE LETTER TO BOARD MEMBERS

The United States Supreme Court recently decided the highly-anticipated *Janus v. AFSCME* case in a 5 - 4 decision that alters the landscape of public sector employment relations and collective bargaining. Overturning longstanding precedent, the Court held that public employees may not be compelled to pay mandatory agency fees, or "fair share" fees, to public-sector unions, because such involuntary fees violate the First Amendment of the United States Constitution.

Janus v. AFSCME challenged the constitutionality of requiring public employees who are not union members to pay compulsory agency fees to an exclusive representative. Mark Janus is an Illinois public sector employee who sued the American Federation of State, County and Municipal Employees ("AFSCME"), arguing a state law allowing the union to charge and collect fees from non-members, including Janus, violated his and other workers' First Amendment rights.

Agency fee payers are employees who work under an agency fee system who have opted out of the union. Through agency fees, these employees are required to pay the costs associated with collective bargaining, grievance processing, and contract administration, among other things. Agency fee payers cannot be compelled to pay for the political and ideological activities of the union. At least 22 states, including California, have laws that provide for agency fees. Under *Janus*, these agency fee statutes are no longer constitutional. Dues payers, on the other hand, are employees who are members of the union and pay dues to the union for both the matters that agency fee payers pay for, and also for the political and ideological activities of the union. *Janus* does not immediately impact dues payers because these employees have chosen to be part of the union. However, the *Janus* decision held that employees who choose not to be in the union must affirmatively consent to any payment made by that nonmember to the union. Similarly, *Janus* requires employees to affirmatively consent to be in the union, which could impact public agencies that have a union contract providing for an opt-out system wherein the employee is automatically in the union and a dues payer unless he/she opts out of union membership.

The Supreme Court previously decided this issue in 1977 in *Abood v. Detroit Board of Education*, then holding it constitutional for public sector unions to collect fees from nonunion members, to defray the cost of collective bargaining and other activities, provided nonunion members are not required to pay for a union's political activities. This has been the law for over forty years, until now.

In anticipation of the *Janus* decision, labor unions throughout California lobbied legislators to obtain more protective and union friendly laws on the books in order to acquire and retain more dues payers. Assembly Bill ("AB") 119, requiring public employers to give unions access to new employee orientations and onboarding, is an example of these lobbying efforts that have translated into new law. In addition, Senate Bill ("SB") 285, signed into law in October 2017,

makes it unlawful for a public employer to "deter or discourage public employees from becoming or remaining members of an employee organization." SB 866—signed by the Governor on June 27, 2018—was immediately effective and contains several provisions, one of which will impact certain public agency communications. This bill provides that any mass communication made by a public employer concerning public employees' rights to join or support a union, or to refrain from doing so, is subject to the meet and confer process with the union(s). In the event the parties are unable to reach agreement on the content of the communication, the District is able to distribute the communication, but also must simultaneously distribute the union's own mass communication. "Mass communication," is defined as "a written document, or script for an oral or recorded presentation or message, that is intended for delivery to multiple public employees." At least one employee organization appears to interpret mass communication as a communication to more than one employee. There are several other active bills that, if passed, would further expand union rights in California.

Given the above, it is critically important that Board Members, as representatives of the public agency, are aware of these limitations on communications regarding union participation and tailor any comments or responses to questions accordingly. If an employee asks you questions about the *Janus* case, the recent legislation, or whether to join or stay in the union, we strongly recommend that you refer them to their labor organization for answers to those questions. We also recommend that you be mindful of any comments that you may make that could be construed as deterring or discouraging union participation as we expect this limitation will be broadly construed. If you have any questions, or if you need to direct our employees to a District contact, please reach out to _____ [likely Human Resources or Personnel].