CLIENT NEWS BRIEF

Overturning Longstanding Precedent, Supreme Court Rules that Non-Union Members Cannot Be Required to Pay Agency Fees

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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."

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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 Public Agency 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 applicable 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.

Guidance Measures - Full Suite of Resources

Lozano Smith has partnered with leading associations and has also developed several training opportunities and resources to assist public agency employers in addressing new requirements and obligations. We invite you to download and register for any of the following:

- **Webinar:** Join a panel of Lozano Smith attorneys for a live webinar on Friday, June 29. This interactive podcast will break down the *Janus* decision and SB 866 and offer a guide for implementation. Registration is open here.

- **Toolkit:** Lozano Smith will be soon publishing an in-depth resource with answers to frequently asked questions, an implementation checklist, templates for communication, and more.

For assistance responding to the immediate and long-term impacts of *Janus*, please contact the authors of this Client News Brief or an attorney at one of our eight offices located statewide. You can also visit our website, follow us on Facebook or Twitter or download our Client News Brief App.