# CLIENT NEWS BRIEF

## Supreme Court Rules Public Sector Union Agency Fees Are Unlawful

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Overturning a longstanding precedent, the United States Supreme Court has held in *Janus v. AFSCME* that public employees may not be compelled to pay mandatory agency fees, or "fair share" fees, to public-sector unions, because such fees violate the First Amendment.

The *Janus* decision will have a sweeping, nationwide impact on public sector labor unions. The Court's 5-4 decision immediately affects laws in at least 22 states, including California, that currently allow public sector unions to charge and collect agency or fair share fees.

**Background**

Mark Janus is an Illinois public sector employee who sued the American Federation of State, County and Municipal Employees (AFSCME), arguing that a state law allowing the union to charge and collect fees from non-members violated his and other workers' First Amendment rights.

The Supreme Court previously decided this issue in 1977 in the case of *Abood v. Detroit Board of Education*, then holding it was constitutional for public sector unions to collect agency fees from nonunion members to defray the cost of collective bargaining and other activities, provided nonunion members were not required to pay for a union's political or ideological activities. The Court now holds in *Janus* that states and public-sector unions may no longer collect agency fees from nonconsenting employees.

The Court held that compelling employees to subsidize the speech of private speakers, including public-sector unions, violates the First Amendment, noting 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."

Critically, "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." In anticipation of the ruling, California's newly adopted Senate Bill (SB) 866, signed into law by the Governor on June 27, makes several changes regarding public employers' deduction of union dues and fees. Among these is a requirement for public employers to rely on the representations of the union regarding an employee's deduction authorizations. Given the Supreme Court's holding, this provision of SB 866 potentially runs afoul of the First Amendment, as interpreted and applied in *Janus*.

Additional notable statements made by the Court in *Janus* include:

- Unions can be effective even without agency fees, without which designation of a public-sector union as the exclusive representative still confers many benefits.



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- Representation of nonmembers, even without agency fees, furthers the union's interest in keeping control of the administration of the collective bargaining agreement, since the resolution of one employee's grievance can affect others.

- Going forward, it would likely be unconstitutional for a public sector employer to adopt a collective bargaining agreement that discriminates against nonmember employees.

- Individual employees who are not members of a union may potentially be required to pay for certain services of a union, such as representation at 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. 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.

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- **CASBO Workshop:** The Northern Section Human Resources Professional Development Workshop Series will feature Dulcinea Grantham presenting a legal update exploring the impact of *Janus*. Registration is open here.

- **ACSA FAQ:** Lozano Smith helped lead the development of a comprehensive overview specific to *Janus* and SB 866. This FAQ is available for download here.

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.