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CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION

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To: Schools Legal Service Clients

From: Timothy L. Salazar, Esq./Melissa H. Brown, Esq.

Re: Next Steps in a post-*Janus* World

On June 27, 2018, the United States Supreme Court issued its decision in *Janus v. American Federation of State, County, and Municipal Employees (AFSCME), Council 31, et al. (Janus)*.¹ In a 5-4 ruling, the Court held that mandatory "agency fees" (union fees collected from nonmembers) imposed on nonconsenting public sector employees are unconstitutional. As a result, public school employers, including public school and community college districts and county offices of education, must cease agency fee deductions immediately.

Background

The facts in *Janus* are now well publicized. Mark Janus is employed by the state of Illinois as a child support specialist and works in a unit represented by the AFSCME union. Mr. Janus refused to join the union because he opposes many of its public policy positions, including those it takes in collective bargaining. Nevertheless, under his unit's collective bargaining agreement, he was required to pay an agency fee of \$44.58 per month.² Mr. Janus claimed all "nonmember fee deductions are coerced political speech" and that "the First Amendment forbids coercing any money from the nonmembers."³

The Supreme Court held in its landmark ruling that ". . . states and public-sector unions may no longer extract agency fees from nonconsenting employees."⁴ The Court overturned a four decades old decision in *Abood v. Detroit Board of Education*⁵ and ruled that compulsory agency fees violate the First Amendment and cannot continue. The Court's decision and its ramifications pertaining to public school employers take effect immediately.

¹ 2018 U.S. Lexis 4028, 2018 WL 3129785.

² *Id.* at 2-3.

³ *Id.* at 5-6.

⁴ *Id.* at 48.

⁵ 431 U.S. 209 (1977).

California school districts typically deduct union dues from payroll checks for those employees who sign and submit union membership application forms authorizing dues deductions. Government Code section 3546 authorizes mandatory "fair share service fee" ("agency fee") deductions from public school employees who choose not to join the union. The *Janus* decision focuses on agency fee payers and renders Government Code section 3546 unenforceable.

The *Janus* ruling does not affect an agency fee payer's status as a "bargaining unit employee." Unless the former agency fee payer joins the union as a dues paying member, the fee payer will become a non-union bargaining unit employee. The employee will remain covered by the applicable collective bargaining agreement, but the association(s) may impose limitations on representational matters.

This update is intended to provide guidance in the wake of the *Janus* decision and in light of related state legislation on which we have previously reported.

RECOMMENDED NEXT STEPS

Agency Fee Payer Lists/Communication with Unions

As previously recommended, public school employers should have updated and/or created a list of agency fee payers for each of their bargaining unit(s) and prepared payroll departments to initiate procedures to discontinue agency fee deductions as required by the Court's decision. We understand many associations have provided districts with lists of their agency fee payers. Employers should communicate now with each association regarding cessation of agency fee deductions and confer with the association regarding an accurate list of agency fee payers.

The *Janus* decision was issued after most employers processed their June payroll. If applicable, we recommend employers inform the association in writing that agency fees for the full month of June were deducted and transmitted to the association, providing a list of each affected employee. We have template letters to the associations addressing various options which can be tailored to your specific needs and provided to you on request.

Some districts do not have any agency fee payers in their bargaining unit(s). In these districts, no further action is required other than to continue processing and withholding union membership dues deductions.

Demands to Bargain

Severability provisions in collective bargaining agreements render invalid and unenforceable provisions declared to be illegal by a lawful authority. *Janus* invalidates provisions in collective bargaining agreements requiring mandatory agency fee deductions. Unless addressed during annual collective bargaining negotiations, we can expect demands for effects bargaining from associations.

Communications with Employees

As previously noted, the law restricts communications between a public school employer and employees which could discourage union membership.⁶ If any bargaining unit member makes inquiries to the employer regarding their membership status, the district should not engage in any substantive discussions with the employee and instead refer the employee to the association.

Any employee request to cancel or change authorizations for union dues payroll deductions must be directed to the union, not the employer, and the union is responsible for processing these requests.⁷ The employer must rely on information provided by the union regarding whether union dues deductions were properly canceled or changed, and the union must indemnify the employer for any claims made by the employee for deductions made in reliance on information provided by the union.⁸

Communications to Multiple Employees Regarding Union Membership

New Government Code section 3553 provides that before a public employer disseminates "mass communications" (defined as any written document or script for an oral or recorded presentation or message intended to be delivered to multiple employees) to employees or applicants concerning employees' rights to join or support a union, or to refrain from joining or supporting a union, it must meet and confer with the exclusive representative concerning the content of the mass communication. If the employer and the representative cannot agree on the content, and if the employer still chooses to disseminate the mass communication, the employer must at the same time distribute a mass communication of reasonable length provided by the union.

We continue to recommend that employers (including board members, administrators, and supervisors) not engage employees in discussions about union membership dues or otherwise disseminate correspondence on the topic. Employees should be directed to the association for information on any matter related to their union status.

⁶ Government Code section 3550.

⁷ New Education Code sections 45060(e), 45168(a)(6), 87833(e), and 88167(a)(6).

⁸ A certified or recognized union that certifies it has and will maintain individual employee authorizations is not required to submit to the employer a copy of the employee's written authorization in order for the payroll deductions, unless a dispute arises about the existence or terms of the authorization. The union must indemnify the employer for any claims made by the employee for deductions made in reliance on its notification.

Employer-employee relations post-*Janus* will be a fluid scenario. We will continue to provide guidance and updates as necessary.

Please feel free to contact our labor and employment attorneys/negotiators with questions or concerns regarding *Janus* or any of the above information.

MBH/TLS:clr