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## JANUS V. AFSCME SUPREME COURT DECISION FREQUENTLY ASKED QUESTIONS

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This information is intended to assist your organization with the initial questions that have arisen from the Janus v. AFSCME Supreme Court decision and related legislation in California, Senate Bill 866. As it is not legal advice, we recommend that you consult with legal counsel should you have additional questions.

### FREQUENTLY ASKED QUESTIONS:

**Q:** Why haven't I heard about SB 866?

**A:** *SB 866 was amended at the last minute as a budget trailer bill allowing it to be fast-tracked through the legislature and signed by the Governor on June 27, 2018.*

**Q:** When does SB 866 take effect?

**A:** *Because SB 866 is a budget trailer bill and was signed by the Governor, it is now the law.*

**Q:** Does the new legislation override the Janus decision?

**A:** *State law cannot override a U.S. Supreme Court decision holding a law unconstitutional. The Janus decision calls into question the constitutionality of SB 866. Janus examined required union dues, while the legislation provides for employee written authorization to collect union dues. As discussed in later answers, there is an inconsistency between the language in SB 866 and the Janus decision requiring districts to make a decision as to how they want to proceed.*

*SB 866 authorizes, among other things, public sector unions to request payroll deductions and requires public employers to honor those requests without reviewing a copy of the individual authorization. It is not clear at this time whether that satisfies the Court's "clear and compelling evidence" standard. For now, however, SB 866 is the law in California. We will continue to update this FAQ regarding the impact of SB 866 intersecting with Janus.*

**Q:** Does SB 866 impact a public employer's ability to communicate with employees about the Janus decision?

**A:** *Yes. Any "mass communication" you send to your employees or applicants concerning their rights to join/support or refrain from joining/supporting their union, requires a meet and confer process with the applicable union. If agreement cannot be reached on the contents of the communication, the employer may send out the mass communication but must also distribute at the same time the union's own mass communication to public employees.*

*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. Please keep in mind, this provision will have a significant impact on public employer mass communications beyond discussion of the Janus decision.*



**Q:** What can/should/cannot we say to employees about Janus and SB 866?

**A:** *It is critically important that Board Members and administrators, as representatives of the school district, be aware of the limitations SB 866 places 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.*

**Q:** What about communication with the public?

**A:** *Although SB 866 does not on its face refer to mass communications to the public, a public school employer should be wary of communications made to the public at a board meeting or on the district's website as these may still be construed as mass communications necessitating the meet and confer process since school districts know that employees attend board meetings and frequent the district's website. For these types of communications, the same mindfulness should be exercised as when communicating with employees about the Janus decision and related issues.*

**Q:** Which employees does Janus cover?

**A:** *Janus covers any and all public employees who are in positions represented by a union and who elect not to be union members. The most immediate impact is on public employees who were agency fee payers prior to June 27, 2018. Agency fee payers are employees operating under an agency fee system and have chosen to opt out of the union. Through agency fees, these employees were required to pay the cost associated with collective bargaining, grievance processing, and contract administration, among other things. Prior to Janus, agency fee payers could not be compelled to pay for the political activities of the union. After Janus, all agency fees or other payments by non-members to a union violate the First Amendment of the U.S. Constitution, unless the employee affirmatively consents to pay.*

**Q:** Does Janus trigger an obligation to negotiate?

**A:** *No, in most cases. Most collective bargaining agreements contain a severability clause providing that if any provision of the agreement is unlawful it is essentially "severed" from the agreement, while the remaining provisions remain in full force and effect. Therefore, any language addressing agency fees in an agreement conflicting with Janus is null and void, while the rest of the agreement would remain intact. However, districts and unions may have to meet and negotiate over the impacts of the Janus decision on other areas of collective bargaining agreements.*

**Q:** What will the effect of Janus/SB 866 be on hiring, collective bargaining/due process?

**A:** *Many of the effects of Janus at the bargaining table are not known at this time. As to hiring, SB 866 makes confidential the date, time and location of employee orientations, aside from notifying the employees attending the orientation, the exclusive representative, and vendors providing services at the orientation.*

**Q:** How should I prepare my payroll department to handle dues deductions and requests to stop them?

**A:** *Immediately alert your district's payroll and business teams about the case and legislation. Since the June payroll has already locked, determine the implications on processing payroll in July and subsequent months. Establish internal protocols with regard to receipt and implementation of written notifications from union officials regarding initiation and cessation of union dues and agency/service fee deductions; including processing of any retroactive reimbursements. If necessary, consult with business services of your County Office of Education.*

**Q:** When does payroll stop agency fee deductions in light of the Janus ruling?

**A:** Under Janus, “(n)either an agency fee nor any other payment to the union may be deducted from a nonmembers’ wages, nor may any other attempt be made to collect such a payment unless the employee affirmatively consents to pay.” SB 866 states that dues or other payments to the union must be deducted unless the union notifies the district that the employee has revoked consent for such deductions. SB 866 cannot overrule Janus, but it does raise questions for making these deductions. Because of the inconsistency, districts should work with their legal counsel to determine how to proceed with stopping agency fee deductions.

**Q:** What is the process if a union member notifies us that they would like to opt out of paying dues?

**A:** Based on the language of SB 866, if an employee notifies the district of his/her desire to opt out of paying dues/discontinue membership in the union, district staff must refer the employee directly to the union in order to work out termination of union membership/agency fee deductions. The district cannot unilaterally implement such employee request. Confirm with union leaders to whom employees should be directed and how, and communicate the process to all payroll, business, and human resources department staff. While Janus dealt specifically with agency fees, there is broad language noted above that seems to prohibit any deduction for union payments without the employee’s express consent. Under SB 866, the employee provides the union, not the District, with their revocation and the District is to rely on the union’s information that the deduction was properly cancelled or changed. Again, because of the inconsistency between Janus and SB 866, you should work with counsel as these issues arise.

**Q:** What impact does Janus have on agency/service fee provisions in our collective bargaining agreement(s)?

**A:** The Court declared agency/service fee payments unconstitutional making those provisions in current collective bargaining agreements null and void, effective immediately. SB 866 triggers the obligation for districts and unions to meet and negotiate to address the impacts of the judicial decision (as well as the impacts of SB 866) on such provisions as well as other related issues within the mandatory scope of bargaining.

**Q:** What impact does Janus have on “maintenance of membership” provisions in our collective bargaining agreement(s)?

**A:** Depending on the particulars of your “maintenance of membership” provisions, Janus will likely invalidate these provisions. Specifically, the Court ruled that compelling agency fees or union dues is unconstitutional resulting in the maintenance of membership provisions that require non-union members to remit payment to a union unconstitutional. Your CBA probably includes a “severability” clause that maintains all valid provisions if one or more terms is declared invalid or unlawful.

**Q:** If employees ask us questions whether they can opt out of their union and the effects of doing so (i.e., whether they are still covered by the CBA), what do we tell them/can we tell them?

**A:** Districts may continue to answer questions from individual employees, including telling employees they have the right to join or not to join a union. Under SB 866, the district must mutually agree with the unions about the contents and dissemination of any mass communications – a communication to multiple employees. If individual employees ask whether they are still covered by a CBA, the answer is yes. If an employee has completed an authorization for deduction of union dues and wishes to revoke that authorization, under SB 866 the district must direct them to their union. Districts should also be mindful of the prohibition against deterring or discouraging applicants for employment or employees from becoming or remaining union members.

**Q:** If an employee does not pay dues, what level of representation are they entitled to?

**A:** *With regard to disciplinary matters, the Court noted that there are less restrictive means than agency fees to mitigate the risk of non-members who seek representation in disciplinary proceedings or altogether deny representation. The level of representation afforded to non-paying employees will therefore depend on the specific maintenance of membership provisions in a CBA to the extent those provisions remain in force after the Janus ruling. Some provisions provide for “reasonable costs” to be paid by an employee who is not a union member but who uses the grievance or arbitration provisions of a CBA. Districts and their unions may need to renegotiate these provisions in light of Janus.*

**Q:** If an employee does not pay dues, does the union contract apply to them?

**A:** *Yes, a CBA applies to all classifications that are part of a bargaining unit. If an employee’s classification is within the bargaining unit represented by a union, then the CBA applies to that employee.*

**Q:** Unions have expressed concerns about anti-union organizations attempting to contact members of their bargaining unit. What are our obligations if we are contacted by one of these organizations?

**A:** *If anti-union organizations ask the district to distribute any communications to employees, the district should proceed with caution. Districts must not - under existing law - deter or discourage applicants for employment or employees from becoming or remaining union members. SB 866 requires a district to meet and confer with the unions concerning the contents of any mass communication. Districts have no other obligations if contacted by an anti-union organization.*

**Q:** Does SB 866 impact union access to new employer orientations?

**A:** *Yes. Many districts have completed negotiating union access to new employee orientations as required by AB 119. SB 866 amends the law to prohibit the disclosure of the date, time, and place of the orientation to anyone other than the employees, exclusive representative, or a vendor that is contracted to provide a service for purposes of the orientation.*

**Q:** How do we comply with a Public Records Request for information on the employee orientation?

**A:** *Because SB 866 prohibits disclosure of the information, districts must redact the date, time, and place of the orientation from any public record request. It is advisable to keep a record of the response to such a request to demonstrate that this information was not disclosed. The prohibition on disclosure applies only to employers; nothing prevents employees themselves from publicizing this information.*

**Q:** What other steps do you recommend we take?

**A:** *Districts should review their CBAs, in particular their specific maintenance of membership provisions. If these provisions or any part of them are declared unconstitutional by the Court, districts should be prepared to negotiate new provisions that comply with the Court’s ruling and SB 866.*

**ADDITIONAL REFERENCE POINTS AND INFORMATION DISTRICTS SHOULD CONSIDER COMPILING AS YOU NAVIGATE THE POST-JANUS LANDSCAPE ARE:**

- » How many employees does the district have?
- » How many different union groups are in your district?
- » How many employees are in each group?
- » What are the average annual individual union dues?
- » How many employees in the district have already opted out of union membership and only pay agency fees?
- » Is income taxed before or after dues deduction?
- » Are pensionable (STRS/PERS) earnings calculated before or after union dues deductions?

**LOOK FOR ADDITIONAL UPDATES TO COME FROM ACSA AND THE LEGAL ALLIANCE.**