

Agenda

- 1. How We Got Here
- 2. What Cities did to Prepare for Janus
- 3. Holding in Janus v. AFSCME
- 4. State Response to Janus (SB 866)
- 5. A Month Later: What's Happening Now?

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- Union positions on Janus and SB 866
- City responses
- Open Questions

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How We Got Here



Union Membership Pre-Janus

Under the Meyers-Milias Brown Act:

- Employees have the right to join employee organizations (i.e. labor associations or unions)
- Unions may implement "agency shop" by:
 - Agreement between agency and union, or
 - By a vote of the bargaining unit members.Government Code § 3502.5.
 - "Service Fee" becomes condition of employment

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Union Membership Pre-Janus

- Abood v. Detroit Bd. Of Ed. (1977)
 - Supreme Court upheld as constitutional state statute authorizing "agency shop" for local government employees, whereby every employee represented by the union, must pay a "service charge" as a condition of employment, even if not a union member.
 - For duties "germane" to collective bargaining
 Not for ideological expenditures
- Friedrichs v. CFTA (2016)
 - No change, split court...

Anticipated Holding in Janus

 That Abood would be overturned by majority of now-filled Supreme Court...

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What Cities Did to Prepare for Janus

• Pre-Janus, cities prepared...

- Do our labor agreements have agency shop provisions?
 - Also commonly called "Fair share" or "Service Fee"
- Do we know who the fair-share payers or religious objectors are?
 - If not, follow up with the union for membership information
- Can payroll stop deducting fees (and how quickly)?
- Draft memos to employee organizations anticipating Janus decision and informing of consequences

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Holding in Janus v. AFSCME

Janus v. AFSCME

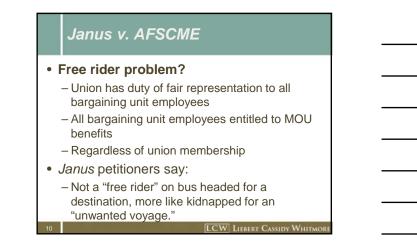
• U.S. Supreme Court holds public sector agency shop unconstitutional

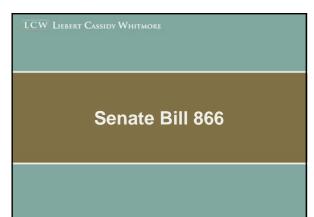
- Service fees are subject to First Amendment protection because labor negotiations touch on matters of "public concern"
- Need clear and affirmative consent from employee before making wage deduction
 - Cannot "waive" first amendment right by abstention/presumption
- Court not persuaded by counter arguments regarding "labor peace" and "free rider problem" (Abood justifications)

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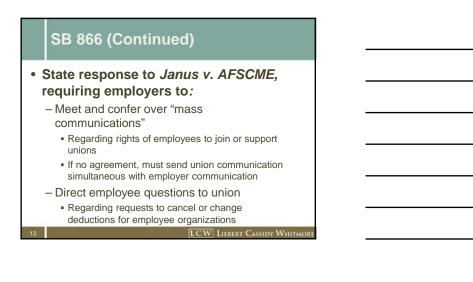
SB 866

• State response to Janus v. AFSCME, requiring employers to:

- Honor requests to deduct union membership dues from employee payroll
 - Employers "shall honor" these requests
- Rely on union certification that they have and will maintain dues deduction authorizations
 - Cannot ask for copies or documentation
 - Unless dispute re existence or content arises

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SB 866 (Continued)

• State response to Janus v. AFSCME, requiring employers to:

Keep employee orientations confidential:
Date, time and place must be confidential.

 May be disclosed to employees, exclusive representative, or a vendor contracted to provide services for the purposes of the orientation.

SB 866, Effective Date

• When Did Senate Bill 866 Take Effect?

- June 27, 2018
- About 3 hours after Janus holding
- Had "urgency status" as budget trailer bill

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What's Happening Now?

- Requests from unions
 - To comply with law
 - To go further than law requires
- Requests from employees
 - To change membership status
 - To intervene when feeling ignored or "harassed" by union
- Questions left unanswered
- · Forthcoming challenges

Requests from Unions - Example 1

- Stop agency fees immediately...
- How should employer respond?
 - This is required by *Janus*, so must comply with this request, *but*
 - Don't release union from responsibility to indemnify employer for disputes arising from fees.

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Requests from Unions - Example 2 • Provide report of employees for whom fees were ceased, day ceased, amount of charges ceased, within 15 days.

- Must Employer Respond?
 - Yes, union still entitled to information relevant and necessary to representational duties, but
 - Timeline is not statutorily set, but cannot unreasonably delay

Requests from Unions - Example 3

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- Meet and confer over language to replace agency fees, whether or not contained in current MOU
- Must employer do so?
 - See MOU, consider severability and zipper clauses
 - If no policy or MOU provision, impacts and effects bargaining still applies, but
 - Employer has no obligation to work with union to develop "language to replace fees" (*they're unlawful!*)
 - Obligation is to comply with law, impacts bargaining.

Requests from Unions - Example 4

- Direct to union, inquiries or requests from employees (members or fee payers) about:
 - The Janus decision
 - Requests to stop paying dues or fees, or
 - Questions regarding agency fees, dues, union membership, or current law regarding public employee unionionism...
- · Warning that such communications from employer may be "deemed to deter or discourage" membership, in violation of MMBA.

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Requests from Unions - Example 4 (Continued)

- Must employer comply with directive?
 - <u>Must not</u> deter or discourage membership, and
 <u>Must</u> direct employee to union *if* question is in relation to request to cancel or change deductions for employee organizations, but
 - May still *otherwise* respond to employees.
 - Best Practice: Direct union-related questions to the union. Ask union who to direct communications to (a good relationshipbuilding opportunity).

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Requests from Unions - Example 5

- Meet and confer with the union over mass communications
- Must employer comply?
 - Not if it's not sending a mass communication regarding employees' rights to join or support unions
 - But, consider whether good relationshipbuilding opportunity, e.g. opportunity to agreeupon messaging

Requests from Unions - Example 6

- Remind management that it is illegal to discourage or dissuade employees from becoming or remaining union members.
- Must employer comply?
 - No; how the agency directs its managers is up to agency, but
 - True that managers *should not* be discouraging or dissuading employees from joining unions, not a bad idea to remind!

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Requests from Unions - Example 7 Place disputed fees in an escrow account. Must employer comply? No; not a requirement from Janus or SB 866, but Probably a good idea!

Requests from Unions - Example 8

- Do not respond to PRA Requests for Records identifying who is/is not a union member.
- How should agency respond?
 - Considerations:
 - It is the employer's responsibility to respond to PRA and determine whether it must do so.
 - Employer will be the party responsible for defending related lawsuit/writ

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Requests from Employees -Example 1

- Discontinue union membership
- How should employer respond?
 - Direct employee to union
- What result?
 - It depends!
 - Maintenance of Membership provisions
 - Membership enrollment/contracts between
 - employee and union

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Requests from Employees -Example 2

- Discontinue agency shop fee
- How should employer respond?
 Provide factual information regarding status of fee (i.e. they have already been ceased)
 - Direct employee to union with questions

Requests from Employees -Example 3

- Tell union to stop harassing/bullying me, investigate harassment
- How should employer respond?
 - Carefully review, case by case analysis
 - BUT beware, could be protected union activity, may not be appropriate for employer to get involved

Questions Left Unanswered

• Date of *Janus* versus date of payroll, how to handle over/under charge to employee or payment to union?

Possible Approaches: Prorate if possible Reimburse employee if not remitted to union Union to reimburse if remitted

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	Questions Left Unanswered
	Are maintenance of membership provisions now unlawful?
	Maybe.
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Questions Left Unanswered

• Must union/employer reimburse serve fee payers for pre-*Janus* Agency fees?

To Be Determined . . .

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Questions Left Unanswered

• Who's responsible for erroneously withheld / paid fees?

It depends!





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Questions?

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