

LCW LIEBERT CASSIDY WHITMORE



Next Steps for Cities after
Janus v. AFSCME
and S.B. 866
League of California Cities
Webinar | August 2, 2018

Presented By: Laura Kalty

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?

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

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How We Got Here

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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...

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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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Janus v. AFSCME

- **Free rider problem?**
 - Union has duty of fair representation to all bargaining unit employees
 - All bargaining unit employees entitled to MOU benefits
 - Regardless of union membership
- *Janus* petitioners say:
 - Not a “free rider” on bus headed for a destination, more like kidnapped for an “unwanted voyage.”

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Senate Bill 866

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:**
 - Meet and confer over “mass communications”
 - Regarding rights of employees to join or support unions
 - If no agreement, must send union communication simultaneous with employer communication
 - Direct employee questions to union
 - Regarding requests to cancel or change deductions for employee organizations

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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.

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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?

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

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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

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Requests from Unions - Example 3

- **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.

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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 unionism...
- 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?**
 - Must not deter or discourage membership, and
 - Must 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 relationship-building 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 relationship-building opportunity, e.g. opportunity to *agree-upon* messaging

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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!

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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

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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

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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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Where are we going from here?

- **Things we're likely to see:**
 - Employees seek to leave membership
 - More challenges to unions from “right to work” groups
 - Challenges to SB 866
 - Unions take additional steps to encourage membership, demonstrate value
 - State legislative action / clean up bills

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Questions?

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