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DATE: June 29, 2018

TO: California Community Colleges

FROM: Marc LeForestier
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SUBJECT: **Advisory 18-03: Union "Fair Share" Fees; *Janus v. AFSCME* and Senate Bill 866 (2018)**

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This advisory provides information regarding the recent decision by the United States Supreme Court in *Janus v. American Federation of State, County and Municipal Employees* (2018) ___ U.S. __, 2018 WL 3129785, and provisions in California Senate Bill 866, which was signed this week. Both developments have implications for the collection of union dues by public agency employers and public employee organizations in California. Community college district officials should direct questions about the implementation of the *Janus* decision and Senate Bill 866 to your local counsel.

## A. The *Janus* Decision

For more than forty years, the United States Supreme Court has held that a labor union may compel the employees it represents to share the costs of collective bargaining and other forms of representation, but that the costs of a labor union's political activities may be shared only voluntarily. (*Abood v. Detroit Bd. of Ed*. (1977) 431 U.S. 209, 261.) Only a decade ago, the Court unanimously described the *Abood* rule as "a general First Amendment principle." (*Locke v. Karass* (2009) 555 U.S. 207, 213-214.) This week, the Court overruled the *Abood* precedent in a 5-4 ruling that unfortunately again underscores the politicized nature of the Court.

The Court's ruling in *Janus* is rooted in a construction of the First Amendment that conflates the expenditure of money with speech, and dates to the 1970s. (See *Buckley v. Valeo* (1976) 424 U.S. 1; *Citizens United v. Federal Elections Commission* (2010) 558 U.S. 310). The First Amendment provides simply that "Congress shall make no law . . . abridging the freedom of speech." (U.S. Const., 1st Amend., 14th Amend. [making the First Amendment applicable to the states].) Writing for the majority, Justice Alito reasoned that this language is broad enough to restrain state regulation of economic and regulatory policy—in this case, to prohibit states from compelling its own employees to contribute to the costs of their labor representation. The Court's specific holding reads as follows:

> 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. By agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed. [Citations.] Rather, to be effective, the waiver must be freely given and shown by "clear and compelling" evidence. [Citations.] Unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met.

(*Janus*, 2018 WL 3129785, at p. *31.)

While the Court's decision today will have many detractors (see, e.g., *Janus*, 2018 WL 3129785, at p. * 32, Sotomayor, J., dissenting; Kagan, J., dissenting), it is now the law of the land. The *Janus* decision immediately impacts at least 22 states, including California, that currently allow public sector unions to charge and collect agency fees. Although this ruling addresses provisions of Illinios law, it renders conflicting provisions of California law unconstitutional. (See, e.g., Govt. Code, § 3546; see also *Schmid v. Lovette* (1984) 154 CalApp.3d 466, 473-474 [recognizing authority of state agency to decline to enforce a "patently unconstitutional" state statute, nothwithstanding Cal. Const., art III, § 3.5].)

The *Janus* decision is effective immediately. This means that community college districts may no longer deduct public agency fees from the wages of district employees unless an employee clearly and affirmatively consents to pay the fee.

**B. Senate Bill 866**

On June 27, 2018, Governor Brown signed the California State Budget, along with Senate Bill 866. Senate Bill 866 places a number of affirmative obligations on community college districts and unions that represent community college district employees, including provisions that directly impact the manner in which union membership dues and fees are collected and managed. Effective immediately, SB 866 requires the following:

- *Collection of Union Membership Fees:* Community College Districts are now required to rely on the representations of a public employee organization regarding an employee's deduction authorizations. An employee's request to change authorizations for payroll deductions for union dues and/or fees must be directed to the public employee union rather than to the district, and the employee organization is now responsible for processing these requests. The district is required to honor the terms of an employee's written authorization for payroll deductions as represented by the union, but may not require the public employee organization to submit a copy of the employee's written authorization unless a dispute arises as to the existence or terms of the written authorization. (Ed. Code § 87833 and § 88167)

- *Indemnification of District*. Public employee organizations are required to indemnify the district for any claims made by a district employee for wage deductions made in reliance on its notification. (Ed. Code § 87833(f) and § 88167(a)(7))

- *No Deterrence or Discouragement*. A public employer shall not deter or discourage public employees or applicants to be public employees from becoming or remaining members of an employee organization, or from authorizing representation by an employee organization, or from authorizing dues or fee deductions to an employee organization. (Gov. Code § 3550)

- *Mass Communications*. If a public employer chooses to send mass communications to public employees (or applicants) concerning the right to join or support an employee organization, or to refrain from

joining or supporting an employee organization, it must first meet and confer with the exclusive representative regarding the content of the communication. In the event that the public employer and the exclusive representative do not come to an agreement on the content of the communication, the public employer must distribute its communication along with a communication of reasonable length provided by the exclusive representative. (Gov. Code § 3553)

- *Confidentiality of Employee Orientations.* New employee orientations must remain confidential. The date, time and place of the orientation shall not be disclosed to anyone other than the employees, the exclusive representative, or a vendor that is contracted to provide a service for purposes of the orientation. (Gov. Code, § 3556)

**C. Moving Forward**

The *Janus* decision prohibits the collection of agency fees from public sector employees without the employee's affirmative consent. Senate Bill 688 establishes a new process for the deduction of employee organization fees from an employee's wages – employee organizations are now responsible for processing requests from employees, and community college districts are required to rely on the representations of employee organizations regarding an employee's deduction authorizations.

District representatives are responsible for maintaining strict neutrality regarding employee membership and participation in employee organizations. We caution district officials not to make any statements expressing disfavor or bias regarding membership or participation in an employee organization at the local level. Any actions or communications that reflect discouragement or bias with respect to an employee's choice to join, form, or participate in the activities of an employee organization could subject a district to liability under SB 866.

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