Top 10 Questions about Senate Bill 866

New State Legislation Impacting How Public Employers Communicate with Employees and Manage Employee Organization / Union Membership Dues

By Erin Kunze on June 27, 2018 https://www.calpublicagencylaboremploymentblog.com/

On June 27, 2018, Governor Brown signed into law the Final State Budget, along with budget trailer bill, Senate Bill 866. In brief, though there is little comment in the Bill's legislative analysis, it is clear that Senate Bill 866 is a direct response to the Supreme Court's anticipated, and now adopted, holding in *Janus v. AFSCME*. As noted in our related Special Bulletin, the Supreme Court's decision in *Janus v. AFSCME* overturned forty-plus years of case law that authorized agency shop – or mandatory union service fees – in public sector employment. The Court's decision in *Janus v. AFSCME* means that public agency employers and unions that represent public employees can no longer mandate as a condition of employment that employees pay a service fee (or comparable religious objector charitable contribution) for the portion of union dues attributable to activities the union claims are "germane to [the union's] duties as collective bargaining representative."

While public employers and public employee organizations (i.e. unions or local labor associations) can no longer mandate these fees as a condition of continued employment, Senate Bill 866 amends and creates new state law regulating: (1) how public employers and employee organizations manage organization membership dues and membership-related fees; and (2) how public employers communicate with employees about their rights to join or support, or refrain from joining or supporting employee organizations. It also prohibits public employers from deterring or discouraging public employees and applicants for public employment from becoming or remaining members of employee organizations (a declaration of existing law). Finally, Senate Bill 866 expands employee organization access to employee orientations by making such orientations confidential.

Below, we outline the top 10 questions arising from Senate Bill 866:

1. **Does Senate Bill 866 Apply to My Public Agency?**

Yes. Senate Bill 866 applies to all public agencies, though it does not apply to all public agencies in the same manner. For example, for the purposes of salary and wage deductions in relation to employee organization membership dues and related fees, the Bill defines a "public employer" as the state, Regents of the University of California, the Trustees of the California State University, as well as the California State University itself, the Judicial Council, a trial court, a county, city, district, public authority, including transit district, public agency, or any other political subdivision or public corporation of the state, but not a "public school employer or community college district."

But while public schools and community college districts are not included in the definition of "public employer" for the purposes of salary and wage deductions, they are not exempt from Senate Bill 866. Instead, separate provisions apply to those agencies. The provisions that apply to public school and community college district employers largely reflect those that apply to other public employers regarding the management of employee organization membership dues and related fees, though there are some distinctions.

Provisions governing wage and salary deductions for public employers, other than public schools and community college districts, are now codified at Government Code sections 1152, 1153, 1157.3, 1157.10, and 1157.12. (Section 1153 applies to state employers only, and section 1157.10 applies only to state employees of public agencies.)

Provisions governing wage and salary deductions applicable to public schools and community college districts are codified at Education Code sections 45060, 45168, 87833, and 88167 (reflecting deductions for public school certificated and classified employees, and community college district academic and classified employees).

2. **What Should I do if an Employee Asks My Agency to Discontinue the Employee's Union / Employee Organization Membership Dues Deduction? Can I Respond?**

You can respond, but your response is limited to referring the employee back to the employee organization. With the passage of Senate Bill 866, public employers as well as public school and community college district employers are required to direct employee requests to cancel or change authorizations for payroll dues deductions or other membership-related fees to the employee organization. Employee organizations are responsible for processing these requests.

Distinct from employee organization / union membership dues and membership-related fees, the Supreme Court's holding in *Janus v. AFSCME*, requires employers to immediately stop withholding involuntary service fees; but employers should also notify and meet and confer with any employee organizations regarding the negotiable effects of that change as soon as possible. Though Senate Bill 866 does not specify how agencies respond to employer inquiries about service-fees, it may also be appropriate to direct the question to the employee organization (e.g. if an employee asks whether he/she can voluntarily pay the union something other than membership dues). This assessment should be made on a case-by-case basis.

3. **Must My Agency Rely on an Employee Organization's Statement Regarding an Employee's Organization Membership?**

Yes. Public employers are required to honor employee organization requests to deduct membership dues and initiation fees from their members' wages. Public employers are also required to honor an employee organization's request to deduct their members' general assessments, as well as payment of any other membership benefit program sponsored by the organization. Public employers must additionally rely on information provided by the employee organization regarding whether deductions for an employee organization have been properly canceled or changed. Consequently, because public employers will be making these deductions in reliance on the information received from employee organizations, employee organizations must indemnify public employers for any claims made by an employee challenging deductions.

Public school and community college district employers are similarly required to rely on information provided by employee organizations regarding whether deductions for the organization have been properly canceled or changed. However, as with public employers, the employee organization must indemnify the public school or community college district employer for any claims made by an employee challenging deductions.

4. **Can My Agency Demand that the Union / Employee Organization Provide the Agency with a Copy of an Employee's Written Authorization for Payroll Deductions?**

No, except in very limited circumstances. As an initial matter, public employers must honor employee authorizations for deductions from their salaries, wages or retirement allowances for the

payment of dues, or for any other membership-related services. Deductions may be revoked only pursuant to the terms of the employee's written authorization. Similarly, public school and community college district employers must honor the terms of an employee's written authorization for payroll deductions. However, public employers that provide for the administration of payroll deductions (as required above, or as required by other public employee labor relations statutes), must also rely on the employee organizations' certification that they have the employee's authorization for the deduction. A public employer is prohibited from requiring an employee organization to provide it with a copy of an individual's authorization, as long as the organization certifies that it has and will maintain individual employee authorizations. The only exception is where a dispute arises about the existence or terms of the authorization.

Similarly, public school and community college district employers must rely on an employee organization's certification that it has an employee's authorization for payroll deductions. Upon certification, public school and community college district employers are prohibited from requiring the employee organization to provide it with a copy of the employee's written authorization. As with public employers, a public school or community college district employer can only request a copy of the employee's written authorization if a dispute arises about the existence or terms of the authorization. Again, because employers will be making deductions in reliance on the information received from employee organizations, employee organizations must indemnify employers for any claims challenging these deductions.

5. **Can I Discourage or Deter Employees from Becoming or Continuing in Union / Employee Organization Membership? Can I Discourage or Deter them from Enrolling in Automatic Membership Dues Deductions?**

No to both questions. Public employers remain prohibited from deterring or discouraging public employees, or applicants, from becoming or remaining members of employee organizations. They are similarly prohibited from deterring or discouraging public employees or applicants from authorizing representation by an employee organization, or from authorizing dues or fee deductions to such organizations. The statute provides that this is a declaration of existing law.

Notably, for the purposes of this provision, a public employer is any employer subject to the Meyers-Milias Brown Act (MMBA), the Ralph C. Dills Act, the Judicial Council Employer-Employee Relations Act (JEERA), the Educational Employment Relations Act (EERA), the Higher Education Employer-Employees Relations Act (HEERA), the Trial Court Employment Protection and Governance Act, the Trial Court Interpreter Employment and Labor Relations Act, the Los Angeles County Metropolitan Transportation Authority Transit Employer-Employee Relations Act, and Employers for in-home supportive services (IHSS) providers (pursuant to Welfare and Institutions Code section 12302.25). This provision also applies to public transit districts with respect to their public employees who are in bargaining units not subject to the provisions listed above.

6. **Does Senate Bill 866 Prohibit My Agency from Informing Employees about the Cost of Being a Union / Employee Organization Member?**

Yes. This could be seen as deterring or discouraging an employee from becoming an employee organization member or authorizing dues or fee deductions to an employee organization. As noted in response to question 5, this conduct is prohibited. In addition, as discussed in question 7 below, employers are prohibited from sending mass communications to employees about employee organization membership without first meeting and conferring with the organization about the content of the communication.

7. **Can My Agency Still Send Mass Communications to Employees about Union / Employee Organization Membership?**

Yes, but only if the agency first meets and confers about the content of the communication with the recognized employee organization.

A public employer that chooses to send mass communications to their employees or applicants concerning the right to "join or support an employee organization, or to refrain from joining or supporting an employee organization" must first meet and confer with the exclusive representative about the content of the mass communication. If the employer and exclusive representative do not come to an agreement about the content of the communication, the employer may still choose to send it. If it does, however, it must also include with its own communication, a communication of reasonable length provided by the exclusive representative. Notably, this requirement does not apply to a public employer's distribution of a communication from PERB concerning employee rights that has been adopted for the purposes of this law.

For the purposes of mass communication provisions, a public employer means any employer subject to the Meyers-Milias Brown Act (MMBA), the Ralph C. Dills Act, the Judicial Council Employer-Employee Relations Act (JEERA), the Educational Employment Relations Act (EERA), the Higher Education Employer-Employees Relations Act (HEERA), the Trial Court Employment Protection and Governance Act, the Trial Court Interpreter Employment and Labor Relations Act, the Los Angeles County Metropolitan Transportation Authority Transit Employer-Employee Relations Act, and Employers for in-home supportive services (IHSS) providers (pursuant to Welfare and Institutions Code section 12302.25). This provision also applies to public transit districts with respect to their public employees who are in bargaining units not subject to the provisions listed above.

8. **Just What is a "Mass Communication" for the Purposes of Senate Bill 866?**

For the purposes of Senate Bill 866, a "mass communication," means a written document, or script for an oral or recorded presentation or message, that is intended for delivery to multiple public employees regarding an employee's right to join or support or not to join or not to support an employee organization. This includes email communications.

9. **With Whom Can I Share Information about Employee Orientations?**

Senate Bill 866 requires that new employee orientations be confidential. In addition to existing law that provides exclusive representatives with mandatory access to new employee orientations following the passage of AB 119 last year, 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 services for the purposes of the orientation."

10. When Does Senate Bill 866 Take Effect?

Today! As a budget trailer bill, Senate Bill 866 is considered "urgency legislation." This means it goes into effect immediately upon the Governor's signature. As noted above, Governor Brown signed Senate Bill 866 into law on June 27, 2018. Accordingly, the time to comply with the new law is now!