association of california school administrators

CALIFORNIA TEACHERS ASSOCIATION

ACSA AND CTA JOINT ADVISORY
JANUS v. AFSCME AND ITS IMPACTS

On June 27, 2018, the United States Supreme Court issued a 5-to-4 decision in *Janus v. AFSCME Council 31* that overruled over forty years of law that allowed public sector unions to charge fair share fees to employees who, though represented by those unions in the workplace, chose not to become union members. The *Janus* decision has continued to generate questions among school employers, administrators, and employees. In addition, recent legislative changes in California have affected the rights and responsibilities of public employers and the unions who represent public employees.

The California Teachers Association (CTA) and the Association of California School Administrators (ACSA) provide this joint guidance regarding *Janus'* meaning and recent legislation related to union membership. This joint document also discusses rules that might apply when outside, non-union entities seek to obtain contact information for union-represented public employees.

ACSA and CTA are pleased to collaborate on this guidance, and we are proud to work together to provide optimal learning conditions in our schools and help our students succeed. While *Janus* prevents unions from collecting fair share fees from nonmembers without their consent, the case does not otherwise alter employee rights or impact our ongoing efforts to maintain strong and collaborative relationships between ACSA and CTA members.

ACSA Executive Director

CTA President

FREQUENTLY ASKED QUESTIONS

1. What was the issue in *Janus*?

Mark Janus, a public employee in Illinois, claimed that a statute that allowed his union to collect "fair share" or "agency" fees from him violated his First Amendment rights. Mr. Janus had chosen not to become a member of the union that represented him and his colleagues in the workplace. Although he had declined union membership, under state law and United States Supreme Court cases decided prior to *Janus*, he was obligated to pay a fee to the union for the union's collective bargaining and related representational activities. He was not obligated to subsidize the union's political activities (which was a separate, optional fee). Nevertheless, Mr. Janus contended that payment of the agency fee itself – sometimes called the "fair share" fee – was unlawful "compelled speech" under the First Amendment of the United States Constitution.

2. What was the Supreme Court's ruling in Janus?

The U.S. Supreme Court ruled that the Illinois statute violated the First Amendment by compelling nonmembers to pay a fee to the union. In reaching this decision, the Court overturned four decades of law, particularly the Court's prior decision in *Abood v. Detroit Bd. of Ed.*[1] The majority in *Janus* ruled that a public employee union may no longer collect fair share fees from a nonmember without the nonmember's affirmative consent.

3. Did the Janus decision affect dues paid by union members, as opposed to fair share fees that were paid by *nonmembers*?

No. Membership dues were not at issue in the *Janus* case. *Janus* only decided whether the involuntary payment of fair share fees by nonmembers was permissible, and the case held that it was not. The *Janus* decision itself does not impact any agreements between a union and its members regarding the payment of union dues. Those agreements remain an internal arrangement between the union and the employee, and union membership remains a voluntary employee decision.

4. Does *Janus* require unions to re-sign existing union members?

No. As noted above, *Janus* does not involve dues paid by members to their unions. Membership dues should not be confused with fair share fees. Union membership agreements, existing membership cards, or other agreements by union members to pay dues are unaffected by *Janus* and should continue to be honored, particularly under a new California law enacted through SB 866. The *Janus* holding does not require current union members to reauthorize dues deductions or to sign up for membership again.

The *Janus* decision only means that public sector employers cannot deduct, and unions cannot collect, fair share fees from a *nonmember's* wages without the nonmember's clear and affirmative consent.

5. So does Janus have any effect on the way that dues are collected from union members?

No. *Janus* does not address the collection of dues from union members. The decision also does not involve or affect payroll deduction methods.

6. How should the employer and union cease the collection of fair share fees?

School districts and unions should identify all nonmembers (if not yet done) and share that information with each other as soon as reasonably possible to ensure that fair share fees are no longer being deducted from nonmembers' wages. Many administrators and CTA chapters have already worked hard together to reconcile their fee payer lists and to confirm the identities of nonmembers for whom fees should no longer be deducted.

District payroll and/or business personnel should be handling internal district protocols and logistical steps needed to cease payroll deductions for former fee payers, if not already done so. Further, districts and unions should discuss with each other protocols for handling and reimbursing any fair share fees that might be inadvertently deducted from nonmembers' pay after June 27, 2018.

7. Has CTA reimbursed any fees to former fee payers?

Yes. CTA established an escrow account for the purpose of refunding to nonmembers any fees that were collected prior to June 27, 2018, which were intended to cover the period from June 27 through the end of the CTA membership year on August 31. Due to the absence of summer payroll periods in many districts, CTA and some of its affiliates collected fees prior to June 27 for nonmembers to cover July and August. CTA has sent refund checks to all those nonmembers for whom CTA has addresses, reimbursing them for any fees that covered the period June 27, 2018 through August 31, 2018, with interest.

8. Are unions still required to represent nonmembers in matters within the scope of the union's representational functions?

Yes. *Janus* did not undermine the fundamental principle of exclusive representation by a union or the union's duty of fair representation (DFR) to its members. The Educational Employment Relations Act (EERA) still requires an exclusive representative to fairly represent all members of its bargaining unit with regard to bargaining and enforcing labor contracts, regardless of whether the unit member has joined the union.

Separately, unions can provide services to union members that are outside the DFR. Unions are still permitted to restrict such extra-contractual services and members-only benefit programs to their members.

9. Does Janus require us to renegotiate our labor contracts?

No, not in most cases. Most labor contracts contain a "severability" clause, which maintains the validity of the rest of the contract even if one provision has been voided by law. After *Janus*, fair share fee language in contracts is void and unenforceable. So long as the contract has a severability clause, the remainder of the contract remains valid. Eventually, employers and unions likely will want to meet to negotiate the removal of any potentially void language.

10. If an employee asks the school district to drop the employee's union membership, how should the district respond?

The school district *must* refer the employee to her or his union. The union is obligated to process the employee's request within a reasonable time. Remember that under current state law, the employer may *not* deter or discourage job applicants or employees from becoming or remaining members of an employee organization, withdrawing membership from the employee organization, or otherwise interfere with an employee's decision regarding union membership.[2] Thus, if an employee asks the district to drop her/his union membership, the employer should refer the employee to the union and inform the employee that the request must be directed to the union.

11. How does SB 866 impact the payroll deduction process?

Senate Bill 866 (June 2018) amended several statutes regarding payroll deduction of union member dues. Current laws allow employees to authorize payroll deduction of dues by notifying their union in writing.[3] This writing may be a signed union card or an electronic writing, signature or similar recording consistent with California law. These payroll authorizations must be maintained by the union, not the employer.

SB 866 clarifies that an employee's revocation of a dues deduction authorization is governed by the terms of the employee's authorization document with the union. As with requests to revoke *membership*, an employee's request to revoke a *dues deduction agreement* must be directed to the union.

Employers must process payroll dues deductions for all employees whom the union reports as having written authorizations. The employer relies on the union's list of employees who have authorized dues deductions. Unions are required by statute to indemnify employers against claims that might arise regarding the employer's reliance on the union's lists.

12. What if an employee disputes that s/he authorized payroll deduction of dues?

Consistent with SB 866, if an employee disputes the authorization for deduction of union dues from her/his pay, the district and union should communicate about the dispute. Under SB 866, employers may not require a union to submit copies of employees' written authorizations for payroll deduction, unless a dispute arises about the existence or terms of those authorizations. If a dispute exists and if requested by the District, the union should produce a copy of the employee's dues deduction authorization to both the employee and the district.

If the employee signed a dues deduction authorization but now wants to revoke it, then the revocation request must be directed *to the union and not the district*. The union will assess whether the dues revocation request complies with the authorization agreement. If the union determines the revocation request is valid, the union should promptly notify the district that payroll deductions should cease for that employee and the district should promptly cease payroll deductions of the employee. CTA and its chapters will make every reasonable effort to notify districts promptly when they process and confirm revocations of employees' agreements to pay dues via payroll deduction.

13. How does SB 866 impact a public employer's communications with employees about Janus and related matters?

SB 866 also adds a new section to the EERA that requires an employer to meet and confer with the exclusive representative before sending any mass communications to employees or applicants about their rights to join, support, or refrain from joining or supporting a union.[4] If the school district and union cannot agree on the content of the communication and the school district wishes to proceed with its communication, then the district must send a message of reasonable

length from the union along with the employer's mass communication. This new provision does not affect communications on other subjects.

14. How does SB 866 impact new employee orientations?

In 2017, AB 119 established rights for exclusive representatives to attend new employee orientations. SB 866 amended AB 119 by prohibiting an employer from disclosing the date and location of new employee orientations to anyone other than the employees, the exclusive representative, and vendors that are contracted to provide services at the orientation.[5] School districts should be aware of this new restriction when responding to any inquiries from third parties (including those through CPRA requests).

CPRA REMINDERS POST JANUS AND SB 866 FAQs

15. Some outside organizations that urge union members to drop their union membership are sending requests to districts under the California Public Records Act (CPRA), seeking various information about public employees. How should those requests be handled, no matter who is requesting the information?

CPRA requests for employee contact information (or other information about employees) must be analyzed on a case-by-case basis, often in consultation with legal counsel. Privacy rights, California statutes, court case law, school board policies, and the particular facts of the request are all relevant to ensuring the proper response.

A school district is only required to provide records that exist and are in its possession. A district is *not* required to create materials to respond to a CPRA request. In some circumstances the information requested may exist but is exempt from public disclosure. For example, employees' home addresses, home telephone numbers, birth dates, personal email addresses and social security numbers are *not* subject to public disclosure under the CPRA.[6] Federal and State constitutional privacy rights also protect an employee's choices to affiliate with private organizations, and disclosure of union affiliation would violate the associational right of privacy of school employees.[7]

On the other hand, information such as the employee names, departments, job title, hire and separation dates, and compensation information are generally disclosable.[8]

Beyond these general rules, districts and employees should carefully evaluate the circumstances of a particular CPRA request to determine an appropriate response, and work with their legal counsel as appropriate.

16. Some outside groups have been sending emails to employees, urging them to drop their union membership. What is an appropriate response?

First, district staff should understand they are under no obligation to respond to or engage with these senders. Many school districts have email systems which allow individual users to block unwanted emails. If staff do not want to receive these emails, they can block the sender. School districts are encouraged to remind staff how to do this.

If staff receive similar or identical emails from outside organizations that are unwanted or disruptive, regardless of its content, they should also notify their school district's IT department. Most school districts also have the ability to block or filter out emails that are unwanted or disruptive.

Second, districts may consider reviewing their computer use/email policies that disallow "spam" emails or impose other content neutral restrictions on email use or outside email solicitations. School district email systems and computer networks are not designed to be "public forums" that are open and available to the public at large. The purpose of these systems is to support and facilitate each district's educational mission. Spam emails can be both annoying and responsible for virus proliferation on computer networks. For these reasons, some districts have blocked or "filtered" spam emails from outside organizations not based on content. Districts should consider filtering repeated emails which are disruptive to district business, a drain on their servers and possibly harassing.

17. Aside from invalidating fair share fee arrangements, did *Janus* alter any other rights or obligations of public sector employers, unions or employees?

No. While *Janus* is a significant departure from prior law with regard to nonmember fair share fees, the decision does not alter other rights and obligations of public sector employees and employers under state law.

We hope that the information above is useful as we navigate a changed legal landscape. ACSA and CTA look forward to continuing to work together to support our students throughout California.

***

00262-00022/4336464.1

---

[1] *Abood v. Detroit Bd. of Ed.,* 431 U.S. 209 (1977).
[2] *See* Cal. Gov. Code § 3550.
[3] *See* Cal. Ed. Code § 45060 (certificated employees); Cal. Ed. Code § 45168 (classified employees).
[4] *See* Cal. Gov. Code § 3553.
[5] *See* Cal. Gov. Code § 3556.
[6] *See* Gov. Code § 6254.3; *Sonoma County Employees' Retirement Ass'n v. Superior Ct*., 198 Cal.App.4th 986 (2011); *Sacramento County Employees' Retirement System v. Superior Ct.*, 195 Cal.App.4th 440 (2011).
[7] *Britt v. Superior Court*, 20 Cal. 3d 844 (1978); *Nat'l Ass'n for Advancement of Colored People v. State of Ala. ex rel. Patterson*, 357 U.S. 449 (1958).
[8] *See International Federation of Prof. and Technical Engineers, Local 21 v. Superior Ct.,* 42 Cal.4th 319 (2007); *Commission on Peace Officer Standards and Training v. Superior Ct.,* 42 Cal.4th 278 (2007).