

June 29, 2018

New Legal Guidance: Board Communications in a Post-Janus World

The decision for plaintiffs in *Janus v. AFSCME*, along with related bills in the California Legislature, have altered the labor relations landscape for school districts and county offices of education. One area of particular concern for board members – and one that has been underplayed in much of the Janus coverage – is how the ability to communicate broadly on labor issues has been constrained.

It is critically important that board members, as representatives of the District, are aware of the recent changes in the law. The Court decision addresses significant changes in union participation, and the new laws in California place restrictions on communications regarding union participation. Based on the information below, board members should be mindful of their communications with the public and District or County Office of Education staff. This is true whether board members are answering questions or addressing the public regarding union participation and activity. Questions regarding union participation or activity should be directed to the District or County Office Education staff.

Background

The 5 - 4 decision in Janus transforms public sector employment relations and collective bargaining by declaring that mandated agency fees or “fair share” fees are unconstitutional. The Supreme Court previously decided this issue in 1977 in *Abood v. Detroit Board of Education*, then holding it constitutional for public sector unions to collect fees from nonunion members, to defray the cost of collective bargaining and other activities, provided nonunion members are not required to pay for a union’s political activities. This has been the law for over forty years, until now.

The U.S. Supreme Court held in Janus that public employees may not be compelled to pay mandatory agency fees, or “fair share” fees, to public-sector unions, because such involuntary fees violate the First Amendment of the United States Constitution. Agency fee payers are employees who work under an agency fee system who have opted out of the union, but are required to pay the costs associated with collective bargaining, grievance processing, and contract administration, among other things. Agency fee payers cannot be

compelled to pay for the political and ideological activities of the union. Under Janus, these agency fee statutes are no longer constitutional.

Legislative and Legal Implications

In anticipation of the Janus decision, labor unions throughout California lobbied legislators to obtain more protective and union friendly laws, including Assembly Bill (“AB”) 119, requiring public employers to give unions access to new employee orientations and onboarding and Senate Bill (“SB”) 285, signed into law in October 2017, which makes it unlawful for a public employer to “deter or discourage public employees from becoming or remaining members of an employee organization.”

SB 866—signed by the Governor on June 27, 2018—was immediately effective and contains several provisions, one of which will impact certain District communications. This bill provides that any mass communication made by a public employer concerning public employees’ rights to join or support a union, or to refrain from doing so, is subject to the meet and confer process with the union(s). In the event the parties are unable to reach agreement on the content of the communication, the District would be able to distribute the communication, but would also need to simultaneously distribute the union’s own mass communication.

“Mass communication,” is defined as “a written document, or script for an oral or recorded presentation or message, that is intended for delivery to multiple public employees.” At least one employee organization appears to interpret mass communication as a communication to more than one employee. There are several other active bills that, if passed, would further expand union rights in California.

Given the above, it is critically important that board members, as representatives of the District, are aware of these limitations on communications regarding union participation and tailor any comments or responses to questions accordingly. If an employee asks you questions about the Janus case, the recent legislation, or whether to join or stay in the union, we strongly recommend that you refer them to your district or county office of education staff to answers to those questions. We also recommend that you be mindful of any comments that you may make that could be construed as deterring or discouraging union participation as we expect this limitation will be broadly construed.