Mandatory Union Agency Fees Violate First Amendment

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ATTORNEYS

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Non-member public employees cannot be forced to pay agency fees. Justice Alito, writing for the 5-4 U.S. Supreme Court majority, stated that the agency fees violate "the free speech rights of non-members by compelling them to subsidize private speech on matters of substantial public concern." The decision reverses over forty years of precedent that held agency fees were permitted as long as objecting agency fee payers are only required to pay for contract administration and negotiation costs.

This decision will apply to public employees in bargaining units where a union has an agency shop agreement or arrangement. Employees in the unit can either voluntarily join the union as a member, paying full union dues, or they can decline to join, paying a mandatory agency fee (or a conscientious objector fee to a charity). Agency fees are also called "fair share" fees. To qualify for an agency shop, the union must be an exclusive or majority representative and is required to represent all employees in the unit, whether the employee is a member of the union or not. The agency fee is intended to compensate the union for its collective bargaining and representation services provided to those who do not pay union dues. The decision in ***Janus v. AFSCME, Council 31*** only applies to the compelled fees collected, not to those who pay union dues.

The California Legislature, at the behest of the public sector unions, has been working to mute the impact of the Janus decision. Last year, the legislature passed AB 119 (Government Code §§ 3555-3559), providing existing unions a process to gain access to new employee orientation and to contact information for employees in their units. SB 285 (Government Code §§ 3550-3552), was also passed prohibiting public employers from deterring or discouraging public employees from becoming or remaining members of a union.

SB 866 was passed within the last few days and is pending on the Governor's desk. It is a budget trailer bill and, if signed, it will be effective immediately. Among other actions, it changes the process to require that employee requests to change or cancel union deductions be processed through the union rather than the employer. The union then notifies the employer and the employer is obligated to accept the information supplied by the union regarding deductions. There are also rules regarding mass communications, such as a memo to all employees regarding union deductions or the Janus decision as they relate to

employee rights to join or support a union or refrain from joining or supporting a union.

Employers will need to consult their memoranda of understanding and any separate agency shop agreements to determine the immediate impact of this important decision. The status of SB 866 should be determined before addressing union deduction issues and mass communications to employees. We anticipate having additional advice as events unfold in the days to come. If you have questions before then, please feel free to contact **Roy Clarke** or **Rebecca Green** in our Labor & Employment Department.