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LEGAL UPDATE

October 18, 2018

To: Superintendents/Presidents/Chancellors, Member Community
College Districts

From: Sarah Hirschfeld-Sussman 
Schools Legal Counsel

Subject: Governor Brown Signs Bill Limiting Liability for Pre-*Janus*
Agency Fee Lawsuits (SB 846)
Memo No. 12-2018(CC)

Governor Brown signed Senate Bill (“SB”) 846 on September 14, 2018,¹ effective immediately, which protects public employers, employee organizations and any of their employees or agents against certain lawsuits related to agency or “fair share” fees² collected prior to the United States Supreme Court’s June 27, 2018 decision in *Janus v. AFSCME*.³

Prior to *Janus*, mandatory agency or fair share fees were considered legally permissible under the First Amendment,⁴ and were authorized by state laws governing labor relations of public entities.⁵ The *Janus* decision held that requiring public-sector employees to pay agency fees as a condition of public employment violated employees’ First Amendment rights, overturning laws that had been in place for decades.

¹ Senate Bill 846 is available at https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB846.

² An agency shop fee arrangement occurs when employees are required to pay certain compulsory “fair share” or “service” fees to the employee organization as a condition of employment, regardless of whether the employee is a member of the union.

³ *Janus v. American Federation of State, County, and Mun. Employees, Council 31* (2018) 138 S.Ct. 2448.

⁴ *Janus* overruled the 1977 Supreme Court case *Abood v. Detroit Bd. of Ed.* (1977) 431 U.S. 209, which held that agency fees were valid under the First Amendment insofar as the fees were used to finance union expenditures for collective bargaining, contract administration and grievance procedures.

⁵ The Meyers-Milias-Brown Act, the Ralph C. Dills Act, and the Educational Employment Relations Act all provided that agency or fair share fees could be required of public employees in bargaining units that did not wish to become members of their recognized employee organization.



Since the *Janus* decision, lawsuits have been filed or threatened by groups of public employees seeking reimbursement and damages for past agency fees they were required to pay to their employee organization as a condition of being public employees.⁶

In response, the Legislature passed SB 846, which protects employers and unions from liability in any such lawsuit, if it is filed under California law. The law adds section 1159 to the Government Code, providing employers and unions a “complete defense...for requiring, deducting, receiving, or retaining agency or fair share fees from public employees...if the fees were permitted at the time under the laws of this state then in force and paid, through payroll deduction or otherwise, prior to June 27, 2018.”⁷ The law applies to all lawsuits currently pending as well as any future lawsuits.⁸ Since nearly all agency fee collection was permitted under California law prior to *Janus*, SB 846 appears to limit liability for nearly all lawsuits seeking to recover pre-*Janus* agency fees.

However, the known lawsuits filed to date have alleged violations of the United States Constitution, and not a violation of California law. As such, it is unclear whether SB 846 will have any effect on these lawsuits, or on any future lawsuits filed on First Amendment grounds. We will keep you updated on this issue as it develops.

Please contact our office with questions regarding this Legal Update or any other legal matter.

The information in this Legal Update is provided as a summary of law and is not intended as legal advice. Application of the law may vary depending on the particular facts and circumstances at issue. We, therefore, recommend that you consult legal counsel to advise you on how the law applies to your specific situation.

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⁶ One example of such a lawsuit is the class action suit *Wilford et. al. v. National Education Association of the United States et. al.* pending before the United States District Court for the Central District of California (Case No. 8:18-cv-01169, filed July 2, 2018). In that case, a group of teachers who were not members of their respective unions and were charged agency fees for many years filed a class action complaint seeking a refund of all agency fees paid to their unions.

⁷ Government Code section 1159(a).

⁸ Government Code section 1159(b).