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THE PUBLIC SECTOR

Janus: The sequel plays out in California

by Jeff Sloan and Tim Yeung
Sloan Sakai Yeung & Wong LLP

Declaring that *Abood* was wrongly decided and that agency shop has always been unconstitutional, the *Janus* decision handed opponents of agency shop a definitive victory. After 45 years and billions of dollars that had gone—illegally, in the view of the U.S. Supreme Court—into the coffers of public-sector unions, the fight was finally over. Not.

Four federal cases in California's Northern and Eastern Judicial Districts embody the sequel to *Janus.* Three of the cases were filed against several unions, local agencies, state agencies, California State University, one federal agency, and last, but not least, the Public Employment Relations Board (PERB) itself. The plaintiffs include employees and retirees. Each case is largely predicated on language in *Janus* holding that agency shop has never been lawful.

Potentially wrongful union conduct post-Janus

The public employees claim they were required by the collective bargaining agreement (CBA) between their employer and their exclusive bargaining representative either to join the union or pay an "agency fee" that was almost the same as union dues. Faced with that Hobson's choice, each employee opted for union membership, allegedly because it was a better deal given that membership in the union had certain privileges not available to fee payers.

But after *Janus* revealed that agency shop wasn't lawful, the employees realized that their choice of union membership was coerced because they wouldn't have joined if they had known that agency shop was unlawful. Dramatically, the complaint in one of the cases says, "A person who is told, 'Sign this contract or else I will take $500 per year from your paycheck,' and then signs the contract in response to this 'offer,' has signed the contract under duress and has not provided legally valid consent."

Many of the employees also allege that their union or their employer unlawfully prevented them from resigning from the union by requiring them to fill out and transmit the union's routine resignation forms. In making that argument, they rely on a key clause in *Janus:* "Neither an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay." The complaints seek punitive damages for the unions' allegedly "purposeful" misconduct. The pending cases are *Aliser et al. v. SEIU California et al.,* cv-02574 (U.S.D.C., E.D. Cal.); *Hernandez et al. v. AFSCME et al.,* cv-02419 (U.S.D.C., E.D. Cal.); *Martin v. California Teachers Association,* cv-01951 (U.S.D.C., E.D. Cal.); and *Smith v. Superior Court of the County of Contra Costa,* cv-05472 (U.S.D.C., N.D. Cal.).

Potentially wrongful employer conduct? Blame SB 866

Public-sector employers also are being sucked into the maelstrom of this epochal litigation. But, paradoxically, they are merely following the law. Signed by Governor Jerry Brown on the same date the Supreme Court issued *Janus,* Senate Bill (SB) 866 requires public-sector employers in California to refer all employee inquiries about union membership to the exclusive bargaining representative.

Given SB 866, it would seem that public-sector employers that remain neutral in a dues dispute would be shielded against liability. The employees who filed suit don't see it that way, however. The lawsuits show that when an employer continues to make dues deductions despite employees' demands to resign from the union, it can be added to a lawsuit against the union by protesting employees.

How will the conflict be resolved? The constitutionality of SB 866 is being challenged in some of the cases. The California attorney general has intervened in three of the cases and may intervene in the fourth case. Meanwhile, in post-*Janus* litigation brought by employees against public agencies, unions may well be on the hook for the agencies' attorneys' fees based on California law and the provisions of their CBAs.

Final insult: SB 866 gags noncoercive employer communications

Under SB 866, public-sector employers also may not unilaterally send employees or job applicants "mass communications" concerning their rights "to join or support an employee organization, or to refrain from joining or supporting an employee organization." Instead, they are required to meet and confer with the exclusive bargaining representative about

the content of the mass communication. Moreover, if the parties cannot reach agreement and the employer decides to go ahead with its proposed mass communication, it must also distribute a communication of reasonable length provided by the union.

By now, this provision of SB 866 isn't news to California public-sector employers. A recent case is of interest, however. The PERB has initiated an injunctive relief proceeding in Sacramento County Superior Court, seeking to stop a large public employer from issuing communications about the impact of *Janus.* The impetus for the move was an e-mail sent soon after the *Janus* decision but before SB 866 (signed by the governor the day *Janus* was issued) was widely known. The employer took steps to withdraw the memo, succeeding at all but a handful of worksites. Two months later, the PERB sought an injunction, which the employer opposed.

The superior court denied the injunction request because the employer had made a concerted effort to fix its mistake and the PERB delayed in seeking the injunction. The case is now at the administrative hearing stage at the PERB.

Bottom line

Post-*Janus* litigation is likely to continue for a while. To avoid being targeted, public-sector employers should be sure that their CBAs/memoranda of understanding (MOUs) have been revised to be consistent with *Janus.*

The most recent litigation highlights the risks of "maintenance of membership" provisions. Maintenance of membership doesn't require employees to join the union, but it does require them to remain members during the term of the CBA. Most unions will cooperate with employers in addressing maintenance of membership risks because a union likely will be liable for paying the employer's attorneys' fees if it's sued based on the contract clauses. Unions still have the option to embed into their bylaws any commitment to continued membership.

Most CBAs or MOUs contain "savings" clauses that enable the removal or renegotiation of contract clauses that are determined to be illegal. By now, most agencies have already worked with their unions to adjust for *Janus.* Those that haven't are well-advised to review their clauses and determine the best approach for jointly addressing them.

Public-sector employers must also adhere to SB 866's edict to steer completely away from communications with employees about union dues issues and instead refer employees to the union. The legality of SB 866's restraints on noncoercive employer speech about mass communications hasn't been settled. Indeed, the meaning of the term "mass communication" itself is subject to reasonable dispute. Employers can avoid this trap for the unwary by being sure that their managers are aware of the SB 866 requirement.

Sloan

Yeung

The authors can be reached at Sloan Sakai Yeung & Wong LLP in San Francisco, jsloan@sloansakai.com and tyeung@sloansakai.com. ✤