SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
A Limited Liability Partnership
Including Professional Corporations
DAVID A. SCHWARZ (Cal. Bar No. 159376)
dschwarz@sheppardmullin.com
JAY T. RAMSEY (Cal. Bar No. 273160)
jramsey@sheppardmullin.com
ALEXANDRA M. JACKSON (Cal. Bar No. 327689)
ajackson@sheppardmullin.com
1901 Avenue of the Stars, Suite 1600
Los Angeles, California 90067-6055
Telephone: 310.228.3700
Facsimile: 310.228.3701

LAW OFFICE OF MARK W. BUCHER
Mark William Bucher (Cal. Bar No. 210474)
markb@calpolicycenter.org
18002 Irvine Blvd Ste 108
Tustin, CA 92780-3321
Telephone: 714.573.2201
Facsimile: 714.573.2297

CENTER FOR INDIVIDUAL RIGHTS
Michael E. Rosman
rosman@cir-usa.org
1100 Connecticut Ave., NW, Suite 625
Washington, DC 20036
Telephone: 202.833.8400
Facsimile: 202.833.8401
(*pro hac vice* application forthcoming)

Attorneys for Plaintiffs
Jeffrey I. Barke, Ed Sachs, Laura Ferguson, Jim Reardon, Leighton Anderson, Phillip Yarbrough, and Rodger Dohm

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Jeffrey I. Barke, Ed Sachs, Laura Ferguson, Jim Reardon, Leighton Anderson, Phillip Yarbrough, and Rodger Dohm,

Plaintiffs,

v.

Eric Banks, Erich Shiners, Arthur A. Krantz, and Lou Paulson, in their official capacities as members of the California Public Employment Relations Board ("PERB"); and J. Felix De La Torre, in his official capacity as General Counsel of PERB,

Defendants.

Case No. 8:20-cv-00358

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF FOR VIOLATION OF U.S. CONST., AMEND. I.

Plaintiffs, Jeffrey I. Barke; Ed Sachs; Laura Ferguson; Jim Reardon; Leighton Anderson; Phillip Yarbrough; and Rodger Dohm ("Plaintiffs"), allege and aver as follows:

INTRODUCTION

1. This is a constitutional challenge to California Government Code Section 3550 ("Section 3550"), which prohibits a "public employer" (as defined by statute) from "deter[ring] or discourag[ing] public employees or applicants to be public employees from becoming or remaining members of an employee organization, or from authorizing representation by an employee organization, or from authorizing dues or fee deductions to an employee organization." Cal. Gov. Code § 3550.

2. According to its legislative history, the ostensible purpose of Section 3550 is to "stop employers from engaging in unfair tactics in an attempt to convince or coerce their employees to withdraw from union membership," and to "ensure that public employers shall remain neutral when their employees are deciding whether to join a union or to stay in the union." But Section 3550 does not promote neutrality. It bars speech that "deters or discourages" union membership, not speech that promotes or encourages union membership. Nor does Section 3550 protect employee free choice. Existing law already prohibits actions that may interfere with, restrain, or coerce employees in the exercise of representational rights, including the right to choose whether to be unionized or to join a union. Instead, Section 3550 one-sidedly skews public discussion in favor of public employee unions by effectively silencing officials who would voice their opinions about the disadvantages of public sector unionization.

3. Plaintiffs are elected members of various local California government bodies, including city councils, school boards, and community college and special purpose districts. After Section 3550's enactment, elected officials, including Plaintiffs, now face the threat of unfair labor charges against their agencies

whenever they share their perspectives or convey factual information about unionization or a union's policy agenda on a host of other important public matters. Under Section 3550's sweeping ban, even objectively accurate information about public employee unionization might conceivably "deter or discourage" employees from becoming or remaining union members. Section 3550's threat of liability, coupled with a complete lack of guidance as to compliance, is already chilling the ability of elected officials, including Plaintiffs, to speak freely about public employee unions and the implications of collective bargaining proposals coming before the city councils or boards on which they serve.

4. Plaintiffs are justifiably concerned that Section 3550's explicit viewpoint discrimination, coupled with its vague and overbroad terms, leave them at the mercy of whatever hindsight inference may be drawn whenever they engage in a public discussion about unions or unionization. Section 3550 does not, as the sponsors of the law suggest, promote the ability of employees to make informed choices about unionization. It suppresses only one side of that debate, a point all but conceded by the author of Section 3550, who is quoted as saying that "'[r]ight now, there is nothing to stop employers from engaging in tactics to discourage employees from becoming union members, or from convincing or coercing their employees to withdraw from union membership.'" **Ex. A** [April 24, 2017 Senate Committee on Public Employment and Retirement SB 285 at 4].

5. Elected officials have both the right and the obligation to enter the field of political controversy. The protection of political speech is intended not only to secure freedom of expression, but to safeguard the ability of the actions of local elected officials to reflect the will of their constituents. The First Amendment and California law protect the ability of these elected officials to freely discuss and advocate matters of public concern, whether through political or elected activities, so as to discharge their duties as elected representatives. Accordingly, Plaintiffs respectfully request a declaration that Section 3550 abridges the freedom of speech

of public employees and that, as applied to those elected to governing boards of public employees in this state, Section 3550 violates the First Amendment of the U.S. Constitution.

6. Because "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," *Elrod v. Burns*, 427 U.S. 347, 373 (1976), Plaintiffs have suffered and shall continue to suffer Section 3550's chilling restrictions on core political speech. They are therefore entitled to an immediate and permanent injunction barring the enforcement of Section 3550 as to Plaintiffs and all similarly-situated elected representatives of public employers.

JURISDICTION AND VENUE

7. This action arises under the Constitution of the United States and 42 U.S.C. § 1983. This Court has subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1343.

8. Venue in this district is proper under 28 U.S.C. § 1391(b) because Plaintiffs face injury within this district, a substantial part of the events giving rise to Plaintiffs' claims have occurred or will occur in this District, and all Defendants reside in the State of California and perform their official duties in the State of California, including at PERB offices located in this judicial district.

9. This Court has the authority to enter a declaratory judgment and to provide preliminary and permanent injunctive relief under Rules 57 and 65 of the Federal Rules of Civil Procedure and 28 U.S.C. §§ 2201 and 2202.

PARTIES

I. Plaintiffs

10. Plaintiffs are elected members of representative bodies of California "public employers," as that term is defined under Government Code Section 3552. As relevant here, Section 3552 defines a public employer as "any employer" subject to the Meyers-Milias-Brown Act ("MMBA") of 1968, establishing collective

bargaining for California's municipal, county, and local special district employers and employees (Cal. Gov. Code § 3500 *et seq*.), and the Educational Employment Relations Act ("EERA") of 1976, establishing collective bargaining in California's public schools (K-12) and community colleges (Cal. Gov. Code § 3540 *et seq*.).

11. Under Section 3552 and the MMBA, the definition of public employer includes "every government subdivision," "every district," "every public agency and public service corporation and every town, city and county and municipal corporation, whether incorporated or not and whether chartered or not." (Cal. Gov. Code § 3501(c)). Under Section 3552 and the EERA, a "public school employer" or "employer" includes "the governing board of a school district, a school district, a county board of education, [and] a county superintendent of schools." (Cal. Gov. Code § 3540.1(k)).

12. Jeffrey I. Barke, M.D. is on the Board of Directors of the Rossmoor Community Service District ("RCSD"). A community service district is a public employer under Government Code Section 3550 *et seq*. and the MMBA. *See, e.g., Stationary Eng'rs v. San Juan Suburban Water Dist*., 90 Cal.App.3d 796 (1979). The RCSD Board voted to appoint Dr. Barke to fill a Board vacancy in May 2019. Prior to serving on the RCSD Board, Dr. Barke served as a board member of the Los Alamitos Unified School District from 2006-2018, which is also a public employer under Section 3550 *et seq.* and the EERA. He is a primary care physician in private practice and a Reserve Deputy for the Orange County Sheriff's Department.

13. Ed Sachs is an elected member of the Mission Viejo City Council. The Mission Viejo City Council is a public employer under Government Code Section 3550 *et seq*. and the MMBA. Mr. Sachs has served on the City Council since November 2014. His term expires in November 2022.

14. Laura Ferguson is a member of the San Clemente City Council. The San Clemente City Council is a public employer under Government Code Section 3550 *et seq*. and the MMBA. Ms. Ferguson was elected to the City Council

in 2018. Her term in office expires in November 2022. The employees of the City of San Clemente are represented by the San Clemente City Employees' Association (SCCEA). The City and the SCCEA currently operate under a Memorandum of Understanding (MOU) that is in force through June 30, 2020. *See* City of San Clemente, Memorandum of Understanding, https://www.ocea.org/assets/files/mous/san-clemente-city-employees-association-mou.pdf.

15. Jim Reardon was elected to the Board of Trustees of the Capistrano Unified School District ("CUSD") in 2012. His current term ends in 2020. The CUSD is a public employer under Government Code Section 3550 *et seq*. and the EERA. As trustee for CUSD Area 2, Mr. Reardon serves portions of the city of San Juan Capistrano as well as unincorporated areas of Ladera Ranch, Las Flores, and Coto de Caza. The Capistrano Unified Education Association ("CUEA") is the exclusive bargaining representative of CUSD teachers.

16. Leighton Anderson is an elected member of the Whittier Union High School District ("WUHSD") Board of Trustees. The WUHSD Board of Trustees is a public employer under Government Code Section 3550 *et seq*. and the EERA. The Whittier Secondary Education Association, an employee organization affiliated with the California Teachers Association and the National Education Association, is the exclusive bargaining representative of WUHSD teachers. *See* WUHSD, Union Contract Info, https://www.wuhsd.org/apps/pages/index.jsp?uREC_ID=753248&type=d&pREC_ID=1160808. Mr. Leighton has served as a trustee since 1997. His current term ends in 2022. All three of Mr. Anderson's children attended high school in the WUHSD, and his wife volunteers at one of WUHSD's high schools.

17. Phillip Yarbrough is President of the Rancho Santiago Community College District ("Rancho Santiago") Board of Trustees. A community college district is a public employer under Government Code Section 3550 *et seq*. and the

EERA. *See, e.g., United Faculty of Contra Costa Community College District*, PERB Decision No. 2652 (June 26, 2019). Mr. Yarbrough was first elected to the Rancho Santiago Board in 1996. He is currently serving his sixth term as an elected member of the Rancho Santiago Board. Mr. Yarbrough formerly taught at both of the district's community colleges: Santa Ana College and Santiago Canyon College. He is also a board member of the County of Orange Redevelopment Oversight Agency, which is subject to the MMBA. Mr. Yarbrough is a member of the Association of Community College Trustees ("ACCT") Public Policy Committee. ACCT is a nation-wide, non-profit educational organization of governing boards, representing elected and appointed trustees who govern over community, technical, and junior colleges in the United States.

18. Rodger Dohm is an elected member of the Ramona Unified School District ("RUSD") Board of Education. He has served as a board member for twelve years. Under the EERA, a public employer includes school districts and the governing board of a school district. The Ramona Teachers' Association ("RTA") is the exclusive bargaining representative of teachers in the RUSD. The RTA and the Governing Board of the RUSD are parties to a collective bargaining agreement. https://www.ramonausd.net/human-resources-4e1a5dda/rta-and-csea-bargaining-agreements-818eefbe. [April 3, 2019 RUSD and RTA Agreement, 2017-2020]. Pursuant to that agreement, the RUSD Board "shall upon request, place on the agenda of each regular Board meeting early in the agenda any non-negotiable items [i.e., matters not required by law to be negotiated such as compensation, hours of employment, and other terms and conditions of employment] brought to its consideration by the [RTA]." *Id.* at p. 6. Mr. Dohm has five children, all of whom attended or are attending school in the RUSD. He also teaches at a school in the Poway Unified School District ("PUSD").

II. Defendants

19. Defendants Eric Banks, Arthur A. Krantz, Lou Paulson, and Erich Shiners are members of the California Public Employment Relations Board ("PERB" or the "Board"). All PERB members are appointed by the Governor and are subject to confirmation by the California State Senate. Board members are appointed to five-year terms, with the term of one member expiring at the end of each calendar year. (There is currently one vacancy on the Board.) The Board has overall responsibility for administering the MMBA and the EERA, among other public employment labor-management statutes (the "Acts"). PERB is a quasi-judicial agency which oversees public sector collective bargaining in California. It administers the Acts to ensure consistent implementation and application, and adjudicates disputes between parties subject to the Acts.

20. According to its website (www.perb.ca.gov/the-board/the-board-and-its-duties/), PERB has the power to "conduct secret ballot elections to determine whether or not employees wish to have an employee organization exclusively represent them in their labor relations with their employer; prevent and remedy unfair labor practices and interpret and protect the rights and responsibilities of employers, employees and employee organizations under the Acts; bring an action in a court of competent jurisdiction to enforce PERB's decisions and rulings; to take such other action as the Board deems necessary to effectuate the purposes of the Acts it administers."

21. The board members of PERB are charged with enforcement of Section 3550 *et seq*. Cal. Gov. Code § 3551 (PERB "shall have jurisdiction over violations of this chapter.").

22. Defendant J. Felix De La Torre is the General Counsel of PERB. The General Counsel is empowered as an agent of the Board to issue a complaint for

violations of Section 3550 under California Code of Regulations, Title 8, Section 32640.[1]

FACTUAL ALLEGATIONS

I. Senate Bill 285

23. Section 3550 was introduced as Senate Bill ("S.B.") 285 by Senator Toni Atkins on February 9, 2017. According to the Legislative Counsel's Digest, the initial version of S.B. 285 proposed nonsubstantive changes to the definitional provisions of Government Code Section 16645, which (*inter alia*) prohibits a public employer from using state funds to "*assist, promote, or deter* union organizing." **Ex. B** [February 9, 2017 Legislative Counsel's Digest SB 285 at 1 (emphasis added)]. An amended and substituted version of S.B. 285 was introduced on March 14, 2017 as a "gut and amend", which bore no resemblance to the bill's original text.

24. As amended, this version of S.B. 285 added a new Chapter to the Government Code which "would prohibit a public employer from *deterring or discouraging* [but not assisting or promoting] public employees from becoming or remaining members of an employee organization." Ex. A at 3. Rather than limit its reach to public employers or contractors receiving state funds, the revised version of S.B. 285 would apply to every public employer under the jurisdiction of PERB, including counties, cities, districts, the state, schools, transit districts, the University of California, and the California State University, among others.

[1] Cal Code Regs., tit. 8, Section 32640(a) states that a ". . . Board agent shall issue a complaint if the charge or the evidence is sufficient to establish a prima facie case." *See also Superior Court v. Public Employment Relations Bd.*, 30 Cal. App. 5th 158, 191 (2018) ("Typically, a union files a 'charge' with PERB alleging an employer committed an unfair practice and if the allegations are adequate, a complaint is issued by PERB's office of general counsel.").

25. Although the Senate and Assembly committee analyses of S.B. 285 describe the bill as "requir[ing] public employers to remain neutral in employee efforts to organize for or become members of an employee organization in their workplace," [*See* Ex. A at 1], S.B. 285 prohibits public employers from "deterring or discouraging public employees from becoming or remaining members of an employee organization." It does not similarly enjoin public employers from "assisting," "promoting," or "encouraging" unions or unionization in the workplace. According to the bill's author, this one-way version of neutrality was needed, as "'[r]ight now, there is nothing to stop employers from engaging in tactics to discourage employees from becoming union members, or from convincing or coercing their employees to withdraw from union membership.'" *Id.* at 4. In fact, existing law already provided public employees and applicants with numerous safeguards against employer coercion in the exercise of rights guaranteed under law, Cal. Gov. Code § 3543.5(b), including "the right to form, join, and participate in the activities of employee organizations of their own choosing," Cal. Gov. Code § 3502, as well as prohibiting employer interference, intimidation, or discrimination because of employee exercise of their rights as an employer. Cal. Gov. Code § 3543.5(a).

26. At the same time, Senator Atkins claimed that "S.B. 285 is consistent with existing policy and seeks to build off current law." **Ex. C** [June 21, 2017 Assembly Committee on Public Employees, Retirement, and Social Security SB 285 at 3.] In fact, longstanding statutory and decisional law protects the right of public employers to communicate freely with employees on employment matters, including the benefits or disadvantages of unionization, so long as the communication is free of the threat of reprisal or promise of a benefit. These "employer free speech" protections not only safeguard the employer's right to express its views on employment matters over which it has legitimate concerns. They are necessary in order to facilitate full and knowledgeable debate and enable the exercise of a free

and informed employee choice. S.B. 285 would undermine existing free speech protections and potentially expose an employer to an unfair labor charge by merely telling employees that they have a right to resign from union membership or to no longer pay agency fees.

27. The pretextual nature of the stated purposes of S.B. 285 is underscored by the timing of S.B. 285's enactment. S.B. 285 was one of a series of bills passed days after the U.S. Supreme Court granted certiorari in *Janus v. AFSCME*, 138 S. Ct. 2448 (2018) which challenged the constitutionality of public employee agency fees. In addition to S.B. 285, California enacted A.B. 83 (enrolled as Cal. Gov. Code § 3524.51 *et seq*.) (permitting unionization of the California Judicial Council staff), S.B. 201 (enrolled as Cal. Gov. Code § 3562) (permitting students who have jobs at state institutions of higher education to unionize), S.B. 550 (enrolled as Cal. Gov. Code § 3543.8) (imposing fee and cost shifting on employers whenever the employer fails to obtain a judgment more favorable than the offer to settle the dispute proposed by the union), and AB 119 (enrolled as Cal. Gov. Code § 3555 *et seq*.) (requiring employers to provide certified unions with mandatory access to new employee orientations and requiring employers to provide the exclusive labor representative with the name, job title, department, work location, work, home, and personal cellular telephone numbers, personal email addresses on file with the employer, and home address of new employees within 30 days of hire). Each of these statutes impose significant new collective bargaining obligations on public employers and unprecedented limitations on their ability to communicate directly with their employees.

II. Senate Bill 866

28. S.B. 285's speech prohibitions were extended the following year via S.B. 866, an urgency measure (meaning it would become effective immediately) enacted on June 27, 2018 – the same day the U.S. Supreme Court held in *Janus* that compulsory agency fees violate the First Amendment. As amended by S.B. 866,

Section 3550 now reads: "A public employer shall not deter or discourage public employees *or applicants to be public employees* from becoming or remaining members of an employee organization, or *from authorizing representation by an employee organization, or from authorizing dues or fee deductions to an employee organization. This is declaratory of existing law*." **Ex. D** [Cal. Gov. Code § 3550 (emphasis added)].

29. In addition to expanding the scope of Section 3550, S.B. 866 added Section 3553, which prohibits a public employer from sending out a "mass communication" to its employees or applicants concerning the right to "join or support an employee organization, or to refrain from joining or supporting an employee organization," unless the employer first meets and confers with the union about the content of the mass communication. Absent agreement, the employer may not deliver its mass communication unless it simultaneously sends an opposing communication provided by the union.

III. The Chilling Effects Of Section 3550 On Elected Representatives Of Public Employers

30. Whether viewed alone or as part of a larger set of legislative actions, the effect of Section 3550 is to chill the ability of elected representatives to communicate facts and opinions about unions and unionization out of fear that their statements may later be deemed to "discourage" or "deter" unionization. Under statutory and decisional law, a "public employer" encompasses not only (for example) a school district, but "the governing board of a school district," "a county board of education, [and] a county superintendent of schools." (Cal. Gov. Code § 3540.1(k)). Likewise, public agencies subject to the MMBA may be held liable for the conduct of its governing body in official public proceedings, including statements by individual elected officials who sit on their governing boards. *See, e.g., SEIU Local 721 v. County of Riverside*, PERB Decision No. 2119-M (June 24, 2010).

31. Because there are no defined parameters as to conduct that could "deter or discourage" unionization or union membership, elected officials, including Plaintiffs, will choose to avoid any discussion even as to purely factual matters, including the impact of *Janus* on their own employees. Based on that Supreme Court decision, public employers must cease involuntary deductions from paychecks of employees who are not union members. Yet, according to the California School Board Association ("CSBA"), "while informing employees of such change in dues/fees deductions would be consistent with the Court's order, it may be inconsistent with the intent of the amended State law — Government Code 3550." *See* **Ex. E** [California School Board Association, "A Post Janus World: Analyzing the Aftermath of Janus v. AFSCME"].

32. The CSBA cautioned elected school board officials, including Plaintiff Leighton Anderson:

> 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.

Ex. F [June 29, 2018 New Legal Guidance: Board Communications in a Post Janus World.]. According to Dr. Barke, the legal representative of the Los Alamitos Unified School District recommended that the Board not discuss *Janus* with any employees. Similarly, a League of California research paper directed individuals relying on that paper, like Plaintiff Ed Sachs, to a law firm's legal questions and answers blog regarding Section 3550. That firm advised employers, when responding to employee requests to discontinue membership dues deductions, to limit any response "to referring the employee back to the employee organization."

See **Ex. G** [August 2, 2018 League of California Cities Resource Paper: Next Steps for Cities after *Janus v. AFSCME* and S.B. 866]; *see also* **Ex. H** [June 27, 2018 Top 10 Questions about Senate Bill 866 – New State Legislation Impacting How Public Employers Communicate with Employees and Manage Employee Organization/Union Membership Dues at 3]. Further, the firm stated: "Does Senate Bill 866 prohibit my agency from informing employees about the cost of being a union/employee organization member?" The answer given: ***"Yes. This could be seen as deterring or discouraging an employee from becoming an employee organization member or authorizing dues or fee deductions to an employee organization."*** *Id.* at 5 (emphasis added).

33. Plaintiff Laura Ferguson, a member of the San Clemente City Council, was threatened with an unfair labor charge by the San Clemente City Employees Association after she asked the City Manager whether that union used city resources to promote their preferred candidate. All of the Plaintiffs have at times limited discussion of issues in public (including during meetings of their boards) that might call attention to controversial union positions, opting instead to avoid any discussion of subjects related to unions.

34. Plaintiffs are legitimately concerned as to the punitive ramifications of a hindsight review of statements made as part of discharging their official duties. Under PERB's broad remedial mandate, the Board may issue cease and desist orders, obtain injunctions, and ultimately seek contempt sanctions from a court in the event it believes that statements by public officials continue to violate Section 3550. Cal. Gov. Code § 3541.3(i) (authorizing PERB to "take any action in respect of [unfair practice] charges . . . as the board deems necessary to effectuate the policies of this chapter). Section 3550's complete lack of guidance as to the scope of its prohibited conduct, combined with the *in terrorem* threat of being enmeshed in unfair labor proceedings for statements made at a school board meeting

or in communications with teachers, parents, or the public, is already causing them to refrain from commenting on topics that might trigger Section 3550's speech prohibitions.

35. There now exists an actual, present, and justiciable controversy between Plaintiffs and Defendants concerning their rights and duties with respect to Defendants' enforcement powers under Section 3550. Section 3550 is unconstitutional as applied to elected officials like Plaintiffs because it constitutes a blatant form of viewpoint discrimination. Section 3550 is also unconstitutional as applied to Plaintiffs, based on (among other reasons) its vague and overbroad prohibition of core political speech protected by the First Amendment. Given Plaintiffs' duties as elected officials, as well as the recurring nature of issues pertaining to union, unionization, collective bargaining, and labor-management issues, it is certain that the ongoing restrictions imposed by Section 3550 will recur and continue to chill the ability of Plaintiffs to speak without fear of liability by hindsight judgment. Without a declaration of their rights, Plaintiffs will continue to avoid discussion of any controversial issue that may touch on unions or unionization for fear of exposing themselves and their public agency to liability.

36. Conversely, Plaintiffs have faced and will continue to face a credible threat of legal proceedings brought by PERB based on alleged violations of Section 3550 whenever they respond to questions or express opinions on subjects where the answer may later be deemed to "deter or discourage" unionization.

37. If Plaintiffs do not obtain the requested relief, Plaintiffs will suffer imminent, immediate, and ongoing injury based on the chilling effects of Section 3550 on their First Amendment rights. In such an event, they will be deprived on their constitutional rights under the First Amendment to the United States Constitution and shall suffer irreparable harm. There is no adequate remedy at law.

38. Both the public interest and equity favor granting an injunction to allow Plaintiffs to exercise their constitutional right to disseminate and receive information. Injunctive relief is therefore necessary and appropriate. Accordingly, this controversy is ripe for judicial decision, and declaratory relief is necessary and appropriate pursuant to 28 U.S.C. §§ 2201(a) and 2202, so that the parties may know the legal obligations that govern their present and future conduct.

CLAIM FOR RELIEF

Violation of the First Amendment to the United States Constitution (42 U.S.C. § 1983)

39. Plaintiffs hereby re-allege and incorporate by reference the allegations contained in the above paragraphs as though fully set forth herein.

40. Section 3550 fails to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited while abutting on sensitive areas of basic First Amendment freedoms. Section 3550 gives no indication as to what it means to "deter or discourage" union membership, leading Plaintiffs to avoid any discussion concerning unionization, including by way of providing even factual information responsive to constituent inquiries. Accordingly, Section 3550 is unconstitutionally vague, overinclusive, and overbroad, and violates the First Amendment of the U.S. Constitution as applied to the state through the Fourteenth Amendment.

41. Section 3550 abridges the freedom of speech by discriminating based on the content of the speech and the viewpoint expressed. The state may not regulate speech based on its substantive content or the message it conveys. Accordingly, content-based laws such as Section 3550 are presumptively unconstitutional and may be justified only if the restrictions are narrowly tailored to serve compelling state interests.

42. By restricting speech only if it "deters or discourages" union membership (as opposed to promoting or encouraging membership), Section 3550 constitutes impermissible viewpoint discrimination. The mere assertion of a

content-neutral purpose cannot cure the constitutional defects of a law, which on its face, discriminates based on content. Further, the "deter or discourage" provision reaches far beyond the stated purpose and is not tailored to serve a compelling state interest. Accordingly, Section 3550 violates the First Amendment of the U.S. Constitution as applied to the state through the Fourteenth Amendment.

43. Defendants, acting under color of state law, have enforced and will continue to enforce the challenged law against Plaintiffs and others in violation of their First Amendment rights.

44. As a direct and proximate result of Defendants' unlawful conduct, Plaintiffs have and will suffer irreparable harm, which will continue absent injunctive relief.

///

///

///

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully pray that this Court:

1. Declare Section 3550 unconstitutional because it is vague, overbroad, and discriminates based on content and viewpoint in violation of the First and Fourteenth Amendments.
2. Enter preliminary and permanent injunctive relief prohibiting Defendants from enforcing California Government Code Section 3550.
3. Award such additional and further relief as the Court finds just and proper, including attorneys' fees and costs.

Dated: February 21, 2020

Respectfully submitted,

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By: */s/ David A. Schwarz*
DAVID A. SCHWARZ

LAW OFFICE OF MARK W. BUCHER
Mark William Bucher

CENTER FOR INDIVIDUAL RIGHTS
Michael E. Rosman

Attorneys for Plaintiffs

SENATE COMMITTEE ON
PUBLIC EMPLOYMENT AND RETIREMENT
Dr. Richard Pan, Chair
2017 - 2018 Regular

Bill No:	SB 285	**Hearing Date:**	4/24/17
Author:	Atkins		
Version:	3/14/17 As amended		
Urgency:	No	**Fiscal:**	Yes
Consultant:	Glenn Miles		

SUBJECT: Public employers: union organizing

SOURCE: American Federation of State, County and Municipal Employees (co-source)
California Labor Federation (co-source)
California Nurses Association (co-source)
Service Employees International Union, State Council (co-source)

DIGEST: This bill requires public employers to remain neutral in employee efforts to organize for or become members of an employee organization in their workplace by prohibiting public employers from deterring or discouraging public employees from becoming or remaining members of an employee organization.

ANALYSIS:

Existing law:

1) Governs collective bargaining in the private sector under the federal National Relations Labor Relations Act (NLRA) but leaves it to the states to regulate collective bargaining in their respective public sectors. While the NLRA and the decisions of its National Labor Relations Board (NLRB) often provide persuasive precedent in interpreting state collective bargaining law, public employees have no collective bargaining rights absent specific statutory authority establishing those rights.

2) Provides several statutory frameworks under California law developed over the last half century to provide California public employees collective bargaining rights, govern public employer-employee relations, and limit labor strife and economic disruption in the public sector through a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between public employers and recognized public employee organizations or their exclusive representatives. These include the following:

a) The State Employee-Employer Relations Act (Dills Act), which governs state government employer-employee relations.

b) The Meyers-Milias-Brown Act (MMBA), which governs labor relations between local public agencies and local public employees.

c) The Education Employment Relations Act (EERA) for employer-employee relations within the public school systems (K-12 and community colleges).

d) The Higher Education Employer-Employee Relations Act (HEERA) providing for employer-employee relations at the University of California, the California State University System, and Hastings College of the Law.

e) The Trial Court Employment and Protection and Governance Act (Trial Court Act), which provides Trial Court employees the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations.

f) The Trial Court Interpreters Employment and Labor Relations Act (Court Interpreters Act), which divides the trial courts into four regions and establishes regional court interpreter employment relations committees that set terms and conditions of employment for court interpreters within the region, subject to requirements to meet and confer in good faith.

g) The Los Angeles County Metropolitan Transportation Authority Transit Employer-Employee Relations Act (TEERA), which provides supervisory employees of the Los Angeles County Metropolitan Transportation Authority the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations and for the purpose of meeting and conferring and the right to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

h) The In-Home Supportive Services Employer-Employee Relations Act (IHSSEERA), which creates a public entity joint powers authority called the California In-Home Supportive Services Authority ("Statewide Authority") deemed to be the employer of record, for purposes of collective bargaining, of individual providers of in-home supportive services in each county, as specified.

3) Does not cover California's public transit districts by a common collective bargaining statute. Instead, while some transit agencies are subject to the MMBA, the majority of transit agencies are subject to labor relations provisions that are found in each district's specific Public Utilities Code (PUC) enabling statute, in joint powers agreements, or in articles of incorporation and bylaws. These provisions provide employees with basic rights to organization and representation, but do not define or prohibit unfair labor practices. Unlike other California public agencies and employees, these transit agencies and their employees have no recourse to the PERB. They must rely upon the courts to remedy any alleged violations. Additionally, they may be subject to provisions of the federal Labor Management Relations Act of 1947 (LMRA) and the 1964 Urban Mass Transit Act (now known as the Federal Transit Act).

4) Requires each county to act as, or establish, an employer for in-home supportive service (IHSS) providers under Section 12302.2 of the Welfare and Institutions Code for purposes of collective bargaining under the Meyers-Milias-Brown Act.

5) Establishes the Public Employment Relations Board (PERB), a quasi-judicial administrative agency, charged with resolving disputes and enforcing the statutory duties and rights of local public agency employers and employee organizations but provides the City and County of Los Angeles a local alternative to PERB oversight.

6) Prohibits public employers that receive state funds from using any of those funds to assist, promote, or deter union organizing and provides that any public official who knowingly authorizes the use of state funds in violation of this prohibition shall be liable to the state for the amount of those funds.

This bill:

1) Prohibits a public employer from deterring or discouraging public employees from becoming or remaining members of an employee organization.

2) Delegates jurisdiction over violations of the bill's provisions to PERB and provides that PERB's powers and duties shall apply.

3) Defines "employee organization", "public employee", and "public employer" by reference to existing statutory frameworks governing public employer-employee labor relations, as specified.

Background

Union Neutrality - This bill essentially seeks to ensure that public employers shall remain neutral when their employees are deciding whether to join a union or to stay in the union.

The NLRA and the several California labor relations acts governing public sector collective bargaining generally prohibit unfair labor practices, as defined. Existing law also prohibits public employers that receive state funds from using any of those funds to assist, promote, or deter union organizing and provides that any public official who knowingly authorizes the use of state funds in violation of this prohibition shall be liable to the state for the amount of those funds.

According to the author, however, current law does not extend employee protections against undue influence from employers hostile to unionization "when employees are choosing whether or not to become a union member. Right now, there is nothing to stop employers from engaging in tactics to discourage employees from becoming union members, or from convincing or coercing their employees to withdraw from union membership."

Although union neutrality may be viewed as an employer concession that should be negotiated at the bargaining table, past federal court cases have created uncertainty as to whether bargaining over union neutrality violates federal law under Section 302 of the Labor Management Act (see, *Unite Here Local 355 v. Mulhall, 134 S.Ct. 594 (2013)*, seeking to reconcile conflicting federal circuit court holdings on the issue but dismissed by the Supreme Court as "improvidently granted"). Given the LMRA's applicability to certain transit districts and its persuasive precedent in general, it is appropriate to provide clear, statutory guidance of California law on union neutrality.

Judicial Branch Collective Bargaining - Although trial court employees and trial court interpreters are covered under the Trial Court Act and the Court Interpreters Act respectively, Judicial Council employees are not covered by current labor relations statutes. The Judicial Council, under the leadership of the Chief Justice, is the policymaking body of the California courts. Judicial Council employees implement the council's policies.

Judicial Council employees are expressly exempt from state civil service rules by Article 7 Section 4(b) of the California Constitution and thus, the Dills Act governing state employees labor relations does not, in current form, confer on them bargaining rights. AB 83 (Rodriguez) in the current legislative session would amend the Dills Act to include Judicial Council employees.

In Home Support Services Employers - The designated employer of record for some IHSS employees (and thus, the employer who would be prohibited from deterring or discouraging employees from joining or staying with their union) is potentially in transition.

IHSS program employees provide services to persons who are over 65 years of age, disabled, or blind so that they can remain safely in their own home as an alternative to out-of-home care, such as nursing homes or board and care facilities.

According to the Senate Committee Budget and Fiscal Review Committee Overview of the 2017-18 Budget, "prior to July 1, 2012, county public authorities or nonprofit consortia were designated 'employers of record' for collective bargaining purposes, while the state administered payroll and benefits. Pursuant to 2012-13 trailer bill language, however, collective bargaining responsibilities in seven counties participating in the Coordinated Care Initiative (CCI) – Los Angeles, Orange, Riverside, San Bernardino, San Mateo, and Santa Clara, shifted to an IHSS Authority administered by the state." The Governor proposes in his 2017-2018 Budget to cancel the CCI demonstration project and return the IHSS program back to the prior state-county sharing ratio. Responsibility for collective bargaining would also return to the counties.

Related/Prior Legislation

AB 1889 (Cedillo, Chapter 872, Statutes of 2000), prohibited employers from using state funds to assist, promote, or deter union organizing.

FISCAL EFFECT: Appropriation: No Fiscal Com.: Yes Local: No

SUPPORT:

American Federation of State, County and Municipal Employees (co-source)
California Labor Federation (co-source)
California Nurses Association (co-source)
Service Employees International Union, State Council (co-source)
Association for Los Angeles Deputy Sheriffs
California Association of Professional Employees
California School Employees Association
Los Angeles County Deputy Probation Officers, AFSCME, Local 685
Los Angeles Police Protective League
Riverside Sheriffs' Association
State Building and Construction Trades Council, AFL-CIO

OPPOSITION:

None received.

ARGUMENTS IN SUPPORT: According to the Service Employees International Union, "SB 285 is consistent with long-held California and national labor relations policies which confer the fundamental right to public employees to form, join, and participate in the activities of a union of their choosing free of interference, intimidation, coercion, retaliation or discrimination."

The California Nurses Association states that "if employers successfully convince their employees not to become union members or to withdraw from the union, this weakens the employees' collective power through union representation and unfairly increases the employer's powers in what should be a level playing field" and "effectively undermines California's collective bargaining statutes."

The California Labor Federation argues that the bill is necessary to address "new threats on the federal level, both through the courts and legislatively, that threaten the existence of public sector unions."

According to the California School Employees Association, SB 285 "is an important bill to ensure that workers are free to determine their own fate and future."

2017 California Senate Bill No. 285, California 2017-2018 Regular Session

CALIFORNIA BILL TEXT

TITLE: State funds

VERSION: Introduced
February 09, 2017
Atkins


Image 1 within document in PDF format.

SUMMARY: An act to amend Section 16645 of the Government Code, relating to state funds.

TEXT:

SENATE BILL No. 285

Introduced by Senator Atkins

February 9, 2017

An act to amend Section 16645 of the Government Code, relating to state funds.

LEGISLATIVE COUNSEL'S DIGEST

SB 285, as introduced, Atkins. State funds.

Existing law prohibits using state funds to reimburse a state contractor for any costs incurred to assist, promote, or deter union organizing. Existing law prohibits a public employer receiving state funds from using those funds to assist, promote, or deter union organizing. Existing law establishes certain definitions in this regard.

This bill would make nonsubstantive changes to the definitional provisions described above.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. Section 16645 of the Government Code is amended to read:

16645. For purposes of this ~~chapter, the following terms have the following meanings:~~ **chapter:**

(a) "Assist, promote, or deter union organizing" means any attempt by an employer to influence the decision of its employees in this state or those of its subcontractors regarding either of the following:

(1) Whether to support or oppose a labor organization that represents or seeks to represent those employees.

(2) Whether to become a member of any labor organization.

(b) "Employer" means any individual, corporation, unincorporated association, partnership, government agency or body, or other legal entity that employs more than one person in the state.

WESTLAW © 2019 Thomson Reuters. No claim to original U.S. Government Works.

(c) "State contractor" means any employer that receives state funds for supplying goods or services pursuant to a written contract with the state or any of its agencies. "State contractor" includes an employer that receives state funds pursuant to a contract specified in paragraph (2) of subdivision (d). For purposes of this chapter, the contract shall be deemed to be a contract with a state agency.

(d) (1) "State funds" means any money drawn from the State Treasury or any special or trust fund of the state.

(2) "State funds" includes any money appropriated by the state and transferred to any public agency, including a special district, that is used by the public agency to fund, in whole or in part, a service contract in excess of two hundred fifty thousand dollars ($250,000).

(e) "State property" means any property or facility owned or leased by the state or any state agency.

End of Document

© 2019 Thomson Reuters. No claim to original U.S. Government Works.

Date of Hearing: June 21, 2017

ASSEMBLY COMMITTEE ON PUBLIC EMPLOYEES, RETIREMENT, AND SOCIAL SECURITY
Freddie Rodriguez, Chair
SB 285 (Atkins) – As Amended March 14, 2017

SENATE VOTE: 29-10

SUBJECT: Public employers: union organizing

SUMMARY: Prohibits public employers from deterring or discouraging membership by public employees in an employee organization; delegates to the Public Employment Relations Board (PERB), jurisdiction over acts in violation of these provisions; provides that the PERB's powers and duties shall apply, and defines "employee organization", "public employee", and "public employer" by reference to existing statutory definitions governing public employer-employee labor relations.

EXISTING LAW:

1) Prohibits public employers that receive state funds from using any of those funds to assist, promote, or deter union organizing and provides that any public official who knowingly authorizes the use of state funds in violation of this prohibition shall be liable to the state for the amount of those funds.

2) Provides several statutory frameworks under California law to provide public employees collective bargaining rights, govern public employer-employee relations, and limit labor strife and economic disruption in the public sector through a reasonable method of resolving disputes regarding wages, hours and other terms and conditions of employment between public employers and recognized public employee organizations or their exclusive representatives. These include:

   a) The Meyers-Milias-Brown Act (MMBA), which governs labor relations between local public agencies and local public employees.

   b) The Ralph C. Dills Act (Dills Act), which governs state government employer-employee relations.

   c) The Education Employment Relations Act (EERA) for employer-employee relations within the public school (K-12) and community college systems.

   d) The Higher Education Employer-Employee Relations Act (HEERA), which provides for employer-employee relations at the University of California, the California State University System, and Hastings College of the Law.

e) The Trial Court Employment and Protection and Governance Act (TCEPGA/Trial Court Act), which provides Trial Court employees the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations.

f) The Trial Court Interpreters Employment and Labor Relations Act (Court Interpreters Act), which sets terms and conditions of employment for court interpreters within the trial courts.

g) The Los Angeles County Metropolitan Transportation Authority Transit Employer-Employee Relations Act (TEERA), which provides supervisory employees of the Los Angeles County Metropolitan Transportation Authority the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations.

h) The In-Home Supportive Services Employer-Employee Relations Act (IHSSEERA), which creates a joint powers authority called the California In-Home Supportive Services Authority ("Statewide Authority") deemed to be the employer of record for purposes of collective bargaining.

3) Governs collective bargaining in the private sector under the federal National Relations Labor Relations Act (NLRA) but leaves it to the states to regulate collective bargaining in their respective public sectors. While the NLRA and the decisions of its National Labor Relations Board (NLRB) often provide persuasive precedent in interpreting state collective bargaining law, public employees have no collective bargaining rights absent specific statutory authority establishing those rights.

4) Does not cover California's public transit districts by a common collective bargaining statute. Instead, while some transit agencies are subject to the MMBA, the majority of transit agencies are subject to labor relations provisions that are found in each district's specific Public Utilities Code (PUC) enabling statute, in joint powers agreements, or in articles of incorporation and bylaws.

   These provisions provide employees with basic rights to organization and representation, but do not define or prohibit unfair labor practices. Unlike other California public agencies and employees, these transit agencies and their employees have no recourse to the PERB. Instead, they must rely upon the courts to remedy any alleged violations. Additionally, they may be subject to provisions of the federal Labor Management Relations Act of 1947 (LMRA) and the 1964 Urban Mass Transit Act (now known as the Federal Transit Act).

5) For purposes of payroll, unemployment compensation, unemployment compensation disability benefits, workers' compensation, retirement savings accounts, and other payroll

deductions, requires each county to act as, or establish, an employer for in-home supportive service (IHSS) providers under Section 12302.2 of the Welfare and Institutions Code.

6) Establishes the PERB, a quasi-judicial administrative agency, charged with resolving disputes and enforcing the statutory duties and rights of local public agency employers and employee organizations, but provides the City and County of Los Angeles a local alternative to PERB oversight.

FISCAL EFFECT: According to the Senate Appropriations Committee, pursuant to Senate Rule 28.8, this bill would result in negligible state costs.

COMMENTS: According to the author, "[c]urrent law prohibits public employers from interfering with, intimidating, restraining, coercing, or discriminating against public employees while exercising their right to have union representation in the workplace or not. However, this protection does not extend to employees who are choosing whether or not to become or remain union members. Currently, there is nothing to stop public employers from engaging in unfair tactics in an attempt to convince or coerce their employees to withdraw from union membership.

"If employers successfully convince their employees not to become union members or to withdraw from the union, this weakens the employees' collective power through union representation and unfairly increases the employer's power in what should be a level playing field. This effectively undermines California's collective bargaining statutes.

"SB 285 is consistent with existing California policy and seeks to build off of current law. The bill would close the existing loophole for public employers and ensure that public employees remain free to exercise their personal choice as to whether or not to become union members, without being deterred or discouraged from doing so by their employer."

1) Union Neutrality and Section 302 of the Labor Management Relations Act

The NLRA and the several California labor relations acts governing public sector collective bargaining generally prohibit unfair labor practices, as defined.

Although union neutrality may be viewed as an employer concession that should be negotiated at the bargaining table, past federal court cases have created uncertainty as to whether bargaining over union neutrality violates federal law under Section 302 of the LMRA (see *Unite Here Local 355 v. Mulhall, 134 S.Ct. 594 (2013)*, which sought to reconcile conflicting federal circuit court holdings on the issue but dismissed by the United States Supreme Court as "improvidently granted"). Given the LMRA's applicability to certain transit districts and its persuasive precedent in general, it is appropriate to provide clear, statutory guidance of California law on union neutrality.

2) Judicial Branch Collective Bargaining

Trial court employees and trial court interpreters are covered under the Trial Court Act and the Court Interpreters Act respectively; however, Judicial Council employees are not covered by current labor relations statutes. The Judicial Council, under the leadership of the Chief Justice, is the policymaking body of the California courts. Judicial Council employees implement the council's policies.

Judicial Council employees are expressly exempt from state civil service rules by Article 7 Section 4(b) of the California Constitution and thus, the Dills Act governing state employees labor relations does not, in current form, confer on them bargaining rights.

AB 83 (Santiago), in the current legislative session, amends the Dills Act to include specified Judicial Council employees.

3) IHSS Employers

The designated employer of record for IHSS employees, and thus, the employer that would be prohibited from deterring or discouraging employees from joining or staying with their union, is potentially in transition.

In the May Revision of the 2017-2018 Budget, the Governor proposes to cancel the Coordinated Care Initiative demonstration project and return the IHSS program back to the prior state-county sharing ratio, and responsibility for collective bargaining would also return to the counties.

4) Prior Legislation

2000: Chapter 872 (AB 1889, Cedillo) prohibits employers from using state funds to assist, promote, or deter union organizing.

5) Comments by Supporters

Numerous supporters offer comments similar to those provided by the author.

REGISTERED SUPPORT / OPPOSITION:

Support

American Federation of State, County And Municipal Employees, AFL-CIO
Association for Los Angeles Deputy Sheriffs
California Association of Professional Employees
California Labor Federation, AFL-CIO
California Nurses Association
California Professional Firefighters
California School Employees Association
California Teachers Association

Faculty Association of California Community Colleges
Los Angeles County Deputy Probation Officers, AFSCME, Local 685
Los Angeles County Professional Peace Officers Association
Organization Of SMUD Employees
Riverside Sheriffs' Association
San Diego County Court Employees Association
San Luis Obispo County Employees Association
Services Employees International Union
State Building and Construction Trades Council of California, AFL-CIO
United Domestic Workers Of America, AFSCME, Local 3930
United Public Employees

Opposition

None on file.

Analysis Prepared by: Michael Bolden / P.E.,R., & S.S. / (916) 319-3957

Cal Gov Code § 3550

Copy Citation

Deering's California Codes are current through all 870 Chapters of the 2019 Regular Session.

Deering's California Codes Annotated > GOVERNMENT CODE (§§ 1 — 500000–500049) > Title 1 General (Divs. 1 — 9) > Division 4 Public Officers and Employees (Chs. 1 — 12) > Chapter 11 Prohibition on Public Employers Deterring or Discouraging Union Membership (§§ 3550 — 3553)

§ 3550. Prohibition against deterring or discouraging public employees or applicants from becoming or remaining members of employee organization

A public employer shall not deter or discourage public employees or applicants to be public employees from becoming or remaining members of an employee organization, or from authorizing representation by an employee organization, or from authorizing dues or fee deductions to an employee organization. This is declaratory of existing law.

History

Added Stats 2017 ch 567 § 1 (SB 285), effective January 1, 2018. Amended Stats 2018 ch 53 § 11 (SB 866), effective June 27, 2018.

▼ Annotations

Notes

Amendments:
2018 Amendments (ch 53):

Rewrote the section which read: "A public employer shall not defer or discourage public employees from becoming or remaining members of an employee organization."

Deering's California Codes Annotated
Copyright © 2020 Matthew Bender & Company, Inc.
a member of the LexisNexis Group. All rights reserved.

Trouble viewing this email? **Click here »**

csba
California School Boards Association

A Post-Janus World: Analyzing the Aftermath of *Janus v. AFSCME*

For additional analysis of *Janus v. AFSCME* and its implications for local educational agencies, watch our **Facebook Live discussion of the issue at 2:30 p.m. today** or view it on the CSBA Facebook Page at your leisure. CSBA will also air a **Janus webcast on the afternoon of Friday, June 29.** Finally, for background on Janus and the issues at stake, please reference our **case overview and FAQ.**

LIVE

Janus Announcement:

The U.S. Supreme Court issued its highly anticipated opinion this morning regarding *Janus v AFSCME*. As expected, the Court has ruled, by a 5-4 margin, that compelling nonconsenting employees to pay agency fees, also known as fair share fees, to unions is a violation of their First Amendment rights. This decision by the Court overturns its 1977 ruling in *Abood v. Detroit Board of Education*.

Abood, a 1977 Supreme Court case, gave public employees represented by a union the right to opt out of paying full dues, but upheld the legality of requiring them to pay an "agency fee," sometimes referred to as a "fair share" fee. That fee is an amount calculated to cover the costs of union representation relating to the collective bargaining process, contract administration, and pursuit of matters affecting wages, hours and conditions of employment. It does not include the costs of a union's political activities.

In California, *Abood* has been implemented in that manner. California's Educational Employment Relations Act ("EERA") required payment of agency fees as a condition of

employment, but allowed employees to opt out of those fees that would go toward subsidizing a union's political activities. With *Janus,* that has changed.

Janus argued, successfully, that bargaining activity is inherently political and, therefore, employees should be able to opt out of paying any fees at all to the union.

In deciding for Janus, the Court wrote that, "States and public-sector unions may no longer extract agency fees from nonconsenting employees. The First Amendment is violated when money is taken from nonconsenting employees for a public-sector union; employees must choose to support the union before anything is taken from them. Accordingly, neither an agency fee nor any other form of payment to a public-sector union may be deducted from an employee, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay."

This decision results in an immediate change in the payroll deductions procedures for those employees who have previously foregone membership of the employee organization, but were required to continue to pay agency fees, or to make other payments to the union.

The decision may also have implications for the implementation of new legislation designed to blunt the impact of *Janus.* The 2018–19 Budget Package the Governor signed this morning attempts to change labor law with several key provisions that were drafted in anticipation of a decision for the plaintiff. Specifically, the decision calls into question the legality of parts of Senate Bill 866, and possibly the legality of existing authorizations of agency fees or other payments for deductions.

SB 866 contained the following provisions:

Regarding Dues and Revocation:

- Education Codes Sections 45060 and 45168 address the revocation of certificated and classified employee authorizations for payroll deductions.
    - For Certificated employees, the law now includes deductions for service, programs, or committee provided or sponsored by employee organizations, in additional to union dues. For Classified, the law currently includes union dues and other service dues.
    - Revocations must comply with the terms of the written authorizations
    - Governing boards ***may*** (no longer shall) deduct actual ***reasonable*** costs of making the deduction.
    - Employee requests to cancel or change authorizations for payroll deductions for employee organizations shall be directed to the employee organization rather than the governing board, and the employee organization shall process these requests.
    - Governing boards shall rely on information provided by the employee organization regarding whether the deductions were properly canceled or

changed. The employee organization shall indemnify (legally defend) the public school employer for any claims made by the employee for deductions made in reliance on that information.

- An employee organization that certifies that it has and will maintain individual employee authorizations shall not be required to submit to the governing board a copy of the employees' written authorization in order for the payroll deductions to be effective, unless a dispute arises. The employee organization shall indemnify (legally defend) the public employer against the legal responsibility of their actions and for any claims made by the employee for deductions made in reliance on its notification.

Prohibited from Deterring or Discouraging Membership

- Government Code 3550 is amended as a declaratory statement of existing law, in addition to adding "applicants" to the section. This section is amended to include that public employers may not deter or discourage applicants, in addition to public employees, from becoming or remaining members of a union, or from authorizing representation by an employee organization, or from authorizing dues or fee deductions to an employee organization.

NOTE: Again based on the Court's decision, Districts/County Offices of Education must cease deductions from paychecks of employees who are not union members immediately. In effect, while informing employees of such change in dues/fees deductions would be consistent with the Court's order, it may be inconsistent with the intent of the amended State law — Government Code 3550.

Mass Communications

- Government Code 3553 is a newly added section which addresses "mass communications" by the public employer to public employees or applicants concerning public employees' rights to join or support an employee organization, or to refrain from joining or supporting an employee organization.
  - This law would require the public employer to meet and confer with the employee organization concerning the content of the mass communication.
  - If there is no agreement on the content, and the public employer still chooses to disseminate the mass communication, it must also distribute, at the same time, a communication of reasonable length by the employee organization. Adequate copies shall be provided to the public employer by the employee organization.
  - "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.
  - This section does not apply to the distribution of a communication concerning public employee rights.

Confidentiality of Details Regarding Orientation

- Government Code 3556 is amended to prohibit the disclosure of the date, time and place of the new employee orientation to anyone other than the employees, the exclusive representative, or a vendor that is contracted to provide a service for purpose of the orientation.
    - The Legislature finds the employee rights of privacy outweighs the public right to access with respect to the new employee orientation, and as such, imposes this restriction on the public's right of access.

"Our members have been concerned about the implications of a decision in *Janus* and how it might affect their operations and their relationships with labor unions," said CSBA CEO and Executive Director Vernon M. Billy. "If nothing else, today's announcement lifts the cloud of uncertainty and provides some measure of clarity on how to proceed with matters like fair share fees, payroll deductions and reimbursements. Questions remain, especially related to the implementation of provisions in the 2018–19 budget package that seeks to mitigate the effects of *Janus*. These new laws alter the way employers conduct orientations, communicate with union members and handle changes to membership status. We will continue to help California's school districts and county offices of education work through these issues so they can minimize disruption and implement the Court's decision with fidelity."

Again, for further analysis of *Janus v AFSCME* and its implications for LEAs, be sure to watch our **Facebook Live discussion of the issue at 2:30 p.m. today** (it will remain on the CSBA Facebook page after the live recording) and our **CSBA webcast on Friday afternoon.** You can also find additional information on **the history of Janus in this overview of the case,** published on June 18.

California School Boards Association | 3251 Beacon Blvd., West Sacramento, CA 95691
Phone: (800) 266-3382 | Fax: (916) 371-3407
Website | Privacy Policy

Trouble viewing this email? **Click here »**

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.

California School Boards Association | 3251 Beacon Blvd., West Sacramento, CA 95691
Phone: (800) 266-3382 | Fax: (916) 371-3407
Website | Privacy Policy |

League of California Cities

RESOURCE PAPER: NEXT STEPS FOR CITIES AFTER *JANUS V. AFSCME* AND S.B. 866

Presented by Laura Kalty, Partner
Liebert Cassidy Whitmore

August 2, 2018

I. KEY ELEMENTS OF THE *JANUS* HOLDING (*JANUS V. AMERICAN FEDERATION OF STATE, COUNTY, AND MUN. EMPLOYEES, COUNCIL 31* (2018) 138 S.CT. 2448 ("*JANUS*"))

- Agency shop fees (a.k.a. "fair share fees" or involuntary "service fees") are an unconstitutional violation of the First Amendment.
- Employees must clearly and affirmatively consent before any money is taken from them. Reasoning:
  - ✓ Individuals cannot "waive" their First Amendment rights by presumption. To be effective, such waiver must be "freely given and shown by 'clear and compelling evidence.'"
  - ✓ Unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met. (*Janus* at p. 2486.)
- Overrules *Abood v. Detroit Bd. of Ed. (1977)* 431 U.S. 209, as "wrongly decided."

II. KEY ELEMENTS OF S.B. 866 IMPACTING CITIES (SENATE BILL 866 (CAL. LEGIS. SERV. CH. 53 (S.B. 866))

- Must honor employee organization requests to deduct dues, initiation fees, general assessments and payments of any other membership benefits from the salaries and wages of their members. (Gov. Code, § 3554, added by Stats. 2018, c. 53 (S.B. 866), § 14, eff. June 27, 2018.)
- Must rely on information provided by the employee organization regarding whether deductions for an employee organization were properly canceled or changed. (Gov. Code, § 1157.12, amended by Stats. 2018, c. 53 (S.B. 866), § 10, eff. June 27, 2018.)
- Requires employee organizations to indemnify the public employer for any claims made by the employee for deductions made in reliance on information provided by the employee organization regarding whether deductions for an employee organization were properly canceled or changed. (Gov. Code, § 1157.12, amended by Stats. 2018, c. 53 (S.B. 866), § 10, eff. June 27, 2018.)

©2018 (c) Liebert Cassidy Whitmore

- Must not require employee organizations to provide copies of individual authorizations, if the organization has certified that it has and will maintain such authorizations, unless a dispute about the existence or terms of the authorization arises. (Gov. Code, § 1157.12, amended by Stats. 2018, c. 53 (S.B. 866), § 10, eff. June 27, 2018.)

- Must meet and confer with recognized employee organizations prior to disseminating mass communications to public employees or applicants concerning public employees' right to join or support an employee organization or to refrain from joining or supporting an employee organization. But, employer may send such communication if no agreement is reached, as long is it also sends a communication of reasonable length provided by the exclusive representative at the same time. (Gov. Code, § 3553, added by Stats. 2018, c. 53 (S.B. 866), § 14, eff. June 27, 2018.)

- Must not disclose the date, time and place of an employee orientation, to anyone other than the employees, the exclusive representative, or a vendor that is contracted to provide services for the purposes of the orientation. (Gov. Code, § 3556, amended by Stats. 2018, c. 53 (S.B. 866), § 16, eff. June 27, 2018.)

- Must (still) not deter or discourage public employees or applicants from becoming or remaining members of an employee organization, or from authorizing representation by an employee organization, or from authorizing fees or dues deductions. (Gov. Code, § 3550, amended by Stats. 2018, c. 53 (S.B. 866), § 11, eff. June 27, 2018.)

III. ADDITIONAL RESOURCES

- **Full text of *Janus v. AFSCME*,** available online at https://www.supremecourt.gov/opinions/17pdf/16-1466_2b3j.pdf

- **LCW Special Bulletin: Mandatory Agency Shop Fees Rules Unconstitutional in *Janus v. AFSCME*,** available online at https://www.calpublicagencylaboremploymentblog.com/labor-relations/mandatory-agency-shop-fees-ruled-unconstitutional-in-janus-v-afscme/

- **Full text of Senate Bill 866**: https://leginfo.legislature.ca.gov/faces/billCompareClient.xhtml?bill_id=201720180SB866

- **LCW Special Bulletin: Top 10 Questions about Senate Bill 866,** available online at https://www.calpublicagencylaboremploymentblog.com/labor-relations/top-10-questions-about-senate-bill-866-new-state-legislation-impacting-how-public-employers-communicate-with-employees-and-manage-employee-organization-union-membership-dues/

©2018 (c) Liebert Cassidy Whitmore

LCW Liebert Cassidy Whitmore

California Public Agency Labor & Employment Blog

USEFUL INFORMATION FOR NAVIGATING LEGAL CHALLENGES

Top 10 Questions about Senate Bill 866 – New State Legislation Impacting How Public Employers Communicate with Employees and Manage Employee Organization / Union Membership Dues

By Erin Kunze on June 27, 2018

The post was authored by Erin Kunze.

On June 27, 2018, Governor Brown signed into law the Final State Budget, along with budget trailer bill, Senate Bill 866. In brief, though there is little comment in the Bill's legislative analysis, it is clear that Senate Bill 866 is a direct response to the Supreme Court's anticipated, and now adopted, holding in *Janus v. AFSCME*. As noted in our related **Special Bulletin**, the Supreme Court's decision in *Janus v. AFSCME* overturned forty-plus years of case law that authorized agency shop – or mandatory union service fees – in public sector employment. The Court's decision in *Janus v. AFSCME* means that public agency employers and unions that represent public employees can no longer mandate as a condition of employment that employees pay a service fee (or comparable religious objector charitable contribution) for the portion of union dues attributable to activities the union claims are "germane to [the union's] duties as collective bargaining representative."

While public employers and public employee organizations (i.e. unions or local labor associations) can no longer mandate these fees as a condition of continued employment, Senate Bill 866 amends and creates new state law regulating: (1) how public employers and employee organizations manage organization membership dues and membership-related fees; and (2) how public employers communicate with employees about their rights to join or support, or refrain from joining or supporting employee organizations. It also prohibits public employers from deterring or discouraging public employees and applicants for public employment from becoming or remaining members of employee organizations (a declaration of existing law). Finally, Senate Bill 866 expands employee organization access to employee orientations by making such orientations confidential.

Below, we outline the top 10 questions arising from Senate Bill 866:

1. **Does Senate Bill 866 Apply to My Public Agency?**

Yes. Senate Bill 866 applies to all public agencies, though it does not apply to all public agencies in the same manner. For example, for the purposes of salary and wage deductions in relation to employee organization membership dues and related fees, the Bill defines a "public employer" as the state, Regents of the University of California, the Trustees of the California State University, as well as the California State University itself, the Judicial Council, a trial court, a county, city, district, public authority, including transit district, public agency, or any other political subdivision or public corporation of the state, but not a "public school employer or community college district."

But while public schools and community college districts are not included in the definition of "public employer" for the purposes of salary and wage deductions, they are not exempt from Senate Bill 866. Instead, separate provisions apply to those agencies. The provisions that apply to public school and community college district employers largely reflect those that apply to other public employers regarding the management of employee organization membership dues and related fees, though there are some distinctions.

Provisions governing wage and salary deductions for public employers, other than public schools and community college districts, are now codified at Government Code sections 1152, 1153, 1157.3, 1157.10, and 1157.12. (Section 1153 applies to state employers only, and section 1157.10 applies only to state employees of public agencies.)

Provisions governing wage and salary deductions applicable to public schools and community college districts are codified at Education Code sections 45060, 45168, 87833, and 88167 (reflecting

deductions for public school certificated and classified employees, and community college district academic and classified employees).

2. **What Should I do if an Employee Asks My Agency to Discontinue the Employee's Union / Employee Organization Membership Dues Deduction? Can I Respond?**

You can respond, but your response is limited to referring the employee back to the employee organization. With the passage of Senate Bill 866, public employers as well as public school and community college district employers are required to direct employee requests to cancel or change authorizations for payroll dues deductions or other membership-related fees to the employee organization. Employee organizations are responsible for processing these requests.

Distinct from employee organization / union membership dues and membership-related fees, the Supreme Court's holding in *Janus v. AFSCME,* requires employers to immediately stop withholding involuntary service fees; but employers should also notify and meet and confer with any employee organizations regarding the negotiable effects of that change as soon as possible. Though Senate Bill 866 does not specify how agencies respond to employer inquiries about service-fees, it may also be appropriate to direct the question to the employee organization (e.g. if an employee asks whether he/she can voluntarily pay the union something other than membership dues). This assessment should be made on a case-by-case basis.

3. **Must My Agency Rely on an Employee Organization's Statement Regarding an Employee's Organization Membership?**

Yes. Public employers are required to honor employee organization requests to deduct membership dues and initiation fees from their members' wages. Public employers are also required to honor an employee organization's request to deduct their members' general assessments, as well as payment of any other membership benefit program sponsored by the organization. Public employers must additionally rely on information provided by the employee organization regarding whether deductions for an employee organization have been properly canceled or changed. Consequently, because public employers will be making these deductions in reliance on the information received from employee organizations, employee organizations must indemnify public employers for any claims made by an employee challenging deductions.

Public school and community college district employers are similarly required to rely on information provided by employee organizations regarding whether deductions for the organization have been

properly canceled or changed. However, as with public employers, the employee organization must indemnify the public school or community college district employer for any claims made by an employee challenging deductions.

4. **Can My Agency Demand that the Union / Employee Organization Provide the Agency with a Copy of an Employee's Written Authorization for Payroll Deductions?**

No, except in very limited circumstances. As an initial matter, public employers must honor employee authorizations for deductions from their salaries, wages or retirement allowances for the payment of dues, or for any other membership-related services. Deductions may be revoked only pursuant to the terms of the employee's written authorization. Similarly, public school and community college district employers must honor the terms of an employee's written authorization for payroll deductions. However, public employers that provide for the administration of payroll deductions (as required above, or as required by other public employee labor relations statutes), must also rely on the employee organizations' certification that they have the employee's authorization for the deduction. A public employer is prohibited from requiring an employee organization to provide it with a copy of an individual's authorization, as long as the organization certifies that it has and will maintain individual employee authorizations. The only exception is where a dispute arises about the existence or terms of the authorization.

Similarly, public school and community college district employers must rely on an employee organization's certification that it has an employee's authorization for payroll deductions. Upon certification, public school and community college district employers are prohibited from requiring the employee organization to provide it with a copy of the employee's written authorization. As with public employers, a public school or community college district employer can only request a copy of the employee's written authorization if a dispute arises about the existence or terms of the authorization. Again, because employers will be making deductions in reliance on the information received from employee organizations, employee organizations must indemnify employers for any claims challenging these deductions.

5. **Can I Discourage or Deter Employees from Becoming or Continuing in Union / Employee Organization Membership? Can I Discourage or Deter them from Enrolling in Automatic Membership Dues Deductions?**

No to both questions. Public employers remain prohibited from deterring or discouraging public employees, or applicants, from becoming or remaining members of employee organizations. They

Case 8:20-cv-00358 Document 1-1 Filed 02/21/20 Page 27 of 29 Page ID #:45

are similarly prohibited from deterring or discouraging public employees or applicants from authorizing representation by an employee organization, or from authorizing dues or fee deductions to such organizations. The statute provides that this is a declaration of existing law.

Notably, for the purposes of this provision, a public employer is any employer subject to the Meyers-Milias Brown Act (MMBA), the Ralph C. Dills Act, the Judicial Council Employer-Employee Relations Act (JEERA), the Educational Employment Relations Act (EERA), the Higher Education Employer-Employees Relations Act (HEERA), the Trial Court Employment Protection and Governance Act, the Trial Court Interpreter Employment and Labor Relations Act, the Los Angeles County Metropolitan Transportation Authority Transit Employer-Employee Relations Act, and Employers for in-home supportive services (IHSS) providers (pursuant to Welfare and Institutions Code section 12302.25). This provision also applies to public transit districts with respect to their public employees who are in bargaining units not subject to the provisions listed above.

6. **Does Senate Bill 866 Prohibit My Agency from Informing Employees about the Cost of Being a Union / Employee Organization Member?**

Yes. This could be seen as deterring or discouraging an employee from becoming an employee organization member or authorizing dues or fee deductions to an employee organization. As noted in response to question 5, this conduct is prohibited. In addition, as discussed in question 7 below, employers are prohibited from sending mass communications to employees about employee organization membership without first meeting and conferring with the organization about the content of the communication.

7. **Can My Agency Still Send Mass Communications to Employees about Union / Employee Organization Membership?**

Yes, but only if the agency first meets and confers about the content of the communication with the recognized employee organization.

A public employer that chooses to send mass communications to their employees or applicants concerning the right to "join or support an employee organization, or to refrain from joining or supporting an employee organization" must first meet and confer with the exclusive representative about the content of the mass communication. If the employer and exclusive representative do not come to an agreement about the content of the communication, the employer may still choose to send it. If it does, however, it must also include with its own communication, a communication of

reasonable length provided by the exclusive representative. Notably, this requirement does not apply to a public employer's distribution of a communication from PERB concerning employee rights that has been adopted for the purposes of this law.

For the purposes of mass communication provisions, a public employer means any employer subject to the Meyers-Milias Brown Act (MMBA), the Ralph C. Dills Act, the Judicial Council Employer-Employee Relations Act (JEERA), the Educational Employment Relations Act (EERA), the Higher Education Employer-Employees Relations Act (HEERA), the Trial Court Employment Protection and Governance Act, the Trial Court Interpreter Employment and Labor Relations Act, the Los Angeles County Metropolitan Transportation Authority Transit Employer-Employee Relations Act, and Employers for in-home supportive services (IHSS) providers (pursuant to Welfare and Institutions Code section 12302.25). This provision also applies to public transit districts with respect to their public employees who are in bargaining units not subject to the provisions listed above.

8. **Just What is a "Mass Communication" for the Purposes of Senate Bill 866?**

For the purposes of Senate Bill 866, a "mass communication," means a written document, or script for an oral or recorded presentation or message, that is intended for delivery to multiple public employees regarding an employee's right to join or support or not to join or not to support an employee organization. This includes email communications.

9. **With Whom Can I Share Information about Employee Orientations?**

Senate Bill 866 requires that new employee orientations be confidential. In addition to existing law that provides exclusive representatives with mandatory access to new employee orientations **following the passage of AB 119 last year**, the "date, time, and place of the orientation shall not be disclosed to anyone other than the employees, the exclusive representative, or a vendor that is contracted to provide services for the purposes of the orientation."

10. When Does Senate Bill 866 Take Effect?

Today! As a budget trailer bill, Senate Bill 866 is considered "urgency legislation." This means it goes into effect immediately upon the Governor's signature. As noted above, Governor Brown signed Senate Bill 866 into law on June 27, 2018. Accordingly, the time to comply with the new law is now!

LCW LIEBERT CASSIDY WHITMORE

California Public Agency Labor & Employment Blog

Copyright © 2020, Liebert Cassidy Whitmore. All Rights Reserved.