# COUNTY COUNSELS' ASSOCIATION

# VESTED RIGHTS, LABOR RELATIONS & PERB DECISIONS UPDATE

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# VESTED RIGHTS

# RATIONALE BEHIND THE "CALIFORNIA RULE"

# CALIFORNIA PRECEDENT

- California precedent has "held not only that state retirement statutes create contracts, **but that they do so as of the first day of employment**."

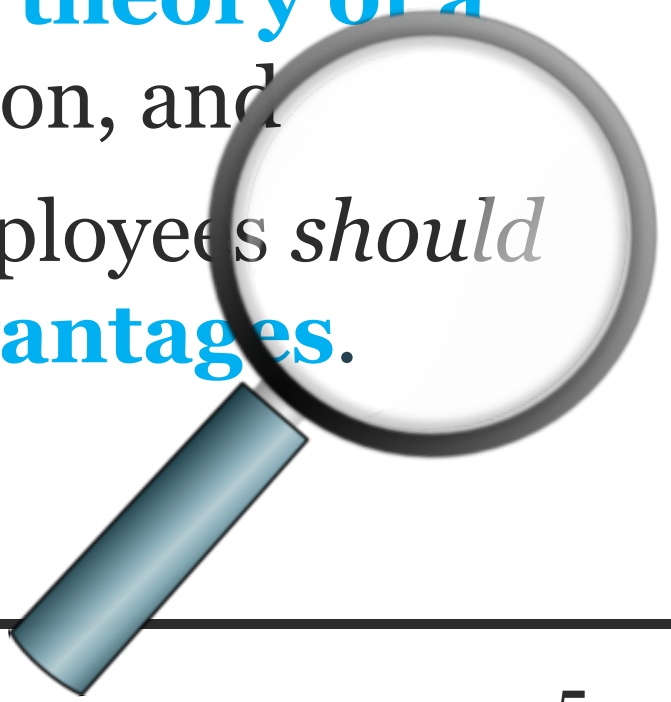
Monahan, Amy B., *Statutes as Contracts? The "California Rule" and Its Impact on Public Pension Reform*, 97 IOWA L. REV. 1029, 1032 (2012)

# *ALLEN V. CITY OF LONG BEACH* (1955) ("Allen I")

*Allen I* announced: What is called "The California Rule"

To be sustained as **reasonable**, modifications to vested pension rights:

- must bear some **material relation to the theory of a pension system** and its successful operation, and
- changes which result in disadvantage to employees *should* be accompanied by **comparable new advantages**.



# *ALLEN V. BOARD OF ADMINISTRATION* (1983)("Allen II")

Before undertaking its analysis, the *Allen II* court stated:

**"With respect to active employees, we have held that any modification of vested pension rights must be reasonable... and when resulting in disadvantages to employees *must* be accompanied by comparable new advantages."**

**This is the only time the Supreme Court has replaced the word "should" with "must" when describing the California Rule.**

# *LEGISLATURE V. EU* (1991)

- Statewide proposition: no participant in Legislators' Retirement Plan should accrue any further benefit or any further service towards vesting.

- Supreme Court: Legislators had "**right to earn future pension benefits through continued service, on terms substantially equivalent to those**" existing at the time they began working, or added at any point during their service

- *Eu* is the only Supreme Court case that directly holds that prospective benefits are vested – but it does not explain its rationale

# WHAT IS THE RATIONALE FOR THE CALIFORNIA RULE?

- Amy Monahan, in her well-known article on the subject (*Statutes as Contracts*? *The "California Rule" and Its Impact on Public Pension Reform*, 97 IOWA L. REV. 1029 (2012)), argues that the rule evolved as a result of selective quoting and mis-quoting of prior cases
- Unions' arguments in briefs have generally been based on "snippets," rather than a cohesive explanation of the basis for the rule

# TWO LINES OF RATIONALE FOR VESTING

- Earned based upon prior service
  - This rationale does not fit neatly with the argument that prospective (as-yet-unearned) benefits are vested
  - But the reality is often complex because future accruals affect the value of prior accruals
  - Also, retiree health benefits are not generally accrued incrementally
- Promise of future benefit

# *REAOC V. COUNTY OF ORANGE*

- Promise of future benefit - legislative intent
  - Express – e.g. pension formula itself – prior to *REAOC*, significant caselaw on retiree health benefits saying must be express
  - Implied (*REAOC*) – holds that the promise can be implied, but continues to be disfavored
    - Note that REAOC is not really an implied contract case

# *REAOC V. COUNTY OF ORANGE*

"Although we agree with the criticism by some state and federal courts that the *California League* analysis was deficient in **failing to focus explicitly on the 'legislative body's intent to create vested rights**,' or the plaintiff's 'heavy burden' to demonstrate that intent, none of this criticism purports to quarrel with the underlying theory in *California League* that public employee benefits, in appropriate circumstances, could become **vested by implication** [citations omitted]."

# *REAOC V. COUNTY OF ORANGE*

- The "legislative intent to create private rights of a contractual nature against the governmental body must be '**clearly and unequivocally expressed**.'"
- "Thus, it is presumed that a statutory scheme is not intended to create private contractual or vested rights and a person who asserts the creation of a contract with the state has the burden of overcoming that presumption."

# *REAOC V. COUNTY OF ORANGE*

- *REAOC* is consistent with a national trend toward unmistakability – e.g.
  - Oregon Supreme Court – *State v. Moro* (2015)
  - Colorado Supreme Court –*Justus v. State* (2014)
  - New Mexico Supreme Court – *Bartlett v. Cameron* (2013)
  - New Jersey Supreme Court – *Berg v. Christie* (2011)
  - First Circuit Court of Appeals –*Parker v. Wakelin* (1997) (Maine)

# FUTURE OF THE "CALIFORNIA RULE": KEY CASES PENDING BEFORE CALIFORNIA SUPREME COURT

# KEY PENDING CASES

1. ***Marin Assn. of Public Employees v. Marin County Employees Retirement Sys.* (2016) 2 Cal. App. 5th 674 (Supreme Court Case No. S237460)**: largely dispensed with the "comparable new advantage" requirement and takes an expansive view on what constitutes "reasonable changes" to vested pension benefits.

2. ***Alameda Deputy Sheriffs' Assn., et al. v. Alameda County Employees' Retirement Assn, et al.* (2018) 19 Cal.App.5th 61 (Supreme Court Case No. S247095)**: agreed with *Marin* on no need for "comparable new advantage," but departed from *Marin* in appearing to require an onerous financial burden to justify any modification.

3. ***Cal. Fire Local 2881 v. CalPERS* (2016) 7 Cal. App. 5th 11 (Supreme Court Case No. S239958)**: applied REAOC standard to find no vested right to "airtime"; adopted reasoning in *Marin* and held that pension benefits may be modified prospectively, before retirement, so long as reasonable or substantial pension remains.

# KEY PENDING CASE

***Marin Assn. of Public Employees v. Marin County Employees Retirement Sys.***

**(2016) 2 Cal. App. 5th 674 (Supreme Court Case No. S237460)**

# *MARIN* - BACKGROUND INFO

- Involves '37 Act (CERL).
- AB 340/197 amended Gov. Code § 31461, which defines "compensation earnable" under '37 CERL Act.
  - Also known as anti-"pension spiking" provision.
- MCERA excludes from "**compensation earnable**":
  - ☒ standby pay, administrative response pay, call-back pay.
  - ☒ cash payments in lieu of health insurance and due to changes in IRC 125 plan.
- Applies to payments and final average salary periods occurring after January 1, 2013.

# *MARIN* COURT:

"[W]hile a public employee does have a 'vested right' to a pension, that right is only to a 'reasonable' pension—not an immutable entitlement to the most optimal formula of calculating the pension. **And the Legislature may, prior to the employee's retirement, alter the formula, thereby reducing the anticipated pension. So long as the Legislature's modifications do not deprive the employee of a 'reasonable' pension, there is no constitutional violation**." (2 Cal.App.5th at p. 680.)

# *MARIN* CASE STATUS

- Grant and hold by California Supreme Court
- Notably, other cases coming up from the California appellate courts are also having petitions granted, but held in anticipation of decisions in *Cal Fire* and *Alameda*
- Just recently, on February 13, 2019, *Wilmot v. Contra Costa County Employees' Retirement Association* – a case involving pension forfeiture provisions of the Pension Reform Act - was issued a grant and hold

# KEY PENDING CASE

***Alameda Deputy Sheriffs' Assn., et al. v. Alameda County Employees' Retirement Assn, et al.***

**(2018) 19 Cal.App.5th 61 (Supreme Court Case No. S247095):**

# ALAMEDA/CONTRA COSTA/MERCED CASES
## 19 CAL.APP.5TH 61

- Also involves changes to ’37 Act (CERL).
- Involves “cash-outs”, on-call/standby pay and various one-time payments.
- But these cases involve AB 197 – additional sections to those considered in *Marin*.
- State:  CERL always prevented inclusion of certain final comp period “cashouts,” “terminal” pay, “on-call” pay; legislature entitled to “clarify” that spiking prohibited.
- Plaintiffs – Disagree, and employees were entitled to rely on retirement board policies that permitted inclusion.

# ALAMEDA COURT:

"Much of *Marin's* vested rights analysis-including its rejection of the absolute need for comparable new advantages when pension rights are eliminated or reduced is not controversial, and we do not disagree with it. **However, we must respectfully part ways with our colleagues…when it comes to their application of the law to this specific dispute**."

# ALAMEDA COURT:

"[W]hen no comparative new advantages are given, the **corresponding burden to justify any changes with respect to legacy members will be substantive**."

"[T]otal pension system collapse may be a sufficiently weighty concern to meet this standard…."

# *ALAMEDA* CASE STATUS

- Fully briefed in California Supreme Court
- Another case concerning pension forfeiture provisions of the Pension Reform Act is on grant and hold – *Wilmot v. Contra Costa County Employees' Retirement Association*

# KEY PENDING CASE

***Cal. Fire Local 2881 v. CalPERS***

**(2016) 7 Cal. App. 5th 11 (Supreme Court Case No. S239958):**

# CAL FIRE LOCAL 2881 V. CALPERS (2016) 7 CAL.APP.5TH 115

- PEPRA elimination of "airtime" (purchase of up to five years service credit). (Gov. Code §§ 20909, 7522.46.)
- Plaintiffs: violation of vested pension right.
- Court finds that presumption is against statutory creation of vested rights, citing *Retired Employees Assn. of Orange County, Inc. v. County of Orange* (2011) 52 Cal.4th 1171, 1186, 1189. (7 Cal.App.5th at p. 126.)

# *CAL FIRE* COURT OF APPEAL:

- No failure to provide a comparable advantage. (7 Cal.App.5th at p. 130.) Court agrees with *Marin* that "should" is only a recommendation. (7 Cal.App.5th at pp. 130-131.)
- No showing that plaintiffs lost right to a "reasonable" pension, again citing *Marin*. (7 Cal.App.5th at p. 132.)

# COUNTDOWN TO SUPREME COURT CAL-FIRE DECISION – 90TH DAY IS MARCH 4

- What to expect from the Cal Fire decision:

# *CAL FIRE* SUPREME COURT ORAL ARGUMENT

# *CAL FIRE* SUPREME COURT ORAL ARGUMENT

- Held December 5, 2018.
- *Cal Fire* was the **first** case heard by Supreme Court.
- The Supreme Court writes its opinions before oral argument; so watching the questions in oral argument can provide clues to individual Justices' views (obviously)
- That said, you can lose ground in oral argument, and the advocates here could both have done so

# *CAL FIRE* SUPREME COURT ORAL ARGUMENT

What is a pension benefit?

# *CAL FIRE* SUPREME COURT ORAL ARGUMENT

- Chief Justice Cantil-Sakauye: Is this a pension benefit?
- Union's Answer: Yes, it is an exchange of consideration.
- Do pension benefits operate under different standard than other benefits?
- If so, what's the definition of a pension benefit? Is it just the "core" equation (salary x percentage of final compensation per year of service)?
- Or are all aspects of a pension system to be treated as "pension," and pension as an exception to the general rule that government benefits are based on statutes, and statutes can be changed?

# *CAL FIRE* SUPREME COURT ORAL ARGUMENT

Where's the line?

# *CAL FIRE* SUPREME COURT ORAL ARGUMENT

- Justice Liu: Where's the line? Does Cal Fire's argument apply to ***any*** benefit, even life insurance?
- Union's Answer: Basically, yes.
- This cannot be right.
- What does Union's counsel mean by reliance? Does this mean that any benefit that affects retirement benefits is vested?
- How does collective bargaining fit into the Union's argument? (See e.g. M&G Polymers v. Tackett)

# *CAL FIRE* SUPREME COURT ORAL ARGUMENT

The primacy of the deferred compensation theory

# *CAL FIRE* SUPREME COURT ORAL ARGUMENT

- Chief Justice Cantil-Sakauye and Justice Kruger: The deferred compensation rationale seems to be the primary rationale for pension vesting.

- But does that apply to the component parts of pensions?

- Deferred compensation lends itself to inherent line-drawing problems

- For example, note, the Chief Justice refers to present service? How does the rationale apply at all to future service?

# *CAL FIRE* SUPREME COURT ORAL ARGUMENT

Consideration

# *CAL FIRE* SUPREME COURT ORAL ARGUMENT

- Justice Kruger: Have both elements of consideration for air time been satisfied? Both done the work and paid for the air time? No! Because the folks who did not get the benefit are those who did not pay.

- Question suggests Court is thinking about how Contract Law actually applies to these cases. This is a hopeful sign.

- Yet, oddly, there is no reference to *REAOC*'s "unmistakability" analysis.

# *CAL FIRE* SUPREME COURT ORAL ARGUMENT

Some members of the Court want to follow *Legislature v. Eu* re: prospective benefits but struggle with explaining its holding

# *CAL FIRE* SUPREME COURT ORAL ARGUMENT

- Justice Liu: Doesn't *Legislature v. Eu* protect prospective benefits?
- Gov't Answer: Prospective benefits only protected when changes would totally destroy pension benefits, or at least would destroy the right to "substantial and reasonable" pension benefit.
- *Legislature v. Eu* is a huge roadblock for a coherent theory of prospective vesting.
- But it also acts as a backstop on a fundamental fairness issue – prevents working for the state for 10 years, and then state saying at start of Year 11 – "no more pension accrual from here on out." So it may be tempting for Supreme Court to keep it as a part of any analysis.

# *CAL FIRE* SUPREME COURT ORAL ARGUMENT

So how do we write the rule to define a vested right?

# *CAL FIRE* SUPREME COURT ORAL ARGUMENT

- Justice Krueger: (to Rei Onishi) How would you write a rule describing what is a vested benefit?

- First question posed to the gov't!

- Gov't Answer: Legislature's intent must be unmistakable.

# *CAL FIRE* SUPREME COURT ORAL ARGUMENT

Based on the oral argument, if Court actually reaches the California Rule issue, one way the Court could approach the rule:

(1) Has the right been "earned," meaning all consideration satisfied? If yes, vested + protected.

(2) Where right has not yet been earned, is there unmistakable legislative intent that the right should be available indefinitely/for certain time period once an employee starts service? (*REAOC)*

(3) If neither of the above, not a vested right and can be changed unless the benefit is destroyed or no reasonable pension remains.

❖ But: the fly in the ointment is *Legislature v. Eu*.

# *CAL FIRE* SUPREME COURT ORAL ARGUMENT

What was missing?

**Any discussion of the standard for altering a benefit that is deemed "vested"**

**"Must" vs. "should" debate**

# ISSUES POTENTIALLY RAISED BY PENDING CASES

# ISSUE RAISED IN PENDING CASES
## *STANDARD OF PROOF*

- *REAOC*: The "legislative intent to create private rights of a contractual nature against the governmental body must be 'clearly and unequivocally expressed.'" (52 Cal. 4th 11171, 1186-1187.)

- Called **"unmistakability" doctrine**.

**UNMISTAKABILITY – HOW DOES IT APPLY TO PENSION STATUTES?**

# HOW TO APPLY REAOC

- The legislative intent to create private rights of a contractual nature against the government body must be 'clearly and unequivocally expressed.'" (52 Cal. 4th 1171, 1186-1187.)
- *REAOC* court applied standard to "implied contracts" for retiree health benefits.
- Does it apply to pension statutes?
- Comes from federal constitutional law; and applied in other states.

# *COMPARABLE NEW ADVANTAGE*

*Marin*, *Cal Fire* and *Alameda*: Courts concluded that California Supreme Court precedent does not require a comparable new advantage for every disadvantage.

- "Should" not "must" remains the Court's preferred expression. And "should" does not convey imperative obligation, no more compulsion than "ought." (*Marin* at 699.)

- Legislature may make "reasonable" modifications; employee entitled only to a "substantial or reasonable" pension. (*Marin* at 702.)

# WHAT JUSTIFICATION IS NECESSARY TO CHANGE VESTED BENEFIT?

- Is anti-"pension-spiking" in a defined benefit plan a sufficient rationale?
- Modification permitted prior to retirement "for the purpose of keeping a pension system flexible and permit adjustments in accord with changing conditions and at the same time maintain the integrity of the system." (*Betts*, 21 Cal. 3d at p. 863.)
- Modification permitted to "restrict a party to the gains 'reasonably to be expected from the contract.'" (*Allen II*, 43 Cal. 3d at p. 120.)
- "Unforeseen advantages or burdens." (*Ibid.*)

# ARE ECONOMIC CONCERNS SUFFICIENT FOR CHANGE AND WHAT IS THE STANDARD?

- "Rising costs alone will not excuse the city from meeting its contractual obligations, the consideration for which has already been received by the city." (*Abbott v. City of Los Angeles*, 1958)
- *Alameda* Court: "total pension system collapse may be a sufficiently weighty concern."
- What happens if member agencies cannot pay their employer contributions?
- Is bankruptcy the only solution?

# VESTING VARIABLES

- The Benefit:
  - Pension vs. retiree health vs. seniority based benefit vs. MOU benefits
- Status of Affected Individuals/Benefit:
  - Retiree vs. active (already earned) vs. active (prospective) vs. unborn
- Source of the Benefit:
  - Express contract vs. statute vs. MOU vs. practice
- Specificity of Performance Guarantee:
  - Express (will get x when retire) vs. implied permanence vs. benefit express but permanence vague

# VESTING VARIABLES (CONT'D)

- Reasons for Changing the Benefit:
  - Actuarily unsound/unexpected windfall vs. plan funding issues vs. sponsor funding issues
- Centrality of the Benefit (Pension):
  - Pension vs. COLA vs. final compensation calculation (inclusion of premiums) vs. ancillary benefits earned (inclusion of terminal pay, premiums, cash-outs, on-call) vs. unearned benefits/enhancements (air time, prior service purchase, veterans)
- Degree of Change
  - Total destruction of benefits vs. impairs substantial pension vs. minor adjustments

# LABOR RELATIONS

# THE *JANUS* DECISION

# FAIR SHARE/AGENCY FEES

- Public employees in a bargaining unit could choose to opt out of union membership.
- Prior to *Janus*, many state laws and CBAs permitted unions to collect "fair share" or "agency" fees from non-members.
- Unions had an obligation to fairly represent these non-members, and the unions' representational activities benefited them.
- Fair share fees only supported the union's representational and collective bargaining duties, not political activity.
- The Supreme Court endorsed fair share fees in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

# *JANUS* DECISION

## SUPREME COURT OF THE UNITED STATES

Syllabus

JANUS *v.* AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31, ET AL.

# *JANUS* DECISION

- On June 27, 2018, in 5-to-4 decision (authored by Justice Alito, as was both Knox and Harris), the Court's conservative majority reversed the decades-old holding of *Abood* and struck down fair share fees as unconstitutional.
- Much of the majority opinion attempts to explain that *Abood* had been incorrectly decided in 1977.
- Majority applied "exacting scrutiny" test.
- Full First Amendment protections to government employees because labor negotiations touch on matters of "public concern."
- Not persuaded by counter arguments re: labor peace; free rider problem; originalist understanding of First Amendment; Pickering, Connick and Garcetti; or stare decisis.

# *JANUS* DISSENT

- Justice Kagan's dissent emphasized the government's wide latitude when acting as an employer and regulating workplace operations and speech of its employees.
- *Abood* struck appropriate and workable balance, consistent with First Amendment case law.
- Majority opinion "subverts all known principles of stare decisis."

# *JANUS* DISSENT

- Justice Kagan stated:

"There is no sugarcoating today's opinion. The majority overthrows a decision entrenched in this Nation's law and its economic life – for over 40 years. As a result, it prevents the American People, acting through their state and local officials, from making important choices about workplace governance. And it does so by weaponizing the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy."

# *JANUS* – IMMEDIATE IMPACTS

- No public employer can permit a union to require non-members to pay a fee for the costs of representation without the clear and affirmative consent of the non-member. Any "agency fee" or "fair share" provisions in collective bargaining agreements or other agency fee arrangements are unconstitutional and null and void.
- The decision nullifies those provisions of California's public employment relations statutes that authorize the collection of agency fees.
- Unions are still under a duty of fair representation vis-à-vis nonmembers.
- The decision does not otherwise alter any other rights or obligations of public sector unions, employees, or employers under California's public employment relations statutes.

# CA LEGISLATIVE RESPONSE

# AB 119 (JUNE 27, 2017)

- Added Cal. Gov. Code §§3555-3559.
- Employers must provide contact information, including home addresses, to exclusive representatives for new employees within 30 days of hire, and for all unit members every 120 days.
- Provide exclusive rep 10 day notice of new employee orientations and access to orientation sessions.
- Negotiate over the "structure, time and manner" of access.
- Arbitrate over terms of access if no agreement reached within 60 days of request to negotiate.
- Amended Cal. Public Records Act §6254.3 to clarify that employees' home/personal data is not subject to public disclosure, with exceptions including disclosure to union.

# SB 285 (OCT. 17, 2017)

- Added Cal. Gov. Code §3550.
- "[A] public employer shall not deter or discourage public employees from becoming or remaining members of an employee organization."
- Confers jurisdiction on the Public Employee Relations Board ("PERB") to enforce this law.

# SB 866 (JUNE 27, 2018)

- California SB 866 was signed into law hours after the *Janus* decision issued.
- Provides a number of protections for unions re: process of becoming a union member or dropping membership.
- Expands prohibition on employers deterring or discouraging employees from joining a union also to prohibit deterring or discouraging job *applicants*.
- Amended AB 119 (Gov. Code §3556) to provide that date and place of new employee orientations are confidential and only exclusive reps and approved vendors have access. Requires that employees wishing to make or withdraw dues authorization go through their union; union not required to provide copy to employer unless there is a dispute. Employers must honor employees' union dues requests and are indemnified against claims regarding propriety of dues deductions.

# SB 866 (CONT'D)

- Added Cal. Gov. Code §3553
- Mass communications to public employees re: their rights to join, support, or refrain from joining or supporting a union are now subject to meet-and-confer requirements. If no agreement is reached, the union may demand that employer simultaneously send union's comparable mass communication.

# SB 1085 (SEPT. 28, 2018)

- Requires employer to grant "reasonable" leaves of absence, without loss of pay, to employees serving as union stewards or union officers.
- Employee organization shall reimburse employer for all compensation paid to the employee unless otherwise provided by an MOU.
- Opposed by CSAC and League of Cities.

# SB 846 (SEPT. 14, 2018)

- Cal. Gov. Code §1159.
- "The Controller, a ***public employer***, an employee organization, or any of their employees or agents, ***shall not be liable for, and shall have a complete defense to, any claims or actions*** under the ***law of this state*** for requiring, deducting, receiving, or retaining ***agency or fair share fees*** from public employees, and ***current or former public employees shall not have standing to pursue these claims or actions***, if the fees were permitted at the time … and paid … prior to June 27, 2018."

# IMPACT AREAS FOR PUBLIC AGENCIES

- Increased organizing activity, including strikes and labor actions.
- Legislature and governor moving to support unions.
- May lead to balkanization of unions.
  - No objective evidence that workers are fleeing unions.
- May lead to more difficulty reaching agreement at the bargaining table.

# POST-*JANUS* LITIGATION

# POST-*JANUS* LITIGATION GENERALLY

- Scores of lawsuits against unions around country.
- 23 lawsuits currently pending against NEA affiliates, 8 of which are against CTA and/or CTA affiliates in CA.
- Overlapping and various claims (often seeking class relief):
  - Former fee payers wanting back fees;
  - Former members wanting back dues;
  - Former religious objectors wanting reimbursement for charitable contributions;
  - Challenges to exclusive representation;
  - Challenges to maintenance-of-dues agreements;
  - Challenges to agency fees in private sector.

# CHALLENGES TO AGENCY FEES

- E.g., *Martin v. CTA*, Case No.: 2:18-cv-08999 (C.D. Cal.); *Few v. UTLA*, Case No. 2:18-cv-09531 (C.D. Cal.).
- No cases have addressed SB 846/Cal. Gov't Code § 1159, which provides defense to ***state law*** claims.
  - Plaintiffs often bring federal claims under § 1983.
- Mootness problem for claims involving prospective collections when union has stopped collecting fees.

# CHALLENGES TO AGENCY FEES (CONT'D)

- "Good faith" defense to § 1983 claims against union defendants for prior collection of agency fees.
- Endorsed by W.D. Wash. in *Danielson v. Inslee*, 340 F. Supp. 3d 1083 (W.D. Wash. 2018)
  - "When engaging in bargaining representation and other pro-union activities funded by Plaintiffs' agency fees, the Union Defendant followed the then-applicable laws, because prior to *Janus*, collection and use of compelled agency fees was lawful. . . . The constitutional defect—compelling collection of agency fees used for political or ideological activities and contrary to Plaintiffs' beliefs—could not have been identified by the Union Defendant, because although the Supreme Court hinted at overruling *Abood*, it did not explicitly do so until *Janus*." *Danielson*, 340 F. Supp. 3d at 1085.
- *Danielson* is up on appeal to the Ninth Circuit.

# CHALLENGES TO EXCLUSIVE REPRESENTATION

- Often same cases attempting to recover prior collections.
- Claim should be foreclosed by *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984).
- *Janus* majority opinion states that government may permit exclusive representation; "[w]e simply draw the line at allowing the government to go further still and require all employees to [financially] support the union irrespective of whether they share its views."
- Union's views aren't attributable to any individual unit member.

# LOOKING AHEAD

# LOOKING AHEAD

- Should the DFR to nonmembers be narrowed? *Janus* suggests that the equal protection clause requires the DFR in exclusive representation context.
- Can unions now assert First Amendment rights to bargain collectively or seek "blanket" workplace policies?
- Are alternative labor relations frameworks preferable, such as:
  - Members-only unions/bargaining;
  - Government-paid representational services;
  - Charging fees to nonmembers for particular services.



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# LOOKING AHEAD (CONT'D)

- Some potential *Janus* doctrinal implications beyond workplace:
  - Mandatory State Bar dues under similar attack, *see Fleck v. Wetch*, 17-886. Will SCOTUS overrule *Keller v. State Bar of Cal.* (1990) and *Lathrop v. Donohue* (1961)? How can court objectively assess governmental interest in compelled fees?
  - Will public universities still be able to use student fees to fund campus events? (*Board of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217 (2000))
  - Are commercial advertising subsidy cases vulnerable, and perhaps now subject to higher scrutiny? (*Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997))
  - Increased weaponizing of First Amendment to prohibit requiring provision of information re: abortion services to patients (National Institute of Family and Life Advocates v. Becerra (2018) or requiring vendor to serve gay couple (Masterpiece Cakeshop v. Colorado Civil Rights Comm. (2018))

# PERB DECISIONS

# CURRENT PERB MEMBERS

- Current PERB members:
  - **Eric Banks** (since 2015) – former labor organizer;
  - **Arthur A. Krantz** (since Feb. 28, 2018) – former partner at labor-side law firm;
  - **Erich Shiners** (since Feb. 28, 2018) – former partner at employer-side law firm;
- Five seats total – one fully vacant, another has a pending appointment

# FUTURE PERB MEMBER?

- Gov. Newsom made his first appointment on Feb. 6, 2019.
- **<u>Lou Paulson</u>**
  - Immediate past president of Cal. Professional Fire Fighters Assoc.
  - Former member of the Executive Board of the Cal. Federation of Labor.
- Must be confirmed by the Senate.

# PERB ACTIVITY

- Flurry of decisions came down in December.
  - Out of 61 PERB decisions in 2018, 24 were issued in December.
- Stats show that PERB leans pro-union.
  - Generally PERB is deferential to its ALJs.
  - But 100% of reversals of ALJs in December (7 out of 7) occurred when the ALJ found in favor of the employer.

# THE GOOD, THE BAD AND THE UGLY

# THE GOOD

- *Local 3061 v. City of Ontario* – Decision 2606-M
  - Short on facts, but PERB found no retaliation for protected activity in the written reprimand of two employees for dishonesty, harsh language and refusing to work with a coworker.
  - Takeaway: Just because an employee is active in the union does not mean that the employee is immune from workplace discipline when appropriate.

# THE GOOD

- *Local Unit 1 v. City of Yuba City*– Decision 2603-M
  - Involved concurrent negotiations with multiple unions to renew MOUs.
  - Less generous last, best and final offer (LBFO) to one union was not discriminatory or retaliatory when all unions received the same proposals initially, but the complaining union drove a much harder bargain (including threatening to strike).
  - Takeaway: Not all unions must end up with the same terms in the course of concurrent negotiations.

# THE BAD

- *Cal. Sch. Employees Assoc. v. San Bernardino Comm. College Dist.* – Decision 2599
  - Supervisor questions employee about his whereabouts during a shift. The employee requests a union representative.
  - The supervisor ends the interview, but demands a written memorandum before the employee is relieved of duty.

# THE BAD

- *Cal. Sch. Employees Assoc. v. San Bernardino Comm. College Dist.* – Decision 2599 (Cont'd)
  - Holding: employer violated *Weingarten* rights.
  - *Weingarten*'s concerns "may be diminished slightly in the absence of face-to-face questioning and verbal responses, but they are present nonetheless."
  - Takeaway: Requests for written memos – not just oral interviews – may trigger *Weingarten*.
  - Query: What would happen if employee is given a couple days to write the memo, but employer does not confirm that the employee made contact with a union rep?

# THE BAD

- *SEIU Local 1021 v. Cnty. of San Joaquin*–Decision 2619-M
  - Supervisor demands, via email, that employee provide memorandum explaining why employee continued with bingo activity against supervisor's orders.
  - Employee requests union representation before writing the memo. Supervisor requests internal affairs investigation based on not providing the memo and disobeying orders over the bingo game.

# THE BAD

- *SEIU Local 1021 v. Cnty. of San Joaquin*–Decision 2619-M
  - During investigative interview, employee has a union rep present.
  - At conclusion of the investigation, employee is issued a notice of intent to suspend for 10 working days. The discipline is based primarily on failure to write the memo, with bingo scheduling a secondary concern.
  - *Skelly* hearing ensues with union rep. The hearing officer agrees there was a *Weingarten* violation, but upholds suspension based solely on bingo insubordination.

# THE BAD

- *SEIU Local 1021 v. Cnty. of San Joaquin*–Decision 2619-M
  - Holding: Employer violated *Weingarten* rights during the memo incident (no surprise after *San Bernardino*).
  - Remedy: Expunge discipline and "make whole."
  - Takeaway: PERB will lean more toward "fruit of the poison tree" doctrine than "harmless error" – if an initial violation of *Weingarten* escalates, further disciplinary actions may be tainted even when union reps provided and *Weingarten* issues are taken out of the equation.

# THE UGLY

- *Local 773 v. City of Commerce* – Case 2605
  - Employer terminated employee, and the union filed a grievance that went to arbitration.
  - The union subpoenaed two employee-witnesses, and employer announced its intention to interview those witnesses before they testified.
  - Employer interviewed employees with a union rep present, and the union rep did not object  when the employer asked "do you know why you're being called to testify?"
  - Employer, however, did not explicitly state that the interviews were voluntary and that there would be no consequences for non-participation.

# THE UGLY

- *Local 773 v. City of Commerce* – Case 2605
  - PERB confirmed adoption of "*per se*" rule in *Johnnie's Poultry*, 146 NLRB 770 - when questioning a represented employee in advance of an adversarial hearing, "the employer must communicate to the employee the purpose of the questioning, assure him that no reprisal will take place, and obtain his participation on a voluntary basis."
  - PERB rejected related case, *Cook Paint & Varnish*, 648 F.2d 712 (and many other federal courts), which rejected this *per se* approach for a "totality of the circumstances" approach to see whether questioning was coercive.

# THE UGLY

- *Local 773 v. City of Commerce* – Case 2605
  - Holding: Employer impermissibly failed to provide *Johnnie's Poultry* warning before interview.
  - Holding: Asking employee "do you know why you are being called to testify" was impermissible inquiry into union's arbitration strategy.
  - Concurrence (Shiners): No need for *per se* rule – should adopt totality of the circumstances.

# THE UGLY

- *Local 773 v. City of Commerce* – Case 2605
  - Takeaway: When in doubt, give *Johnnie's Poultry* warning and be careful about questioning.
  - Takeaway: PERB remains untroubled by expanding CA labor laws far beyond federal jurisprudence.
  - Query: Does this rule prevent information gathering that can lead to settlement?
  - Query: Where is the line during questioning that separates permissible fact gathering from impermissible inquiry into union strategy?

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