



## **Policy Analysis of SB 5623 and HB 1575: Undermining Public Employees' Constitutional Rights**

*Maxford Nelsen  
Director of Labor Policy  
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[FreedomFoundation.com](http://FreedomFoundation.com)

[360] 956-3482 | P.O. Box 552, Olympia, WA 98507

## Introduction

The U.S. Supreme Court in June 2018 ruled in *Janus v. AFSCME* that it is unconstitutional to require public employees to financially support a union as a condition of employment and that unions and government employers may not make union deductions from an employee's wages without the clear and affirmative consent of the employee.<sup>1</sup>

In light of declining union membership among public-sector unions in Washington, legislation under consideration Olympia seeks to maximize unions' dues-collection ability at the expense of public employees' rights.<sup>2</sup>

House Bill 1575<sup>3</sup> and its identical companion Senate Bill 5623<sup>4</sup> contain a series of measures sought by government unions to help shield them from legal liability for illegal dues-collection practices and boost their ability to collect dues in the future. The bills continue legislative efforts to undermine *Janus* begun in 2018.

During the 2018 legislative session, narrow Democrat majorities in the state House and Senate passed two bills designed to preemptively insulate government unions against an expected loss for unions in *Janus*.<sup>5</sup> One bill, HB 2751, required government employers to collect union dues from all public employees' wages automatically and without authorization in the event mandatory union dues were found to be unconstitutional.<sup>6</sup>

However, the Supreme Court not only struck down mandatory union dues for public employees but clarified that unions could not seize any funds from a public employee "unless the employee affirmatively consents to pay."<sup>7</sup> The added clarification adopted a recommendation made by the Freedom Foundation in one of its two *amicus curiae* briefs submitted to the court in support of plaintiff Mark Janus.<sup>8</sup>

The other bill, SB 6229, granted union organizers access to newly hired public employees for at least 30 minutes in a captive-audience setting for the purposes of soliciting membership and was largely unaffected by *Janus*.<sup>9</sup>

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<sup>1</sup> *Janus v. AFSCME*, 585 US \_ [2018]. [https://www.supremecourt.gov/opinions/17pdf/16-1466\\_2b3j.pdf](https://www.supremecourt.gov/opinions/17pdf/16-1466_2b3j.pdf)

<sup>2</sup> Maxford Nelsen. "WFSE membership down 20% since Janus." Freedom Foundation. October 29, 2018. <https://www.freedomfoundation.com/labor/wfse-membership-down-20-since-janus/>

<sup>3</sup> House Bill 1575 [2019]. <https://app.leg.wa.gov/billsummary?BillNumber=1575&Year=2019&Initiative=False>

<sup>4</sup> Senate Bill 5623 [2019]. <https://app.leg.wa.gov/billsummary?BillNumber=5623&Initiative=false&Year=2019>

<sup>5</sup> Maxford Nelsen. "State Democrats pass two more bills to benefit union donors." Freedom Foundation. February 13, 2018. <https://www.freedomfoundation.com/labor/state-democrats-pass-two-more-bills-to-benefit-union-donors/>

<sup>6</sup> Maxford Nelsen. "State Democrats advance bill to protect unauthorized union dues deductions." Freedom Foundation. January 31, 2018. <https://www.freedomfoundation.com/labor/senate-democrats-advance-bill-to-protect-unauthorized-union-dues-deductions/>

<sup>7</sup> *Janus v. AFSCME*, 585 US \_ [2018]. [https://www.supremecourt.gov/opinions/17pdf/16-1466\\_2b3j.pdf](https://www.supremecourt.gov/opinions/17pdf/16-1466_2b3j.pdf)

<sup>8</sup> James Abernathy. "Freedom Foundation influences Janus decision." Freedom Foundation. July 9, 2018. <https://www.freedomfoundation.com/litigation/freedom-foundation-influences-janus-decision/>

<sup>9</sup> Maxford Nelsen. "Bills seek to subject public employees to union membership pitches." Freedom Foundation. February 1, 2018. <https://www.freedomfoundation.com/labor/bills-seek-subject-public-employees-union-membership-pitches/>



SB 5623/HB 1575 continues these efforts to take away in practice the rights and choices for public employees affirmed in principle by *Janus*. If passed as currently written, the legislation would:

**1. Make it easier for unions to deduct dues from public employees' wages and harder for public employees to cancel such deductions.**

Current state laws require government employers to deduct union dues from an employee's wages upon written authorization of the employee. HB 1575/SB 5623 require government employers to also begin dues deduction upon electronic or "recorded voice" authorization of an employee.

SEIU 775, which represents Washington's individual provider home care aides (IPs) serving Medicaid clients, began an effort to sign IPs up for union membership over the phone after the U.S. Supreme Court made union membership optional for IPs in *Harris v. Quinn* in 2014.<sup>10</sup> The program has operated without legal authority for years, and IPs report the telephonic membership solicitations are quite deceptive.

An anonymous letter sent to the Freedom Foundation allegedly from an employee in SEIU 775's call center claimed he or she was directed, "under threat of being fired," to "solicit and lie to members, to record messages and obtain signature over the phone using deceptive way" (errors in original).<sup>11</sup>

An IP recently filed an unfair labor practice (ULP) complaint against SEIU 775 with the Public Employment Relations Commission (PERC) after he unknowingly agreed to an "irrevocable" union dues deduction authorization over the phone.<sup>12</sup>

Even if union staff did not intentionally try to deceive employees, SEIU 775's current membership agreement is close to 2,000 words long. Among other things, the form:

- authorizes union dues deductions from the employee's wages;
- limits the employee's ability to cancel the deductions to 15 days per year;
- releases the union from legal liability related to dues deductions;
- authorizes the state to provide the union with the employee's bank account and other personal financial information;
- authorizes the union to bill the employee's personal financial accounts or cards for union dues; and,
- authorizes extra deductions for the national SEIU political fund.<sup>13</sup>

Understanding a printed version of the form is very difficult. Digesting the details of the form over the phone is impossible.

Allowing additional methods of authorizing union dues deductions, even if deceptive, would not be as

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<sup>10</sup> *Harris v. Quinn*, 573 U.S. \_\_\_ [2014]. <https://supreme.justia.com/cases/federal/us/573/11-681/>

<sup>11</sup> A copy of the letter is available online at: <https://www.freedomfoundation.com/wp-content/uploads/2016/05/SEIU-staff-letter-to-FF-March-19-2016.pdf>

<sup>12</sup> A copy of the complaint is available online at: [https://www.freedomfoundation.com/wp-content/uploads/2019/03/2019-02-22-COM-No.-131322\\_Redacted.pdf](https://www.freedomfoundation.com/wp-content/uploads/2019/03/2019-02-22-COM-No.-131322_Redacted.pdf)

<sup>13</sup> A copy of SEIU 775's current membership form is available online at: <https://www.freedomfoundation.com/wp-content/uploads/2018/07/SEIU-775-membership-form-version-6-clean.pdf>



objectionable if employees could use the same means to cancel the deduction of dues from their wages. But HB 1575/SB 5623 specifically requires,

“An employee’s request to revoke authorization for payroll deductions must be *in writing* and submitted by the employee to the *exclusive bargaining representative* in accordance with the *terms and conditions of the authorization*.” (Emphasis added)

Under this legislation, dues deductions can be initiated using almost any method but can only be cancelled in writing. Employees cannot approach their employer directly about cancelling dues deductions but must get their union to instruct the employer to cancel the deductions.

This is significant because most government unions have inserted irrevocability provisions into their dues deduction authorization agreements. The provisions generally obligate the employee to pay union dues for at least one year and limit the signer’s ability to cancel the deductions thereafter to a narrow annual window period, usually between 10 and 15 days in length. Examples include the Washington Federation of State Employees/AFSCME Council 28,<sup>14</sup> Teamsters Local 117,<sup>15</sup> Public School Employees of Washington/SEIU 1948<sup>16</sup> and the Washington Public Employees Association/UFCW 365.<sup>17</sup>

HB 1575/SB 5623 effectively gives unions control over government payroll deduction systems and allows them to veto any employee’s dues cancellation request if it does not meet the union’s arbitrary requirements.

When asked during a committee hearing why HB 1575 does not permit public employees to cancel dues payments in the same manner used to authorize them, Pat Thompson, deputy director of the Washington State Council of County and City Employees/AFSCME Council 2, could not answer.<sup>18</sup> Similarly, when Sen. John Braun (R-Centralia) proposed an amendment to SB 5623 in the Senate Labor and Commerce Committee to permit public employees to cancel union dues deductions in writing, electronically or via recorded voice authorization, the only argument voiced against the amendment came from Sen. Karen Keiser (D-Des Moines), who stated,

“The concern I have with this amendment is, really, it’s impossible to verify a voice, even if it’s recorded, as being from an actual member or individual who’s authorized to withdraw.”<sup>19</sup>

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<sup>14</sup> A copy of WFSE’s membership form is available online at: [http://www.freedomfoundation.com/wp-content/uploads/2018/01/MoD\\_12617\\_distributed.pdf](http://www.freedomfoundation.com/wp-content/uploads/2018/01/MoD_12617_distributed.pdf)

<sup>15</sup> A copy of Teamsters 117’s membership form is available online at: <http://www.freedomfoundation.com/wp-content/uploads/2018/01/Teamsters-117-membership-form.pdf>

<sup>16</sup> A copy of SEIU 1948’s membership form is available online at: <http://www.freedomfoundation.com/wp-content/uploads/2018/01/SEIU-1948-membership-card.pdf>

<sup>17</sup> A copy of WPEA’s membership form is available online at: <https://www.freedomfoundation.com/wp-content/uploads/2019/01/WPEA-irrevocable-membership-form.pdf>

<sup>18</sup> Pat Thompson, deputy director of the Washington State Council of County and City Employees/AFSCME Council 2. Testimony before the Washington State House Committee on Labor and Workplace Standards. February 4, 2019. <https://www.tvw.org/watch/?clientID=9375922947&eventID=2019021043&startStreamAt=1609&stopStreamAt=1706&autoStartStream=true>

<sup>19</sup> Sen. Karen Keiser. Comments during a hearing of the Washington State Senate Labor and Commerce Committee. February 20, 2019.

The Democrat majority on the committee proceeded to vote the amendment down, though it had no qualms about voting to advance the underlying bill allowing unions to initiate dues deductions from public employees based on recorded voice authorizations.

In the fiscal note prepared by nonpartisan legislative staff to estimate the cost of SB 5623, PERC — the agency that administers state collective bargaining laws and resolves public-sector labor disputes — predicted the dues-deduction provisions in the bill would result in employees filing more unfair labor practice complaints against unions:

“Following the *Janus v. AFSCME* decision, PERC has seen an increase in unfair labor practice cases involving voluntary dues authorization cards similar to the ones described in SSB 5623. PERC anticipates an increase in caseload as a result of the voluntary dues authorization process SSB 5623 to resolve disputes regarding:

- Whether the employee knowingly signed a commitment card;
- Whether the union’s commitment card is sufficiently clear to constitute a binding document;
- Whether the employer properly transmitted the information to the union from the employer; and
- Whether the union timely informed the employer that an employee has opted out.”<sup>20</sup>

The dues-collection process required by SB 5623/HB 1575 both harms public employees’ rights and exposes state and local government employers to legal liability. *Janus* made it quite clear that public employers may not collect union dues from an employees’ wages without proper consent. Should a government employer fail to honor an employee’s revocation of consent for dues deductions, it would be vulnerable to federal civil rights litigation. Yet, if passed, state law would bar public employers from honoring employees’ dues cancellation requests.

In materials prepared for municipal governments in the wake of the *Janus* decision, Summit Law Group noted there is a “[s]trong likelihood that whoever defends [unions’ maintenance of dues] Cards signed before *Janus* (or without appropriate notice of the choices employees have) will lose.” Summit’s advice to public employers is to “[a]llow any employee who requests to discontinue dues/fees to do so” and to “[l]eave the union to enforce its Mod Card if it chooses.”<sup>21</sup>

The Freedom Foundation is already representing state workers in a federal class-action lawsuit against WFSE and the state for refusing to cancel the employees’ dues deductions upon request.<sup>22</sup>

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<https://www.tvw.org/watch/?clientID=9375922947&eventID=2019021352&startStreamAt=1824&stopStreamAt=1902&autoStartStream=true>

<sup>20</sup> A copy of the fiscal note for SB 5623 is available online at:

<https://fortress.wa.gov/ofm/fnspublic/FNSPublicSearch/Search/5623/66>

<sup>21</sup> Rodney Younker. “Practical Tips for Employers Post-*Janus v. AFSCME*.” Summit Law Group. September 25, 2018.

[http://wsama.org/vertical/sites/%7B8ED61B30-6B44-4E1C-8894-9FFBA9264BFB%7D/uploads/17\\_How\\_to\\_Handle\\_Union\\_Dues\\_After\\_Janus.pdf](http://wsama.org/vertical/sites/%7B8ED61B30-6B44-4E1C-8894-9FFBA9264BFB%7D/uploads/17_How_to_Handle_Union_Dues_After_Janus.pdf)

<sup>22</sup> James Abernathy. “Lawsuit catches union already violating *Janus*.” Freedom Foundation. August 8, 2018.

<https://www.freedomfoundation.com/litigation/lawsuit-catches-union-already-violating-janus/>



## 2. Eliminate unions' legal liability under state law for illegally collecting dues or fees from public employees.

Instead of addressing the underlying legal issues involved in forcing public employers to deduct dues at unions' direction, SB 5623/HB 1575 attempts to simply shield unions and public employers from all legal liability for any illegal actions they may commit.

Section 25 of the legislation states:

“Public employers and an employee organization, or any of their employees or agents, are not liable for, and have a complete defense to, any claims or actions under the law of this state for requiring, deducting, receiving, or retaining membership dues from public employees... [C]urrent or former public employees do not have standing to pursue these claims or actions.”

As written, SB 5623/HB 1575 would allow unions and government employers to force public employees to pay union dues, threaten to terminate public employees for failing to pay dues or lie to employees to get them to agree to pay dues without facing any legal liability under state law. SB 5623/HB 1575 does not change the fact that these activities are all illegal under state law, but simply specifies that employees affected by such illegal behaviors would be unable to seek redress or restitution for money taken from them illegally in state court or before PERC.

Even if a union engaged in criminal conduct — such as forging a public employee's signature on a union membership form<sup>23</sup> — the employee would have no standing to file civil litigation to recover the money improperly taken.

Without the ability to resolve disputes over union dues deductions in state court or before PERC, every dispute regarding union dues deductions will have to be resolved in federal court as a civil action for deprivation of rights under 42 U.S.C. § 1983, increasing the time and expense for all involved.

In addition, Section 1 of the legislation would shield unions from legal liability under state law for unconstitutionally collecting agency fees from nonmember public employees prior to *Janus*.

The Freedom Foundation is currently representing teachers represented by the Washington Education Association and state workers represented by the Washington Federation of State Employees who were required to pay agency fees against their will prior to *Janus* in two federal class-action lawsuits seeking to force unions to refund the money unconstitutionally seized from their wages.<sup>24</sup> These lawsuits are based primarily on federal civil rights law and would continue even if HB 1575/SB 5623 is passed.

Nonetheless, the fact that union-aligned legislators are attempting to protect their political allies from facing penalties for their pervasive violations of public employees' constitutional rights is troubling. In fact, it is the height of hypocrisy that some legislators sponsoring HB 1575, like Rep. Monica Stonier (D-

<sup>23</sup> Caleb Jon Vandebos. “Victim of union forgery files lawsuit.” Freedom Foundation. October 1, 2018. <https://www.freedomfoundation.com/litigation/victim-of-union-forgery-files-lawsuit/>

<sup>24</sup> Hannah Sells and Caleb Jon Vandebos. “Freedom Foundation sues WEA, WFSE to end forced unionization.” Freedom Foundation. March 16, 2018. <https://www.freedomfoundation.com/litigation/freedom-foundation-sues-wea-wfse-to-end-forced-unionization/>



Vancouver), are also sponsoring HB 1965, which would permit any person to initiate legal action against any employer for any violation of Washington employment and workplace standards laws.<sup>25</sup>

### 3. Strip public employees of the ability to vote on union representation in secret ballot elections.

Current state laws allow for a union to be recognized to represent a bargaining unit of public employees in one of three ways: voluntary recognition, cross-check (also known as “card-check” in the private-sector) and secret-ballot elections. PERC oversees union certification and related issues.

Voluntary recognition occurs when a union petitions a government employer to recognize and bargain with the union as the exclusive bargaining representative of certain employees. If the employer agrees, the employees are subject to union representation without a vote.

Under cross-check, a union gathers “showing of interest” cards from employees one on one and, if it can gather enough, submits the cards to PERC and is certified as the employees’ exclusive bargaining representative.

Existing state law specifically permits unions to organize most non-state public employees<sup>26</sup> and faculty at state universities<sup>27</sup> via cross-check, and PERC notes it “has extended the cross check process to all other employee groups under its jurisdiction except for certificated teachers.”<sup>28</sup> In most cases, a union must gather showing-of-interest cards from 70 percent of the employees in the bargaining unit to be certified via cross-check,<sup>29</sup> through the threshold is a simple majority for state employees.<sup>30</sup> Except in situations in which multiple unions are seeking to represent the same group of employees, HB 1575/SB 5623 does away with secret-ballot elections and directs that cross-check be used to unionize bargaining units of public employees. It also lowers the threshold for union recognition to 50 percent across the board. Unfortunately, union organizers often harass or mislead employees into signing showing-of-interest cards.

For instance, a Seattle housekeeper recently filed a complaint with the National Labor Relations Board after her workplace was unionized by UNITE HERE Local 8 via a coercive card-check procedure. Among other things, union organizers allegedly misinformed employees about their right to revoke their showing-of-interest cards and prevented them from doing so.<sup>31</sup>

Instead of requiring cross-check across the board, the state should do away with this inherently flawed and undemocratic process and protect public employees’ ability to vote on union representation free

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<sup>25</sup> House Bill 1965 [2019]. <https://app.leg.wa.gov/billsummary?BillNumber=1965&Year=2019&Initiative=false>

<sup>26</sup> RCW 41.56.060[1].

<sup>27</sup> RCW 41.76.020[6].

<sup>28</sup> Michael Sellars, executive director of the Public Employment Relations Commission. Letter to Sen. John Braun. February 27, 2017. Available online at: <https://www.freedomfoundation.com/wp-content/uploads/2019/01/PERC-letter-to-Sen-Braun.pdf>

<sup>29</sup> WAC 391-25-391.

<sup>30</sup> WAC 391-25-396.

<sup>31</sup> National Right to Work Legal Defense Foundation. “Union organizers misled workers about their right to revoke union cards used as “votes,” while company promoted card check drive beyond Board’s “ministerial aid” exception.” January 22, 2019. <https://www.nrtw.org/news/seattle-housekeeper-01222019/>



from coercion in secret-ballot elections.

### The arguments in favor of SB 5623/HB 1575

Only two substantive arguments have so far been made in support of SB 5623/HB 1575.

First, some have contended the legislation would bring “clarity” and “uniformity” to state laws governing union certification and dues deductions.<sup>32</sup> This is undoubtedly true, but clarity and uniformity are only worthwhile if the policy being implemented is a just and legal one. In this case, the legislation is neither.

Second, the Washington State Labor Council claims the legislation is necessary to “[a]lign collective bargaining statutes with *Janus*.”<sup>33</sup> Commendably, the bills do repeal indisputably unconstitutional provisions in state law requiring public employees to pay union dues/fees as a condition of employment. Unfortunately, the provisions are merely being replaced with different unconstitutional laws.

The real motivation for the legislation is quite clear: Maximize union dues collection.

Both HB 1575 and SB 5623 were introduced by legislators who have worked for or have close ties to labor unions.

A union-represented firefighter, Sen. Kevin Van De Wege (D-Sequim) is the prime sponsor of SB 5623.<sup>34</sup> His concise statement on the legislation before the Senate Labor and Commerce Committee cannot be criticized for lacking candor: “I think [SB 5623 is] important legislation to ensure union membership remains strong and, as a union member myself, I see a lot of value in that.”<sup>35</sup>

Co-sponsors of SB 5623 include Sens. Jesse Salomon (D-Shoreline), a union-represented King County attorney;<sup>36</sup> Karen Keiser (D-Kent), former communications director for the Washington State Labor Council;<sup>37</sup> Rebecca Saldaña (D-Seattle), a former SEIU 6 organizer;<sup>38</sup> and, Steve Conway (D-Tacoma),

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<sup>32</sup> Maxford Nelsen. “Washington Legislature Holds Hearings on Anti-*Janus* Bills.” Freedom Foundation. February 6, 2019. <https://www.freedomfoundation.com/labor/legislative-committees-hear-anti-janus-bills/>

<sup>33</sup> Washington State Labor Council. “Update Collective Bargaining Laws: Why Washington’s 2019 Legislature should approve HB 1575 / SB 5623.” [http://www.thestand.org/wp-content/uploads/2019/02/19-WSLC-coll-bargaining\\_one-pager.pdf](http://www.thestand.org/wp-content/uploads/2019/02/19-WSLC-coll-bargaining_one-pager.pdf)

<sup>34</sup> Sen. Kevin Van De Wege. “Biography.” Washington State Senate Democratic Caucus. <http://sdc.wastateleg.org/vandewege/biography/>

<sup>35</sup> Sen. Kevin Van De Wege. Testimony before the Washington State Senate Labor and Commerce Committee. February 5, 2019. <https://www.tw.org/watch/?clientID=9375922947&eventID=2019021052&startStreamAt=564&stopStreamAt=592&autoStartStream=true>

<sup>36</sup> Sen. Jesse Salomon. “Biography.” Washington State Senate Democratic Caucus. <http://sdc.wastateleg.org/salomon/biography/>

<sup>37</sup> Sen. Karen Keiser. “Biography.” [https://web.archive.org/web/20181119023305/https://karenkeiser.org/?page\\_id=6](https://web.archive.org/web/20181119023305/https://karenkeiser.org/?page_id=6)

<sup>38</sup> Rebecca Saldaña for State Senate. “About Rebecca.” <https://web.archive.org/web/20181104044610/https://www.rebeccasaldana.com/about>

former business agent for UFCW Local 81.<sup>39</sup>

The prime sponsor of HB 1575 is WEA-member Rep. Monica Stonier (D-Vancouver).<sup>40</sup> Among the co-sponsors, Rep. Javier Valdez (D-Seattle) is the former president of the Washington State Council of County and City Employees;<sup>41</sup> Rep. Mike Sells (D-Everett) is former president of the Everett Education Association (teachers union) and former secretary-treasurer of the Snohomish County Labor Council;<sup>42</sup> Rep. Mike Chapman (D-Port Angeles) formerly worked as a union-represented police officer;<sup>43</sup> and Rep. Eileen Cody (D-Seattle) was a “founding member” of SEIU 1199.<sup>44</sup>

In short, there is no compelling public policy reason to pass SB 5623/HB 1575. The legislation is flawed on policy, legal and moral grounds and should not be adopted.

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<sup>39</sup> Sen. Steve Conway. “Biography.” Washington State Senate Democratic Caucus. <http://sdc.wastateleg.org/conway/biography/>

<sup>40</sup> Washington Education Association. “Election victories strengthen pro-student, pro-union majority in Olympia.” November 7, 2018. <https://www.washingtonea.org/ourvoice/post/election-strengthens-pro-student-pro-union-majority-in-olympia/>

<sup>41</sup> Rep. Javier Valdez. “Biography.” Washington State House Democrats. <https://housedemocrats.wa.gov/valdez/biography/>

<sup>42</sup> Rep. Mike Sells. “Biography.” Washington State House Democrats. <https://housedemocrats.wa.gov/sells/biography/>

<sup>43</sup> Rep. Mike Chapman. “Biography.” Washington State House Democrats. <https://housedemocrats.wa.gov/chapman/>

<sup>44</sup> Rep. Eileen Cody. “Biography.” Washington State House Democrats. <https://housedemocrats.wa.gov/cody/>

