What Is Going On in Washington?

International Training Conference
September 25, 2018
Neil Reichenberg
IPMA-HR Executive Director
Outline

- Congress Overview/Deficit
- FLSA Overtime/Regular Rate Regulations
- FLSA Case
- Wage-Hour Opinion Letter Request
- DOL Opinion Letters
- Union Fair Share Fees Case
- Public Service Freedom to Negotiate Act
- Mandatory Public Safety Bargaining
- Paid Family Leave
- Health Care Reform
- ACA Constitutionality Case
- Public Employee Pension Transparency Act
- Sexual Orientation/Transgender Discrimination
- Use of Prior Salary
- Collection of Sales Tax
Congress – Upcoming Important Dates

- **September 30, 2018**
  - End of the federal fiscal year – 5 of 12 spending bills expected to be passed

- **November 6, 2018**
  - Mid-term elections:
    - Entire House of Representatives
    - 33 Senate seats (25 Democrats/8 Republicans)

- **December 7, 2018**
  - Date the continuing resolution funding those departments whose appropriations bills were not passed by Congress expires
  - Only 4 times in the last 40 years has Congress completed the appropriations process by September 30th
Deficit

- Congressional Budget Office reported the deficit through the first 11 months of this fiscal year is $895 billion – a 33% increase from the previous fiscal year.
  - Corporate tax receipts down 30% & spending increased for both defense & domestic programs.

- Deficit is currently about $21.5 trillion – annual deficits expected to be over $1 trillion starting next year.
  - Don’t worry – Congress has suspend the debt ceiling.
FLSA Overtime Regulations

- Labor Department announced that proposed regulations for the executive, professional and administrative exemptions have been delayed until January 2019.

- IPMA-HR, NPELRA, ICMA, & GFOA filed joint comments in response to a request for information from the Department of Labor.
The Labor Department announced that it plans to issue proposed regulations in September designed to “clarify, update, and define” the regular rate under Section 207(e)2 of the FLSA.

This section concerns the exclusion from the regular rate of payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work as well as reasonable payments for travel and other expenses.
US Supreme Court ruled in April in the case of *Encino Motorcars v. Navarro* that service advisors at a car dealership are FLSA exempt employees.

In the 5-4 decision, Justice Thomas rejected the principle that FLSA exemptions should be construed narrowly.

Since the FLSA gives no textual indication that its exemptions should be construed narrowly, they should be given a “fair reading”, according to Justice Thomas.
The 2nd Circuit recently ruled in 2 cases interpreting the *Encino Motorcars* decision that:

“Until recently it was a rule of statutory interpretation that a court should narrowly construe an exemption to the FLSA in order to effectuate the statute’s remedial purpose. But this is not the rule anymore...The Supreme Court now instructs that courts have no license to give the exemption anything but a fair reading.”
IPMA-HR has requested a Wage-Hour Opinion letter on the compensability under the FLSA of time spent outside of regularly scheduled work hours by non-exempt employees checking or responding to electronic communications.

Request notes that with the increasing use of technology, the lines between work and off-duty hours can become blurred.
Labor Department issued recently a new opinion letter concerning FMLA related breaks

- Employee with serious health condition needed 15 minute break for every hour worked
- Breaks are not compensable since they primarily benefit the employee and FMLA leave is unpaid
- However, the employee must receive as many compensable breaks as other employees
In another recent opinion letter, the Labor Department decided that an employee’s voluntary participation in biometric screenings, wellness activities, & benefits fairs predominantly benefits the employee and do not constitute compensable work.

Copies of all the Opinion Letters are available at:
https://www.dol.gov/whd/opinion/flsa.htm
Union Fair Share Fees Case

In a 5-4 ruling, the US Supreme Court ruled in the case of *Janus v. American Federation of State, County & Municipal Employees* that the First Amendment rights of government employees who are non-members of a union were violated if they are required to pay a “fair share” fee to the union.

The court stated that “The First Amendment does not permit the government to compel a person to pay for another party’s speech just because the government thinks that the speech furthers the interests of the person who does not want to pay.”

The case involved an Illinois state employee who is represented by AFSCME and sued claiming that he should not be forced to pay fees to support the union’s work.
Union Fair Share Fees Case

The US Supreme Court overturned its 1977 decision in *Abood v. Detroit Board of Education* in which the court ruled that employees do not need to pay for the political activities of unions, but it is constitutional to require nonmembers to help pay for the union’s collective bargaining efforts, since they benefit from these activities.

As to the argument that there should be no free riders enjoying the benefits of union representation, Justice Alito wrote Mr. Janus “is not a free rider on a bus headed for a destination that he wishes to reach but is more like a person on an unwanted voyage”
Union Fair Share Fees Case

Several lawsuits have been filed, with more expected seeking repayment of the fees that have been paid

Issue is whether the Supreme Court’s ruling should be applied retroactively

What about Mark Janus?

Less than a month after the Supreme Court’s ruling, Mark Janus quit his job with the State of Illinois for a position with the Illinois Policy Institute, which helped to fund his litigation, as a senior fellow
Public Service Freedom to Negotiate Act

In response to the *Janus* decision, legislation (S3151/HR6238) have been introduced that would provide all public employees with the right to form and join unions & to bargain collectively over wages, hours, & other terms/conditions of employment.

Federal Labor Relations Authority (FLRA) would administer the law.
Public Service Freedom to Negotiate Act

- FLRA would determine if state law provides substantially similar rights & responsibilities as are included in this bill.
- If not, the regulations to be developed by the FLRA would apply.
- Bill would prohibit lockouts or employee strikes that could disrupt the delivery of emergency or public safety services.
Mandatory Public Safety Bargaining Bill

- Reps. John Duncan (R-Tenn.), Dan Kildee (D-Mich.) and 48 cosponsors introduced a bill, the Public Safety Employer-Employee Cooperation Act (H.R. 4846), that would require state/local governments to recognize public safety officer unions and to bargain collectively over wages.

- The Janus case is what motivated the public safety unions to push for this bill.

- No action expected to be taken this year.

- IPMA-HR is opposed to this legislation.
Mandatory Public Safety Bargaining Bill

- Act would be administered by the Federal Labor Relations Authority (FLRA) which would determine if state law provides rights:
  - Granting public safety officers the right to form & join a labor organization
  - Requiring public safety employers to recognize the employees’ labor organization, to agree to bargain over hours, wages & terms & conditions of employment
  - Providing for binding interest arbitration to resolve an impasse
Mandatory Public Safety Bargaining Bill

If the FLRA determines that a state provides similar rights, then this act would not preempt state law.

If a state does not provide for similar rights then the state would be subject to the act on the later of:

- 2 years after the date of enactment;
- The date that is the last day of the 1st regular session of the state legislature that begins after the date the FLRA makes a determination.
Paid Family Leave

- Senate Subcommittee held hearings recently on the importance of paid family leave.

- Family and Medical Leave Insurance Act (S337/HR947) would provide up to 12 weeks of paid leave.
  - Paid leave available for any FMLA qualifying leave.
  - Payroll deduction of 0.2% of wages paid by employees & employers would fund the leave.
Paid Family Leave

Alternative narrower proposal (S3345) would give new parents the option of using a portion of their Social Security for paid parental leave after the birth or adoption of a child.

- Parents taking the option would receive a Social Security benefit to use for at least 2 months of leave.
- Parents would delay the date at which they begin receiving Social Security retirement by 3 – 6 months per benefit taken.
Republican legislative efforts to repeal and replace the Affordable Care Act (ACA) have failed so far.

Administrative efforts by the Trump Administration to impact the ACA have resulted according to the Commonwealth Fund in an estimated 4 million people losing insurance coverage.

Steps taken have included:

- Reducing the enrollment period by half.
Health Care Reform

The Trump Administration steps to reduce ACA enrollment by:

- Cutting funding by 90% for ACA outreach efforts designed to increase enrollment
- Ending health insurance subsidy payments
- Allowing association health plans that are sold across state lines & not subject to ACA restrictions
- Extending the length of temporary health insurance plans that don’t have to meet ACA standards from 3 months to 12 months
Health Care Reform – What is Next?

- 20 states filed a lawsuit alleging that the ACA is unconstitutional since the recently passed tax law eliminated the tax penalty associated with the individual mandate, the ACA is no longer constitutional – 17 states filed a motion to intervene to defend the ACA

- The complaint alleges that in 2012, the US Supreme Court ruled the ACA’s individual mandate was constitutional because Congress has the power to levy taxes

- With the tax penalty removed, the individual mandate remains without any “accompanying exercise of Congress’s taxing power”

- Judge granted request of 17 states to intervene in the lawsuit in order to defend the ACA
Health Care Reform – What is Next?

- Justice Department said it won’t defend key ACA provisions and supports the states challenging the constitutionality of the ACA.

- Justice Department argues that two of the ACA’s provisions - the guaranteed issue provision, which protects beneficiaries with preexisting conditions and the community rating provision can’t be severed from the individual mandate that was eliminated by the recent tax law.
Health Care Reform – What Is Next?

- Hearing on a preliminary injunction suspending the law was held in September.
- Maryland attorney general filed a lawsuit asking a federal court to rule that the ACA is constitutional.
  - Lawsuit contends that if the ACA is ruled unconstitutional, it would harm state residents.
Health Care Reform – What Is Next?

- Ten Republican Senators introduced a bill (S. 3388) that would prohibit the denial of coverage based on health status.
  - Critics say that while an insurer would have to provide insurance if you have a pre-existing condition, it could exclude any services associated with your pre-existing condition.
  - Bill also would remove rating restrictions based on age, gender, tobacco use or occupation.
Representative Devin Nunes (R-CA) reintroduced the Public Employee Pension Transparency Act (PEPTA) (HR 6290)

The Public Pension Network in which IPMA-HR participates sent a letter to all members of the House of Representatives expressing concern with the proposal, which would:

- Require state and local defined benefit plans to report plan liabilities to the Treasury Department annually to retain their federal tax-exempt bond status
- Require supplementary reports restating these liabilities, using a “risk-free” rate of return
- State that the federal government will not provide a bailout for state and local pension plans
Does Title VII Prohibit Sexual Orientation/Transgender Discrimination?

Evolving area of the law

- 2nd Circuit (*Zarda v. Altitude Express*) and 7th Circuit (*Hively v. Ivy Tech Community College*) have ruled that sexual orientation discrimination is covered by Title VII
- 6th Circuit (*EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*) decided that Title VII prohibits discrimination based on transgender status
- 11th Circuit (*Evans v. Georgia Regional Hospital*) ruled that sexual orientation discrimination is not covered by Title VII & the US Supreme Court declined to review this case
- Justice Department believes Title VII does not cover sexual orientation discrimination while the EEOC believes that it does
Does Title VII Prohibit Sexual Orientation/Transgender Discrimination?

US Supreme Court review is being sought in the following cases:

- Altitude Express, the employer in the 2nd Circuit case has filed a petition seeking US Supreme Court review.

- *Bostock v. Clayton County Board of Commissioners* case, an appeal from an 11th Circuit ruling denying the Title VII challenge by a man who claims he was fired from his job as a child welfare services coordinator due to his sexual orientation.

- R.G. Harris Funeral Homes is seeking review of the 6th Circuit’s ruling.

Future case may be accepted by the Supreme Court.

24 states have laws prohibiting sexual orientation discrimination.
Transgender Employment Discrimination Claims

- Justice Department memo states that Title VII does not prohibit discrimination based on gender identity.
- The memo reverses and withdraws a 2014 memo concluding the opposite position.
- Title VII’s “prohibition on sex discrimination encompasses discrimination between men and women but does not encompass discrimination based on gender identity per se, including transgender status.”
Equality Act

Congressional Democrats introduced legislation (HR 2282/S 1006) that would add sexual orientation and gender identity to other protected classes covered by Title VII of the Civil Rights Act.

47 Senate cosponsors / 198 House cosponsors
Use of Prior Salary

Several circuit decisions on this issue:

- 9th Circuit in *Rizio v. Yovino* ruled that prior salary by itself or in combination with other factors can’t justify wage differential between male & female employees under the Equal Pay Act.

- Plaintiff was hired by Fresno County Office of Education & her pay was based on a formula that took into account her prior salary history.

- 9th Circuit held that “Prior salary is not a legitimate measure of work experience, ability, performance, or any job related quality.” The court stated that “to hold otherwise...would be contrary to the text and history of the Equal Pay Act, and would vitiate the very purpose for which the Act stands.”
Use of Prior Salary

- 11th Circuit (*Bowen v. Manheim Remarketing, Inc.*)) held that an employer’s reliance on prior salary & experience may not provide a bias-free basis for wage disparities
- Plaintiff was promoted to arbitration manager and was paid almost 50% less than her male predecessor and after 6 years, she still earned only as much as her male predecessor did during his 1st year in that role
- 11th Circuit said that after the plaintiff performed effectively for many years, her prior salary & experience would not justify treating her differently than her male predecessor
- 7th Circuit (*Lauderdale v. Illinois Department of Human Services*) found that a difference in pay based upon what employees were previously paid is a legitimate factor other than sex
Use of Prior Salary

6th Circuit (*Perkins v. Rock-Tenn Servs, Inc.*) decided that an employer’s consideration of an applicant’s prior salary is allowed “as long as the employer does not rely solely on prior salary to justify a pay disparity”

Growing trend among states passing laws prohibition asking about salary history that includes: California, Connecticut, Delaware, Massachusetts, Oregon, & Vermont along with some local governments.
Collection of Sales Tax

In *South Dakota v. Wayfair* the Supreme Court ruled that states and local governments can require vendors with no physical presence in the state to collect sales tax.

According to the Court, in a 5-4 decision, “economic and virtual contacts” are enough to create a “substantial nexus” with the state allowing the state to require collection of sales tax.

IPMA-HR joined with several other state and local governments on an amicus brief in support of South Dakota.
Additional Information

For additional information, please contact:

- Neil Reichenberg
- Executive Director
- IPMA-HR
- nreichenberg@ipma-hr.org