Government Affairs Update

TEXAS CHAPTER CONFERENCE

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IPMA-HR
INTERNATIONAL PUBLIC MANAGEMENT ASSOCIATION for HUMAN RESOURCES

Solutions for **Public HR Excellence**

Outline

- Overview
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- Misclassification of Employees
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- Wellness Programs (Litigation/Proposed Guidelines/Legislation)
- Public Pensions
- Criminal Background Checks
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- Title VII Retaliation Case

2016 Elections

- In addition to electing a president, the entire House of Representatives and 1/3 of the Senate
- There will be a limited number of days in which Congress will be in session due to the election
- Post-election session is anticipated and many issues will be deferred until then

Congress

- According to Gallup:
- Approval of Congress averaged 16% in 2015
  - 6th consecutive year in which fewer than 20% approved of Congress
- 52% believe most members of Congress are corrupt
- 69% believe members put the needs of special interests before those of their constituents
- Despite this 95% of incumbents were reelected to Congress in 2014

What Is On the Minds of Voters?

Recent Trends in Most Important U.S. Problems

What do you think is the most important problem facing this country today? [OPEN-ENDED]

	Nov 2015	Dec 2015	Jan 2016	Feb 2016
	%	%	%	%
Economy	17	9	13	17
Government	15	13	16	13
Immigration	9	5	8	10
Unemployment/Jobs	7	6	5	10
National security	3	5	3	7
Terrorism	3	16	9	7
Federal budget deficit/Federal debt	5	2	5	6
Poor healthcare/High cost of healthcare	6	3	4	6

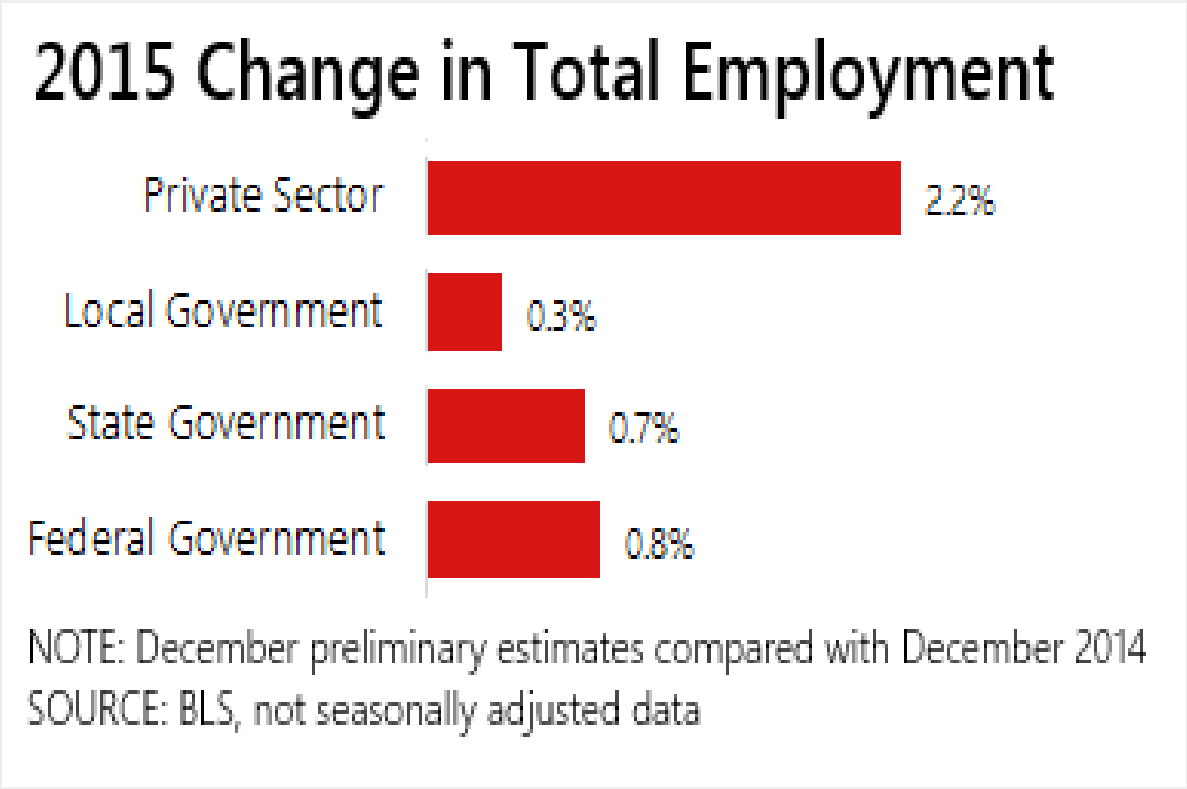
Shown are problems listed by at least 6% of Americans in February 2016

GALLUP

Economy

- According to the Bureau of Labor Statistics, in March, 215,000 jobs were added/unemployment rate is 5%
  - 73 consecutive months of job growth
  - 2.7 million jobs added in 2015/average of 209,000/month this year
  - Wages went up 2.5% over the past year
  - Labor underutilization rate in March was 9.8%
- Government employment up 99,000 in 2015 (1/2 of 1%) & 20,000 in March
  - Private sector employment increased by 2.2% last year
  - Local government employs 470,000 fewer workers than 2008
  - Excluding education, state employment is 182,000 less than 2008

2015 Employment Change



Overtime Regulations

- The Labor Department has issued proposed regulations concerning the executive, professional, & administrative exemptions
  - The salary basis test would increase from $455/week to $970/week
  - The increase would result in 4.6 million currently exempt employees being entitled to overtime
  - Salary basis test would be indexed & the Labor Department sought comments on the best way to determine annual updates
  - Annual compensation threshold for exempt highly compensated employees would increase from $100,000/year to $122,148/year

Overtime Regulations

- The Labor Department made no changes to the duties tests but asked for comments on whether to modify the duties tests by such means as:
  - Adopting the California model requiring exempt employees to spend more than half of their working time on exempt tasks
  - Placing quantitative limits on the amount of time exempt employees may spend on non-exempt duties
  - Modifying or eliminating the concept of concurrent duties whereby exempt employees can maintain exempt status when performing exempt & non-exempt activity simultaneously

Overtime Regulations

- About 290,000 comments were submitted on the proposed FLSA regulations
  - Labor Department said the regs will be finalized in July – could be earlier
- IPMA-HR conducted a survey of state and local governments on this issue and submitted comments that raised the following issues:
  - There is a need to recognize how work in the 21st century is performed and to provide a system that includes flexibility in setting employee hours and offering opportunities for advancement, while making it easier for public employers to classify employees

Overtime Regulations

- IPMA-HR comments:
  - The proposed increase in the salary basis test from $455 per week to $970 per week is too steep and consideration should be given either to lowering it or phasing it in over several years
  - Given the difference in the cost of living in the United States, the Labor Department should consider locality adjustments
  - The proposed automatic annual indexing of the salary basis test is unprecedented and has not been authorized by the Congress
  - Compensation systems don't exist in a vacuum
  - Any modifications to the duties test should include another notice and public comment period
  - Any changes to the duties tests should not include arbitrary percentage standards that must be met by exempt employees

Overtime Regulations

- IPMA-HR participates in the Partnership to Preserve Workplace Opportunity which in December sent a letter signed by 164 organizations to all members of Congress urging them to contact the Department of Labor and the Office of Management and Budget to express concern with the proposed FLSA regulations
- Similar letter on behalf of state and local government and education associations was sent in February
- 108 members of the House have sent a letter to the Labor Secretary Perez expressing concerns

Overtime Regulations

- The Protecting Workplace Advancement and Opportunity Act (S.2707 and H.R 4773) was introduced, supported by IPMA-HR and would:
  - Require the Department of Labor to consider the economic impact of any rule on small businesses, nonprofits, higher education, and governments that will be affected
  - Clarify that automatic increases are not allowed under the FLSA
  - Require any changes to the duties tests be made available for public review and comment
  - Require 120 days for comments on proposed rules and 1 year notice before final rules become effective
- The Department of Labor has sent the final regulations to the Office of Management & Budget for its review – public sector meeting with OMB on April 11th

Use of Electronic Devices by Employees

- The Labor Department indicated it will issue a request for information (RFI) seeking information on the use of electronic devices by overtime-protected employees outside of scheduled work hours and away from the workplace
- IPMA-HR will consider submitting information

Misclassification of Employees

- The Wage and Hour Administrator issued Administrator's Interpretation 2015-1 – Application of the FLSA's Suffer or Permit Standard in the Identification of Employees who are Misclassified as Independent Contractors
- The AI goes to great lengths to emphasize that the term "employee" is broadly defined under the FLSA and therefore genuine independent contractor status should be the exception, not the rule
- The AI's main goal is to provide DOL's view on how courts should interpret the "**economic realities**" test utilized to determine whether a worker is an employee for purposes of the FLSA. If the worker is **economically dependent** on the employer, the worker under the test should be found to be an employee
- This issue has been a priority of DOL

Joint Employment

- The Wage and Hour Division issued guidance (Administrator's Interpretation 2016-1) on joint employment under the Fair Labor Standards Act (FLSA)
- Where a joint employment relationship is found, all joint employers of a worker are liable for compliance with FLSA requirements
- Vertical joint employment applies when workers have an employment relationship with one employer & the **economic realities** show that they are economically dependent on & thus employed by another entity involved in the work
- Factors considered: 1) control or direction over the employees; 2) control over employment conditions; 3) permanency & duration of the relationship; 4) type of work performed (repetitive or unskilled) suggests employees are economically dependent; 5) is the employee's work integral to the business; 6) where is the work performed; 7) whether administrative functions are performed for the employees

Minimum Wage

- Congressional Democrats have introduced the Raise the Wage Act (S. 1150/HR 2150) that would increase the minimum wage to $12/hour by 2020 & adjust for inflation starting in 2021
  - President Obama raised the minimum wage to $10.10/hour for federal contractors
- For the first time, a majority of states – 29 + the District of Columbia have minimum wages above the federal minimum
  - Several cities have enacted higher minimum wages
  - Alabama legislature passed a law repealing the minimum wage increase enacted by the City of Birmingham
- Large companies like Walmart & McDonald's have increased pay for employees

Healthcare Reform

- Congress passed a bill (H.R. 3672) repealing most of the Affordable Care Act that was vetoed by President Obama
- “Because of the harm this bill would cause to the health and financial security of millions of Americans, it has earned my veto,” the president wrote.
- Congress did not have sufficient votes to override the president’s veto

Healthcare Reform – Excise Tax

- IPMA-HR was pleased that as part of the Consolidated Appropriations Act, the excise tax that would have become effective in 2018 will be suspended for two years until 2020
- The excise tax would apply to premiums that exceed $10,200/individual & $27,500 for families
- The excise tax is projected to raise between $87-91 billion, with ¼ coming from the excise tax and ¾ from increases in taxable compensation of employees
- Bills (H.R. 879/H.R. 2050/S. 2045/S. 2075) that would repeal the excise tax have been introduced
- IPMA-HR supports repeal of the excise tax

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Healthcare Reform – Excise Tax

- The President's 2017 budget includes a proposed modification to the excise tax
- The proposal would reflect regional differences in health care costs
- Instead of a single threshold across the country, employers could offer more generous coverage without incurring the tax in states where gold level plans offered on the exchanges cost more than the Cadillac tax limits

Healthcare Reform – Excise Tax

- IPMA-HR submitted comments to the IRS on its request for information on the excise tax that focused on:
  - Only including former employees where they participate in a plan that includes at least 2 current employees
  - Excluding employers with plans in states where laws prohibit reductions in the health benefits offered by employers
  - High-risk employees should qualify for the dollar adjustment without being spun off into separate plans
  - Annual adjustments to premiums should be based on health care cost adjustments rather than the cost of living

Health Care Reform - Definition of Full-Time Employees

- By a vote of 252 – 172, the House of Representatives passed a bill (H.R. 30) that would raise the definition of full-time employment under the ACA from 30 hours per week to 40 hours per week
- A similar bill (S. 30) has been introduced in the Senate
- The Congressional Budget Office estimates that the bill would add $50 billion to the deficit over the next decade and result in 1 million fewer people getting health insurance benefits at work
- The White House said the president would veto the bill
- IPMA-HR supports the bills

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Healthcare Reform -Wellness Programs

- The EEOC has been pursuing litigation against wellness programs arguing that penalties render participation in wellness programs involuntary & could violate the ADA & the Genetic Information Non-discrimination Act (GINA)
- ACA & HIPAA allow financial rewards that may be given for wellness program participation that is limited to 30% of the total premium cost or 50% if the program includes tobacco cessation

Healthcare Reform -Wellness Programs

- The District Court ruled against the EEOC in the case of *EEOC v. Flambeau, Inc.*
- The EEOC alleged that the wellness program violated the ADA's prohibition against mandatory physical examinations & medical questionnaires
- The court agreed with Flambeau that its wellness program was covered by the ADA's bona fide benefit plan exception citing the 11th Circuit decision in Seff v. Broward County
- The District Court noted that compliance with the program was a condition for eligibility in the group health plan making it "difficult to fathom how such a condition could be other than a plan term"

Healthcare Reform -Wellness Programs

- The EEOC has issued proposed guidelines addressing the interaction between the ADA and financial incentives that are offered as part of wellness programs
  - Guidelines expected to be finalized at the end of April
- IPMA-HR submitted comments along with several other groups that focused on:
  - The EEOC does not believe that the insurance safe harbor is the proper basis for interpreting wellness program incentives. This is contrary to the Eleventh Circuit's 2012 decision in *Seff v. Broward County* that an employer group health plan's wellness program did not violate the Americans with Disabilities Act's (ADA's) prohibition on non-voluntary medical examinations and disability-related inquiries because the program falls within the ADA's safe harbor for bona fide benefit plans.

Healthcare Reform – Wellness Programs

- IPMA-HR comments:
  - The EEOC proposal focuses exclusively on wellness programs that operate as part of a group health plan, while many employers provide wellness programs that operate outside of a group health plan
  - The EEOC proposal would limit incentives to 30% of the total cost of employee-only coverage. The proposal would count incentives from both participatory wellness programs such as subsidized gym membership for all employees and health contingent wellness toward the 30% limit.

Healthcare Reform – Wellness Programs

- IPMA-HR comments:
  - The tri-agency (Departments of Labor, HHS & Treasury) regulations permit wellness programs that include tobacco cessation to provide incentives up to 50%, while the EEOC would limit incentives to 30%. The EEOC would allow a 50% penalty on smokers if it simply asked them if they smoke, since this is not a medical examination. However, if the employer tested for nicotine presence, the maximum penalty it could impose would be 30% of the total cost of employee-only coverage.

Healthcare Reform – Wellness Programs

- IPMA-HR comments
  - The proposal does not address wellness plans that cover spouses or dependents in any way
  - Any notice requirement to plan participants should state that compliance with HIPAA privacy regulations is sufficient for compliance under the ADA
  - Urges the EEOC to allow employers sufficient time to alter their wellness programs

Healthcare Reform – Wellness Programs

- The EEOC issued proposed rules to amend the regulations implementing Title II of the Genetic Information Nondiscrimination Act as they relate to employer wellness programs that are part of group health plans
- The proposed rule would allow employers who offer wellness programs as part of group health plans to provide limited financial and other incentives, not to exceed 30% of the total cost of the plan in exchange for an employee's spouse providing information about current or former health status
- IPMA-HR joined with several groups in submitting comments that raise similar points to the ADA guidelines

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Healthcare Reform -Wellness Programs

- Republicans have introduced legislation (S. 620/H.R. 1189), 'Preserving Employee Wellness Programs Act'
- The bills would consider employee wellness programs that provide financial rewards as provided for in the HIPAA guidelines to be voluntary
- Employees would have up to 180 days to request and complete an alternative wellness program if it is medically inadvisable or unreasonably difficult to participate in the employer's wellness program
- Bill would be retroactive to 3/23/10 – date ACA was signed
- IPMA-HR supports these bills

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Public Pensions

- IPMA-HR participates in the Public Pension Network (PPN), which sent a letter to members of Congress opposing the reintroduction (HR 4288) by Representative Nunes (R-CA) of the Public Employee Transparency Act
- The letter notes that the reporting requirements would impose unfunded mandates in areas that are the fiscal responsibility of state and local governments & would be burdensome and costly
- Every state and many local governments have made changes to pension financing, benefits structures or both

Criminal Background Checks

- Representative Walberg (R-MI) has introduced a bill (H.R. 548) that would amend Title VII so that the use of criminal records or information, as mandated by Federal, State, or local law, by an employer, labor organization, employment agency, shall be deemed to be job related and consistent with business necessity and shall not be the basis of liability under any theory of disparate impact
- Bill is in response to the criminal background check guidance issued by the EEOC
- IPMA-HR supports this bill

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First Amendment Case

- The US Supreme Court will review a case, *Heffernan v. City of Patterson* on whether a plaintiff can prevail on a claim of retaliation of the perceived exercise of First Amendment rights
- Jeffrey Heffernan claims he was demoted from his position as a detective when he was observed picking up a lawn sign for his mother who supported the former police chief's bid to unseat the incumbent mayor
- Third Circuit affirmed summary judgment ruling for the city since a claim "must rest upon the actual exercise of a particular constitutional right"

First Amendment Case

- IPMA-HR joined with 7 state and local associations in filing an amicus brief in this case
- The brief argues that a government employer's perception that an employee has exercised his or her First Amendment rights cannot be the basis for a First Amendment retaliation lawsuit.
  - The Supreme Court need not find a constitutional claim exists when an employer misperceives that an employee has engaged in political speech. Collective bargaining statutes, "just cause" protections, civil service statutes, and statutes protecting against interference or attempts to interfere with any individual's civil rights would prevent a state or local government employer from lawfully taking an adverse employment action in such circumstances.

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Public Sector Union Fees Case

- The Supreme Court in a one sentence opinion affirmed the 9th Circuit's decision in the case of *Friedricks v. California Teachers Association* that was a challenge by 10 nonunion public school teachers who say California's requirement that they pay a fee (2/3 of the cost of union membership) to the union for collective bargaining & contract administration violates their free speech rights
- The 9th Circuit upheld the right to require the payment of a fair share fee by nonunion members

Title VII Retaliation Case

- IPMA-HR joined with 2 other associations in filing an amicus brief in support of a petition for review in the case of *City of Houston v. Christopher Zamora*
- Christopher Zamora sued the City for Title VII retaliation after he was suspended for 10 days by the chief of police following an internal affairs investigation
- While the police chief did not exhibit any retaliatory animus towards him, he contended that several supervisors made retaliatory statements to the internal affairs investigators
- Brief argues that Title VII retaliation cases require a plaintiff to prove that retaliatory animus is the "but for" cause of the employment action, which is a more rigorous standard than the "motivating factor" applied by the 5th Circuit

Questions/Additional Information

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