

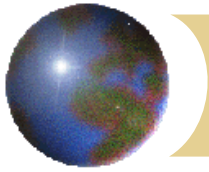
# What Is Going On In Washington?

Government Affairs Webinar

Neil Reichenberg

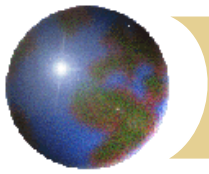
IPMA-HR

Executive Director



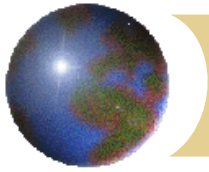
# Government Affairs

- ✦ Monthly updates posted on the IPMA-HR website and included in the HR Bulletin
- ✦ Government Affairs Committee open to all national members
  - ▣ Committee has monthly conference calls



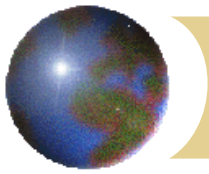
# Outline

- ⊕ Federal Government Funding/Partial Government Shutdown
- ⊕ Economy
- ⊕ Mandatory Collective Bargaining
- ⊕ FLSA
  - ⊕ Regulations
  - ⊕ Opinion Letters
  - ⊕ Legislation
- ⊕ Minimum Wage
- ⊕ Paycheck Fairness Act
- ⊕ Use of Prior Salary
- ⊕ Union Fair Share Fees
- ⊕ Paid Family Leave
- ⊕ Health Care/Cadillac Tax
- ⊕ Healthy Families Act
- ⊕ Sexual Orientation & Transgender Discrimination
- ⊕ Equality Act
- ⊕ Title VII Case



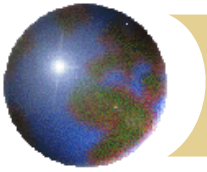
# A Tale of Two Houses

- ✪ The House of Representatives has passed more than 100 bills on a wide range of issues – the Senate refuses to consider most of them
  - ✪ Speaker Nancy Pelosi stated: “The Senate is the graveyard where bills that pass in the Congress that have bipartisan support...go to die”
  - ✪ Senate is focused on confirmations



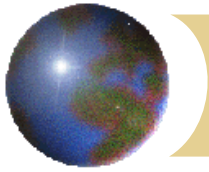
# Federal Government Funding

- ✦ After a partial government shutdown that lasted 35 days earlier this year, the September 30<sup>th</sup> end of the federal fiscal year is approaching rapidly
- ✦ Budget agreement passed by Congress and signed by the President will add another \$320 billion to the deficit over the next 2 years
  - ▣ Appropriations bills still need to be passed



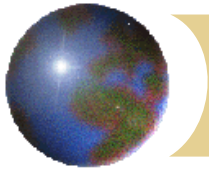
# Partial Government Shutdown

- ⊕ About 800,000 federal workers were either furloughed or worked without pay
- ⊕ Legislation passed and signed into law providing back pay to federal employees when the shutdown ended
  - ⊕ \$86 million/day or \$1,000/second was the payroll cost for the furloughed employees
- ⊕ The Congressional Budget Office (CBO) estimates that the partial government shutdown cost the economy \$11 billion, with \$3 billion in economic activity is lost permanently
- ⊕ Unknown number of contractors also were impacted



# Partial Government Shutdown

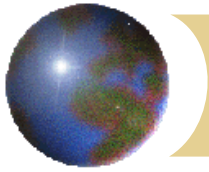
- ✦ For many months, a Gallup poll found that government/poor leadership is the most important problem facing the country today
  - ▣ This month, immigration became #1
- ✦ Long-term damage to the brand of the federal government as an employer, which may impact state governments



# Stop STUPIDITY Act

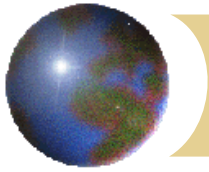
- ⊕ Senator Warner (D-VA) has introduced the Stop Shutdowns Transferring Unnecessary Pain and Inflicting Damage in the Coming Years Act (S. 198)
- ⊕ Bill would automatically keep all of the federal government running in case of a future lapse in funding with the exception of the Congress & the Executive Office of the President
- ⊕ IPMA-HR supports this bill





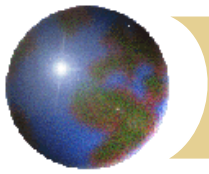
# Economy

- ⊕ 106 consecutive months of job growth/unemployment rate is 3.7% & labor underutilization is at 7%
- ⊕ Deficit is over \$22 trillion and growing rapidly
- ⊕ Congress has again suspended the debt ceiling for 2 years until July 31, 2021
  - ⊞ Should we eliminate the debt ceiling?



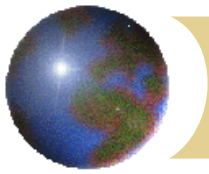
# Mandatory Collective Bargaining

- ❖ The Public Safety Employer-Employee Cooperation Act (HR 1154/S. 1394) has been introduced & would require mandatory collective bargaining for public safety workers
- ❖ The Public Service Freedom to Negotiate Act (H.R. 3463) would guarantee collective bargaining rights to all public employees
- ❖ IPMA-HR opposes these proposals



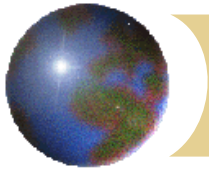
# Mandatory Collective Bargaining

- ❖ IPMA-HR submitted a statement to the House Subcommittee on Health, Employment, Labor & Pensions which held a hearing on these bills
- ❖ The statement notes that our primary concern with these bills is that they impose a federal mandate on state and local governments
  - ❖ There are no studies that demonstrate that state and local governments with collective bargaining are more efficient & effective



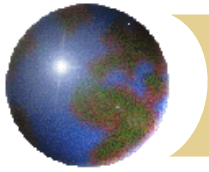
# Mandatory Collective Bargaining

- ❖ Unionization is no guarantee of harmonious labor-management relations despite the claim in the bills
  - ❖ Of the 11 work stoppages in 2018 that occurred in state and local governments, 5 involved unions
- ❖ The Federal Labor Relations Authority, which would administer the law is a beleaguered agency ill-suited to manage collective bargaining for state/local governments
  - ❖ Ranked 27<sup>th</sup> out of 29 small federal agencies in the Best Places to Work survey



# FLSA Overtime Regulations

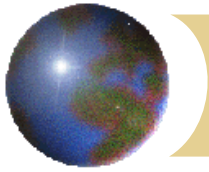
- ❖ The Labor Department has issued the proposed new overtime regulations
- ❖ IPMA-HR submitted comments that were joined by the International City/County Management Association (ICMA), and the Government Finance Officers Association (GFOA)
- ❖ Survey conducted of IPMA-HR members to get input on the proposed regulations



# Comments on the FLSA Overtime Regulations

## Our comments:

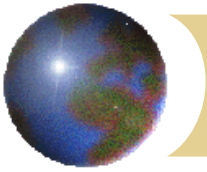
- ❖ Express support for the proposed increase in the salary basis threshold to \$35,308 – 81% of survey respondents expressed support
- ❖ Call for consideration of a salary basis threshold that varies based on the cost of living
- ❖ Support reviewing the salary basis threshold every four years with any proposed adjustments being made through a notice and public comment period
- ❖ Basing future adjustments on changes in the Consumer Price Index



# Comments on the FLSA Overtime Regulations

## Our comments:

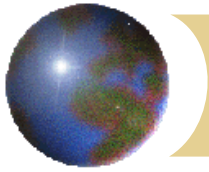
- ❏ Making a smaller increase than is proposed to the salary threshold for highly compensated employees
- ❏ Consider allowing the pro-rating of the weekly salary basis threshold amount for those exempt positions that are part-time
  - This is especially an issue for those governmental organizations that engage in collective bargaining and have bargaining units determined by whether the position is exempt or non-exempt



# FLSA Regular Rate Regulations

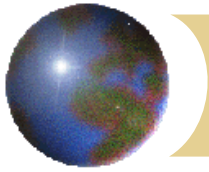
- ❖ IPMA-HR joined with several associations in submitting comments to the Labor Department on the proposed FLSA regular rate rules, which is used to determine overtime compensation
- ❖ Comments note that these regulations were issued more than 60 years ago and the workplace and the law have changed and public sector employers often provide “complex compensation programs that can include multiple types of specialty & incentive pay and inadvertent regular rate violations can create enormous unanticipated expenses for public agencies, which are borne by the taxpayer”





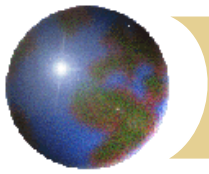
# FLSA Regular Rate Regulations

- ✦ Comments raised the following issues:
  - ✦ Recommend the Labor Department include in the list of payments properly excluded from the regular rate any cash payments made to employees pursuant to a bona fide medical cafeteria plan or clarify that medical cash-in-lieu payments constitute other similar payments excluded from the regular rate



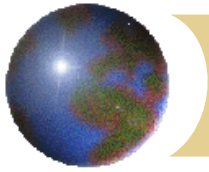
# FLSA Regular Rate Regulations

- ✦ Issued raised in the comments:
  - ✦ Clarify that holiday in lieu pay can be excluded from the regular rate regardless of whether they are paid during the same period in which the leave is foregone or during a subsequent pay period
  - ✦ Confirm that leave related cash outs are excluded from the regular rate



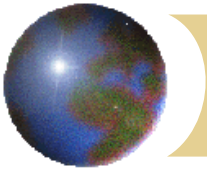
# Wage-Hour Opinion Letter Request

- ❖ 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
  - ❖ DOL advised that it doesn't know whether or when a response will be sent



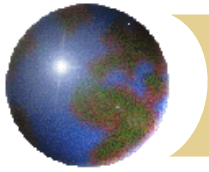
# DOL Opinion Letters

- ❖ Two public safety related opinion letters issued on August 8<sup>th</sup>
- ❖ One concerns whether employees who work for both the fire and police departments is entitled to overtime pay if the hours comply with the 207K exemption
- ❖ DOL regs state that when an employee is engaged in both fire protection & law enforcement, the maximum hours standard is the one which applies to the activity in which the employee spends the majority of work time during the work period



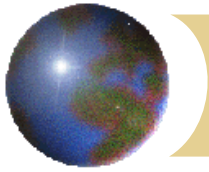
# DOL Opinion Letters

- ❖ The 2<sup>nd</sup> opinion letter concerns whether volunteer reserve deputies who perform paid security work for 3<sup>rd</sup> parties maintain their status as volunteers or become employees under the FLSA
- ❖ Sheriff's office runs a volunteer reserve deputies program
- ❖ Due to increased request for extra duty work from 3<sup>rd</sup> party businesses and individuals for security work, the sheriff's department has offered work to volunteers
- ❖ Performance of extra work for 3<sup>rd</sup> parties does not result in the loss of volunteer status



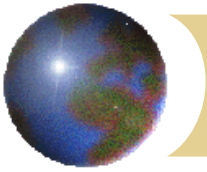
# DOL Opinion Letters

- ❖ Opinion letter concludes that employers are prohibited from designating more than 12 weeks of leave as FMLA leave
- ❖ If employees substitute paid leave for unpaid FMLA leave, the paid leave counts towards the 12 week FMLA entitlement
- ❖ Employers are prohibited from delaying the designation of leave as FMLA leave beyond 5 days after they receive sufficient info from employees
- ❖ Opinion letter is opposite of a 9<sup>th</sup> Circuit decision in which the court ruled that employees can decline FMLA leave, use paid leave before taking FMLA leave



# DOL Opinion Letters

- ❁ Labor Department issued an opinion letter last year 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

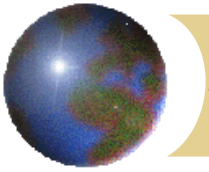


# DOL Opinion Letters

- ❖ In another 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:

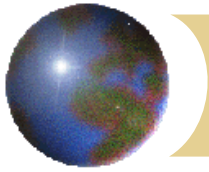
<https://www.dol.gov/whd/opinion/flsa.htm>





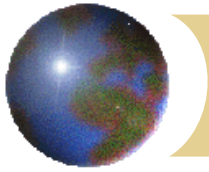
# Restoring Overtime Pay Act

- ❖ Legislation (H.R. 3197/S. 1786) has been introduced and would raise the salary basis threshold for exempt executive, administrative & professional employees to nearly \$51,000/year
- ❖ Bill would set the salary level to the 40<sup>th</sup> percentile of wages in the lowest wage census region and is estimated to make about 4.6 million workers eligible for overtime



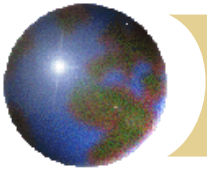
# Minimum Wage

- ❖ The Raise the Wage Act (HR 582/S 150) has been introduced and approved by the House of Representatives
- ❖ Bill would gradually raise the federal minimum wage from \$7.25/hour to \$15/hour over the next 6 years
- ❖ Future increases would be indexed to the median wage growth



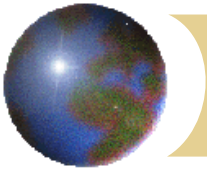
# Minimum Wage

- ⊕ Congressional Budget Office estimates that raising the minimum wage to \$15/hour would raise pay for 17 million workers but could result in between 1.3 million and 3.7 million workers losing jobs
- ⊕ Federal minimum wage was last increased in 2009 and has lost about 18% of its real value
- ⊕ 29 states and some local governments have a higher minimum wage
- ⊕ Do we need a locality based minimum wage?



# Paycheck Fairness Act

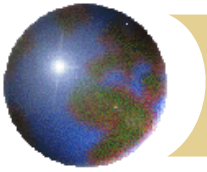
- ✚ Legislation (H.R. 7/S. 270) has been introduced with a large number of cosponsors
- ✚ House of Representatives has approved H.R. 7



# Paycheck Fairness Act

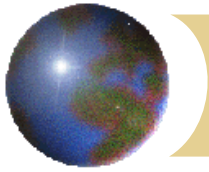
## ✦ The bill would:

- ✦ Require employers to prove that pay disparities exist for legitimate, job-related reasons & not based on gender alone
- ✦ Ban retaliation against workers who discuss their wages
- ✦ Prohibit employers from seeking salary history from prospective employees
- ✦ Make it easier to join class actions challenging pay discrimination



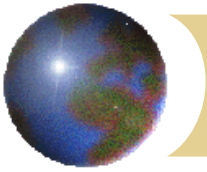
# Use of Prior Salary

- ✦ The US Supreme Court in the case of *Yovino v. Rizo* vacated a decision by the 9<sup>th</sup> Circuit since the vote of a judge was counted in a case decided after the date that he died
- ✦ The Supreme Court stated that it was an error to allow a deceased judge to exercise “the judicial power of the United States after his death...federal judges are appointed for life but not for eternity”



# Use of Prior Salary

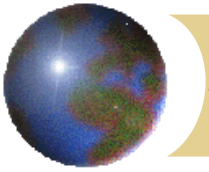
- ✦ 9<sup>th</sup> Circuit had ruled that prior salary by itself or in combination with other factors can't justify wage differential between male & female employees under the Equal Pay Act
- ✦ Plaintiff was hired by Fresno County Office of Education & her pay was based on a formula that took into account her prior salary history
- ✦ 9<sup>th</sup> 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

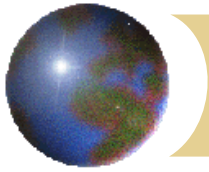
- ✿ There is a split among the judicial circuits on this issue:
  - ✿ 11<sup>th</sup> Circuit (*Bowen v. Manheim Remarketing, Inc.*) held that an employer's reliance on prior salary & experience may not provide a bias-free basis for wage disparities
  - ✿ 7<sup>th</sup> Circuit (*Lauderdale v. Illinois Department of Human Services*) found that a difference in pay based upon what employees were previously paid is a legitimate factor other than sex
  - ✿ 6<sup>th</sup> 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"





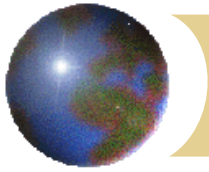
# Union Fair Share Fees Case

- ⊕ As a result of the *Janus* decision, unions have lost dues from nonmembers who are no longer paying fair share fees, but overall union membership is steady or growing in some locations
- ⊕ Full effects won't be known for awhile
  - ⊕ BLS reported that public sector unions overall lost 83,000 members or 0.7% in 2018



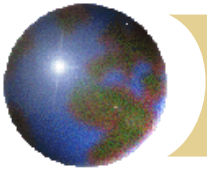
# Union Fair Share Fees Cases

- ✦ There are over 10 courts that have ruled that the *Janus* decision cannot be applied retroactively
- ✦ Mark Janus had his request for back pay for the fair share fees he paid denied, with the judge concluding “AFSCME followed the law and could not reasonably anticipate that the law would change”



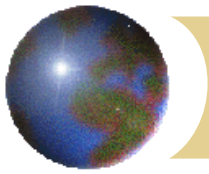
# Paid Family Leave

- ✿ Both parties are interested in providing paid family leave
- ✿ Proposal (S. 463/H.R. 1185) by Democrats would provide up to 12 weeks of paid leave
  - ✿ Paid leave available for any FMLA qualifying leave
    - 66% wage replacement capped at \$4,000/month
  - ✿ Payroll deduction of 0.2% of wages paid by employees & employers would fund the leave
  - ✿ House Education & Labor Committee approved the bill



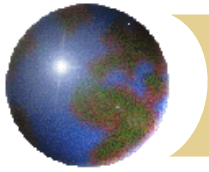
# Paid Family Leave

- ❖ Proposal by Republicans (S. 920/H.R. 1940) would be narrower and give new parents the option of using a portion of their future Social Security benefits for paid parental leave after the birth or adoption of a child
  - ❖ Parents taking the option would be allowed an advance of up to 3 months of their Social Security benefits to finance their time off
  - ❖ Those earning less than \$60,000/year would receive leave pay equal to about 2/3 of their wages
  - ❖ Parents would delay the date at which they begin receiving Social Security retirement by 3 – 6 months per benefit taken or to have the sum gradually deducted from their benefits over the first 5 years of retirement



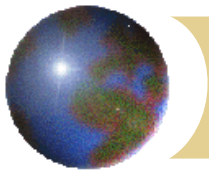
# Health Care

- ❖ “Republicans will be the party of health care”...but not until after the 2020 election
- ❖ Some Democrats support Medicare for all
- ❖ The House of Representatives passed a bill (H.R. 987) that would bolster the Affordable Care Act (ACA) and would try to lower prescription drug prices
- ❖ The bill that was passed combined 4 ACA bills and 3 bills designed to lower prescription drug costs.



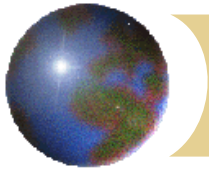
# Health Care

- ✚ There also is bipartisan support for addressing the issue of surprise medical bills that occur for example during a hospital visit in which patients may be seen by doctors who do not participate in the networks included in their health insurance plans.



# ACA Ruled Unconstitutional

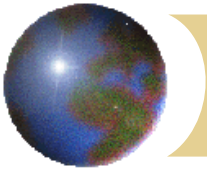
- ✦ US District Court for the Northern District of Texas ruled the ACA is unconstitutional
- ✦ Decision has been appealed to the 5<sup>th</sup> Circuit where the case was heard recently & the ACA remains in effect
- ✦ 20 states filed a lawsuit alleging that the ACA is unconstitutional since the new tax law eliminated the tax penalty associated with the individual mandate making the ACA unconstitutional
- ✦ 17 states intervened to defend the ACA
- ✦ Justice Department argued initially 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
- ✦ Justice Department now argues the entire ACA is unconstitutional



# ACA Ruled Unconstitutional

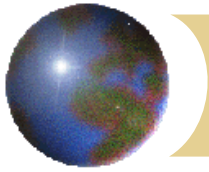
- ⊕ District Court judge concluded that the individual mandate was the ACA's "essential" provision
- ⊕ Rewriting the ACA without this provision is beyond the power of the Court and thus the individual mandate is inseverable from the rest of the ACA





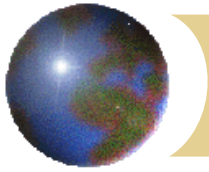
# Cadillac Tax

- ⊕ A bill (H.R. 748) to repeal the ACA's 40% excise tax on high-cost health plans ("Cadillac tax") has been approved overwhelmingly by the House of Representatives
  - ⊞ Similar bill (S. 684) introduced in the Senate
- ⊕ The tax was initially scheduled to take effect in 2018 & delayed 2 times until 2022
  - ⊞ Repeal would reduce revenue by almost \$200 billion over 10 years
- ⊕ IPMA-HR supports the repeal of the Cadillac tax



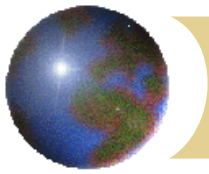
# Age Discrimination in Employment Act

- House Education and Labor Committee has approved the Protecting Older Workers Against Discrimination Act (H.R. 1230)
- Bill would reverse the US Supreme Court's decision in *Gross v. FBL Financial Services* where the court ruled that plaintiffs in ADEA cases must prove that age was the sole motivating factor for an employer taking an adverse employment action
- Plaintiffs in Title VII cases can succeed with a mixed motive argument that discriminatory intent was just one of the reasons for an adverse employment action



# Healthy Families Act

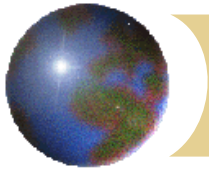
- ⊕ Legislation (S. 636/H.R. 1516) has been reintroduced by Senator Murray (D-OR) and Representative DeLauro (D-CT) and would require employers with at least 15 employees to provide at least 7 days/56 hours of paid sick leave
- ⊕ Employers that provide at least the required paid leave would not be required to give additional sick time
- ⊕ Employees would be allowed to carryover up to 56 hours of paid leave



# Does Title VII Prohibit Sexual Orientation/Transgender Discrimination?

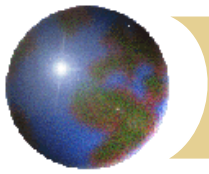
## ✦ Evolving area of the law

- ✦ 2<sup>nd</sup> Circuit (*Zarda v. Altitude Express*) and 7<sup>th</sup> Circuit (*Hively v. Ivy Tech Community College*) have ruled that sexual orientation discrimination is covered by Title VII
- ✦ 6<sup>th</sup> Circuit (*EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*) decided that Title VII prohibits discrimination based on transgender status
- ✦ 11<sup>th</sup> Circuit (*Evans v. Georgia Regional Hospital & Bostock v. Clayton County*) ruled that sexual orientation discrimination is not covered by Title VII
- ✦ Justice Department believes Title VII does not cover sexual orientation discrimination while the EEOC believes that it does



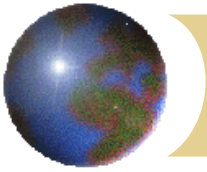
# Does Title VII Prohibit Sexual Orientation/Transgender Discrimination?

- ✿ US Supreme Court has decided that it will review the following cases during the next term that starts in October:
  - ✿ Altitude Express, the employer in the 2<sup>nd</sup> Circuit case has filed a petition seeking US Supreme Court review
  - ✿ *Bostock v. Clayton County Board of Commissioners* case, an appeal from an 11<sup>th</sup> 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 6<sup>th</sup> Circuit's ruling



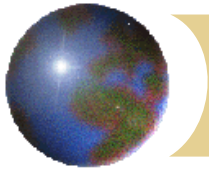
# Equality Act

- ✚ Legislation (H.R. 5, S. 788) has been introduced & would in part amend Title VII to provide protection against employment discrimination based on sexual orientation and gender identity
- ✚ IPMA-HR supports the employment provisions of this legislation
- ✚ House passed H.R. 5



# Title VII Procedural Case

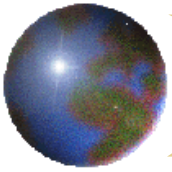
- ⊕ US Supreme Court ruled on June 3<sup>rd</sup> that the requirement to exhaust administrative remedies before raising an issue in a lawsuit isn't a jurisdictional issue that can be raised at any time during a proceeding
- ⊕ Employers need to raise the concern that administrative remedies were not properly exhausted in the answer to the complaint or in a motion to dismiss or risk losing that defense
- ⊕ Employers should make sure that the employee met the charge filing requirement when the lawsuit is filed



# Title VII Procedural Case

- ⊕ Lois Davis filed harassment & retaliation charges with the Texas Workforce Commission, which gave her the right to sue
- ⊕ Subsequent to her filing the charges, she was dismissed for failing to work on Sunday
- ⊕ Her lawsuit for the first time claimed the county engaged in religious discrimination
- ⊕ IPMA-HR joined an amicus brief in support of Fort Bend County





# Additional Information

✚ For additional information, please contact:

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