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Proceedings

A monthly newsletter from McGraw-Hill Education

April 2017 Volume 8, Issue 9

Contents

Dear Professor,

Here's hoping your spring semester is progressing well! Welcome to McGraw-Hill Education's April 2017 issue of Proceedings, a newsletter designed specifically with you, the Business Law educator, in mind. Volume 8, Issue 9 of Proceedings incorporates "hot topics" in business law, video suggestions, an ethical dilemma, teaching tips, and a "chapter key" cross-referencing the April 2017 newsletter topics with the various McGraw-Hill Education business law textbooks.

You will find a wide range of topics/issues in this publication, including:

1. The United States Supreme Court's decision to send a Virginia transgender rights case back to the lower court;

2. United States Supreme Court Justice Stephen Breyer's thoughts and opinions regarding the constitutionality of the death penalty and solitary confinement;

3. A United States House of Representatives bill regarding genetic testing in the workplace;

4. Videos related to a) Iceland's requirement that employers prove they offer equal pay and b) advocacy for paid parental leave in the United States;

5. An "ethical dilemma" related to China's recent decision to protect the intellectual property rights of President Donald Trump and his business dealings in China; and

6. "Teaching tips" related to Article 2 ("In Late-Night Dissent, Justice Breyer Sounds Off Against Solitary Confinement") and the Ethical Dilemma ("China Grants Trump Dozens of New Trademarks") of the newsletter.

I sincerely wish all of you a great remainder of the spring semester!

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Of Special Interest

This section of the newsletter covers three (3) topics:

1) The United States Supreme Court's decision to send a Virginia transgender rights case back to the lower court;

2) United States Supreme Court Justice Stephen Breyer's thoughts and opinions regarding the constitutionality of the death penalty and solitary confinement; and

3) A United States House of Representatives bill regarding genetic testing in the workplace.

Hot Topics in Business Law

Article 1: "Supreme Court Sends Virginia Transgender Case Back to Lower Court"

https://www.washingtonpost.com/politics/courts_law/supreme-court-sends-transgender-case-back-to-lower-court/2017/03/06/0fc98c62-027a-11e7-b9fa-ed727b644a0b_story.html?utm_term=.7a320d2e5e45

According to the article, the United States Supreme Court recently put off a major decision on transgender rights, a result of the Trump administration's decision last month to withdraw federal support of the Virginia high schooler who has waged a legal fight to use the boys' restroom.

The decision to send the case of 17-year-old Gavin Grimm back to a lower court delays until at least next term a decision on whether federal laws that forbid discrimination on the basis of sex also extend to gender identity.

It is an issue that has roiled the nation, pitting LGBT activists and transgender youth and their parents against those who say privacy and safety are compromised by accommodating transgender youth in school restrooms and locker rooms. School boards have found themselves facing either recriminations from the federal government or lawsuits by activists and parents.

In Grimm's case, a panel of the U.S. Court of Appeals for the Fourth Circuit had deferred to guidance issued by the Obama administration and overruled the Gloucester County School Board's policy that students must use restrooms that correspond with their "biological sex."

But the Trump administration last month rescinded that guidance. So the Supreme Court in a one-sentence order vacated the 4th Circuit's opinion and sent it back for further consideration, which may require a closer look at the constitutional and legal questions.

Grimm said he was disappointed that his senior year will probably end without resolution of the issue.

"But I'm still as passionate and happy to be doing this as ever," he said in a conference call with reporters, adding, "If it took 10 years, I'd stick with it."

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Joshua Block, a lawyer with the American Civil Liberties Union who is representing Grimm, said there is a silver lining in the national attention the case has received, even without a Supreme Court decision.

"The overwhelming level of support shown for Gavin and trans students by people across the country throughout this process shows that the American people have already moved in the right direction and that the rights of trans people cannot be ignored," Block said. "This is a detour, not the end of the road."

The Gloucester County School Board had also asked the court to decide the underlying legal issues but said it would now concentrate on convincing the appeals court that the board's "commonsense restroom and locker room policy is legal under the Constitution and federal law."
Conservative legal groups said it was wise of the Supreme Court to vacate the 4th Circuit's ruling and send it back for additional legal argument.

"The first duty of school districts is to protect the bodily privacy rights of all of the students who attend their schools and to respect the rights of parents who understandably don't want their children exposed in intimate changing areas like locker rooms and showers," said Kerri Kupec, legal counsel for the Alliance Defending Freedom.

But school officials who had hoped for a definitive answer from the court said the delay will leave them open to additional lawsuits.

"The ultimate constitutional issues remain unresolved for the school districts," said Francisco Negrón Jr., chief counsel for the National School Boards Association. "Regardless of what action they take, they are liable to be sued by persons on both sides of this issue."

In the absence of a Supreme Court decision and federal guidance, school officials will look to states to navigate what has proved to be a deeply divisive issue in many places, generating heated school board meetings and lawsuits.

In 14 states and the District of Columbia, there are explicit protections for transgender students on the books. In North Carolina, transgender people are barred from using bathrooms that align with their gender identity. Several other states have floated similar legislation, some with financial penalties for schools that allow transgender students to use bathrooms of their choice.
Block said that besides Grimm's case, there are lawsuits in North Carolina, Ohio, Pennsylvania and Wisconsin that may quickly provide the Supreme Court with another chance to consider the core issues of transgender rights.

"There will be plenty of vehicles for the court in the next term if it wants," Block said.
The big question is whether transgender rights are protected by the Constitution as well as Title IX, the 1972 federal law that bans discrimination "on the basis of sex" in schools that receive federal money.

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Grimm relied on Title IX in his lawsuit, which said it was discriminatory for the local school board to insist that he use a private bathroom in the nurse's office rather than ones that aligned with his gender identity.

Grimm was born with female anatomy but came out to his parents as transgender at the beginning of high school. He changed his name and has a Virginia birth certificate that identifies him as male.

The Obama administration sided with Grimm and said schools generally must treat transgender students consistent with their gender identity. In a guidance letter last year, the administration said schools risked losing federal money if they discriminated against transgender students.

A panel of the 4th Circuit said it was deferring to the Department of Education for a definitive reading of the law because Title IX's prohibition on sex discrimination could be read to include transgender students.

That interpretation was rescinded by the Trump administration late last month. It said the Obama administration's guidance did not contain "extensive legal analysis" supporting the reading of Title IX. But the Trump administration's letter to the court did not provide its own conclusion.
The Supreme Court then called for the views of Grimm's lawyers and the school board.

Both urged the court to go ahead with the case, saying there had been enough briefing on the Title IX question for the justices to make a decision.

But generally the Supreme Court does not like to take up an issue that has not had full exploration in the lower courts, and its recent decision to send it back seemed to underscore that.

By the time the issue returns to the Supreme Court, the bench is likely to be fully staffed. The court has been without a ninth member since Justice Antonin Scalia died more than a year ago.

President Trump's nominee, Judge Neil Gorsuch, is in the process of confirmation hearings this month.

The case is *Gloucester County School Board v. G.G.*

Discussion Questions

1. As the article indicates, the United States Supreme Court, in a one-sentence order, vacated the Fourth Circuit's opinion and sent it back for further consideration. In your reasoned opinion, did the Supreme Court act appropriately in vacating the Fourth Circuit's opinion and sending it back down for further consideration? Why or why not?

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This is an opinion question, so student responses will likely vary. In your author's opinion, the central legal question in this case, whether federal laws that forbid discrimination based on sex also extend to gender identity, is ripe for review.

2. In your reasoned opinion, should federal laws that forbid discrimination based on sex also extend to gender identity?

This is an opinion question, so student responses will likely vary.

3. Assuming that his United States Supreme Court nomination is confirmed and that he takes the bench before this case makes its way back to the Supreme Court, how might Judge Neil Gorsuch affect the outcome of the case?

Normally, nine justices serve on the United States Supreme Court. Since Justice Antonin Scalia died in February 2016, there has been a vacancy on the Court, due to: a) the United States Senate's refusal to consider former President Barack Obama's nominee, Judge Merrick Garland; and b) current, ongoing Senate confirmation hearings regarding President Donald Trump's nominee, Judge Gorsuch. If the Senate confirms Judge Gorsuch and he takes the bench before the case makes its way back to the Supreme Court, his vote could possibly be the "swing vote" that effectively decides the case. In terms of Supreme Court decisions, a simple majority decides the case.

Article 2: "In Late-Night Dissent, Justice Breyer Sounds Off Against Solitary Confinement"

http://www.huffingtonpost.com/entry/justice-breyer-dissent-solitary-confinement_us_58c082e3e4b054a0ea679cf9?wwehbmj87htj7cik9&

According to the article, the United States Supreme Court recently denied several pleas from a Texas death row inmate requesting to be spared from execution.

Roland Ruiz had been sentenced to death for the 1992 murder-for-hire of a woman whose husband and brother-in-law wanted her killed. The two men wanted to collect on a $400,000 life insurance policy; instead, they got life sentences for plotting her murder.

Ruiz was executed shortly after midnight. He was 44.

According to a prison official, his final words were for Theresa Rodriguez's surviving relatives: "Words cannot begin to express how sorry I am and the hurt that I have caused you and your family. May this bring you peace and forgiveness."

But before the execution could proceed, Justice Stephen Breyer became the lone voice who would have stopped it.

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"I believe his claim is a strong one, and we should consider it," Breyer wrote in a lengthy statement accompanying one of the court's denials.

In recent years, Breyer has been wanting to hear a case that may kill the death penalty for good, but Ruiz's case was not it. The justice took interest in something else: the way the inmate had been sitting on death row without meeting his fate for nearly a quarter-century, the bulk of it in solitary confinement.

Some 125 years ago, Breyer wrote, the Supreme Court had recognized that imprisonment in isolation raises "long-standing serious objections." As a result of this form of punishment, he added, many prisoners descended "into a semi-fatuous condition," "became violently insane," "committed suicide" or otherwise "did not recover sufficient mental activity to be of any subsequent service to the community."

Breyer then appeared to turn his darts toward a colleague, Justice Anthony Kennedy, who did not join him in his bid to spare Ruiz but nonetheless in 2015 had raised objections of his own about the "human toll" of solitary confinement.

Kennedy was silent this time around, but Breyer quoted him at length — as if to remind him that he once appeared to agree that being caged all alone was cruel and unusual. And that Kennedy, too, had once called for a case to examine the constitutionality of the practice. Kennedy had even invoked Kalief Browder — the Bronx teenager who took his life after being imprisoned in Rikers Island for a crime he didn't commit. Browder, too, had spent long periods in "punitive segregation."

So this may have been a way for Breyer to nudge his colleague, who has built a record on how the Constitution stands as a barrier for certain forms of punishment.

"If extended solitary confinement alone raises serious constitutional questions, then 20 years of solitary confinement, all the while under threat of execution, must raise similar questions, and to a rare degree, and with particular intensity," Breyer concluded.

Last year, Breyer already indicated suffering on death row for 40 years may be unconstitutional. Only time will tell if Kennedy and others on the Supreme Court will join him in this lonely crusade.

Discussion Questions

1. Describe the Eighth Amendment to the United States Constitution.

According to the Eighth Amendment to the United States Constitution:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The ultimate question in the context of this article is what specifically constitutes "cruel and unusual" punishment.

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2. In your reasoned opinion, is the death penalty constitutional? More particularly, does it violate the dictate of the Eighth Amendment to the United States Constitution? Why or why not?

This is an opinion question, so student responses will likely vary. The United States Supreme Court has refused to declare the death penalty "cruel and unusual" in all circumstances, but has instead reserved the judicial right of review regarding whether particular methods of imposing the death penalty constitute cruel and unusual punishment.

3. In your reasoned opinion, is solitary confinement constitutional? More particularly, does it violate the dictate of the Eighth Amendment to the United States Constitution? Why or why not?

This is an opinion question, so student responses will likely vary.

Article 3: "Employees Who Decline Genetic Testing Could Face Penalties under Proposed Bill"

https://www.washingtonpost.com/news/to-your-health/wp/2017/03/11/employees-who-decline-genetic-testing-could-face-penalities-under-proposed-bill/?utm_term=.22886730f0af

According to the article, employers could impose hefty penalties on employees who decline to participate in genetic testing as part of workplace wellness programs if a bill recently approved by a United States Representatives House committee becomes law.

In general, employers do not have that power under existing federal laws, which protect genetic privacy and nondiscrimination. But a bill passed recently by the House Committee on Education and the Workforce would allow employers to get around those obstacles if the information is collected as part of a workplace wellness program.

Such programs—which offer workers a variety of carrots and sticks to monitor and improve their health, such as lowering cholesterol — have become increasingly popular with companies. Some offer discounts on health insurance to employees who complete health-risk assessments. Others might charge people more for smoking. Under the Affordable Care Act, employers are allowed to discount health insurance premiums by up to 30 percent — and in some cases 50 percent — for employees who voluntarily participate in a wellness program where they're required to meet certain health targets.

The bill is under review by other House committees and still must be considered by the Senate. But it has already faced strong criticism from a broad array of groups, as well as House Democrats. In a letter sent to the committee earlier this week, nearly 70 organizations— representing consumer, health and medical advocacy groups, including the American Academy of Pediatrics, AARP, March of Dimes and the National Women's Law Center — said the legislation, if enacted, would undermine

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basic privacy provisions of the Americans With Disabilities Act and the 2008 Genetic Information Nondiscrimination Act (GINA).

Congress passed GINA to prohibit discrimination by health insurers and employers based on the information that people carry in their genes. There is an exception that allows for employees to provide that information as part of voluntary wellness programs. But the law states that employee participation must be entirely voluntary, with no incentives for providing the data or penalties for not providing it.

But the House legislation would allow employers to impose penalties of up to 30 percent of the total cost of the employee's health insurance on those who choose to keep such information private.

“It's a terrible Hobson's choice between affordable health insurance and protecting one's genetic privacy,” said Derek Scholes, director of science policy at the American Society of Human Genetics, which represents human genetics specialists. The organization sent a letter to the committee opposing the bill.

The average annual premium for employer-sponsored family health coverage in 2016 was $18,142, according to the Kaiser Family Foundation. Under the plan proposed in the bill, a wellness program could charge employees an extra $5,443 in annual premiums if they choose not to share their genetic and health information.

The bill, Preserving Employee Wellness Programs Act, HR 1313, was introduced by Rep. Virginia Foxx, (R-N.C.), who chairs the Committee on Education and the Workforce. A committee statement said the bill provides employers “the legal certainty they need to offer employee wellness plans, helping to promote a healthy workforce and lower health care costs.” It passed on a party-line vote, with all 22 Republicans supporting it and all 17 Democrats opposed.

The bill’s supporters in the business community have argued that competing regulations in federal laws make it too difficult for companies to offer these wellness programs. In congressional testimony this month, the American Benefits Council, which represents major employers, said the burdensome rules jeopardize wellness programs that improve employee health, can increase productivity and reduce health care spending.

A House committee spokeswoman told CNBC that those opposed to the bill “are spreading false information in a desperate attempt to deny employees the choice to participate in a voluntary program that can reduce health insurance costs and encourage healthy lifestyle choices.”

Discussion Questions

1. In the context of the employer-employee relationship and the employment setting, should employees have privacy rights? Why or why not?

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This is an opinion question, so student responses may vary. In recent years, courts have frequently sided with employers on the issue. For example, in terms of workplace online communications using the employer's computer and e-mail system, courts have almost invariably favored employers. Employers have successfully argued that they have the right to monitor employee workplace communications in order to assess the propriety of the communications, and to determine whether the employee is being productive while at work.

2. As the article indicates, the proposed bill (the "Preserving Employee Wellness Programs Act") passed House committee consideration on a party-line vote, with all 22 Republicans supporting it and all 17 Democrats opposed to it. Does it surprise you that the vote was strictly "party-line?" Why or why not?

Although this question prompts specific student input, in your author's opinion, the partisan divide on the issue comes as no surprise. Until dramatic change occurs in our system of government, partisanship appears to be the "rule of the day." Your author is concerned that regardless of party affiliation, our political leaders are defaulting to "party-line" vote without comprehensively and fairly evaluating the merits of particular laws. In our democracy, if the people want change in this approach, they must demand it.

3. If the proposed bill becomes law, will employee participation in genetic testing truly be voluntary? Explain your response.

In your author's opinion, it would be a "stretch" to conclude that such a system would be truly voluntary. As the article indicates, the average annual premium for employer-sponsored family health coverage in 2016 was $18,142, according to the Kaiser Family Foundation. Under the plan proposed in the bill, a wellness program could charge employees an extra $5,443 in annual premiums if they choose not to share their genetic and health information. Given the fact that many employees would be unable to afford to pay over $5,000 per year out-of-pocket, their financial circumstances might likely force those employees to capitulate to genetic testing.

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Video Suggestions

Video 1: "Iceland Becomes the First Country in the World to Make Employers Prove They Offer Equal Pay"

http://www.usatoday.com/story/news/world/2017/03/08/iceland-require-firms-prove-equal-pay/98906702/

Note: In addition to the video, please see the following article included at the above-referenced internet site:

"Iceland Becomes the First Country in the World to Make Employers Prove They Offer Equal Pay"

According to the article, Iceland will be the first country in the world to make employers prove they offer equal pay regardless of gender, ethnicity, sexuality or nationality, the Nordic nation's government said recently.

The government said it will introduce legislation to parliament requiring all employers with more than 25 staff members to obtain certification to prove they give equal pay for work of equal value.

While other countries, and the U.S. state of Minnesota, have equal-salary certificate policies, Iceland is thought to be the first to make it mandatory for both private and public firms.

The North Atlantic island nation, which has a population of about 330,000, wants to eradicate the gender pay gap by 2022.

Social Affairs and Equality Minister Thorsteinn Viglundsson said "the time is right to do something radical about this issue."

"Equal rights are human rights," he said. "We need to make sure that men and women enjoy equal opportunity in the workplace. It is our responsibility to take every measure to achieve that."

Iceland has been ranked the best country in the world for gender equality by the World Economic Forum, but Icelandic women still earn, on average, 14 to 18% less than men.

In October thousands of Icelandic women left work at 2:38 p.m. and demonstrated outside parliament to protest the gender pay gap. Women's

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rights groups calculate that after that time each day, women are working for free.

The new legislation is expected to be approved by Iceland's parliament because it has support from both the center-right government and opposition lawmakers. The government hopes to implement it by 2020.

Iceland has introduced other measures to boost women's equality, including quotas for female participation on government committees and corporate boards. Such measures have proven controversial in some countries, but have wide support across Iceland's political spectrum. Viglundsson said some people had argued the equal-pay law imposes unneeded bureaucracy on firms, and is not necessary because the pay gap is closing.

"It is a burden to put on companies to have to comply with a law like this," he acknowledged. "But we put such burdens on companies all the time when it comes to auditing your annual accounts or turning in your tax report.

"You have to dare to take new steps, to be bold in the fight against injustice."

Discussion Questions

1. As the article indicates, Iceland will be the first country in the world to make employers prove they offer equal pay regardless of gender, ethnicity, sexuality or nationality. Does it surprise you that the United States was not the first country to do so? Why or why not?

This is an opinion question, so student responses may vary. Although the United States has expressly prohibited discrimination based on gender, ethnicity and nationality for many decades (the "sexuality" factor has not yet been fully addressed at the federal level), our country has required the aggrieved party (the employee) to prove he or she was subjected to discriminatory treatment. As the article indicates, Iceland has placed the burden of proof on the employer to prove equal pay regardless of gender, ethnicity, sexuality or nationality.

2. As the article indicates, the state of Minnesota has an equal-salary certificate policy. Does it surprise you that Minnesota has such a policy? Does it surprise you that the other forty-nine states do not have such a policy? Explain your responses.

These are opinion question, so student responses may vary. In your author's opinion, it is not surprising that Minnesota has an equal-salary certificate policy, since Minnesota has traditionally been a progressive, "pro-employee" state. It does surprise your author that other progressive states (California, for example) has not already adopted a similar policy.

3. As the article indicates, Iceland has introduced other measures to boost women's equality, including quotas for female participation on government committees and corporate boards. Are quotas in the workplace a good way to address employment discrimination? Why or why not?

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This is an opinion question, so student responses may vary. In your author's opinion, quotas are not the best way to address gender discrimination, since they fill employment positions based on gender rather than qualifications. Arguably, quotas constitute "reverse" discrimination.

Video 2: "Women March across the U.S. to Fight for Equal Rights"

http://abcnews.go.com/Entertainment/anne-hathaway-talks-motherhood-advocates-paid-parental-leave/story?id=45998547

Note: In addition to the video, please see the following article included at the above-referenced internet site:

"Anne Hathaway Talks Motherhood, Advocates for Paid Parental Leave"

According to the article, Anne Hathaway addressed the United Nations on March 8-- International Women's Day -- to advocate for paid parental leave for all Americans.

The actress -- who became a mother for the first time last March and is a goodwill ambassador the U.N. -- spoke about how her personal experiences as a parent have informed her stance on the issue.

Under current law, the Family and Medical Leave Act, caregivers are entitled to 12 weeks of unpaid leave per year for childbirth and other reasons.

"That information landed differently for me when one week after my son's birth I could barely walk. That information landed differently when I was getting to know a human who was completely dependent on my husband and (me) for everything, when I was dependent on my husband for most things and when we were re-learning everything we thought we knew about our family and our relationship," she said.

"Somehow we and every American parent were expected to be back to normal in under three months without income. I remember thinking to myself, 'If the practical reality of pregnancy is another mouth to feed in your home and America is a country where most people are living paycheck to paycheck, how does 12 weeks of unpaid leave economically work?' The truth is for too many people it doesn't."

Certain states (and companies) offer additional protections beyond the 12 unpaid weeks guaranteed by federal law. For instance, New York plans to roll out 12 weeks of paid leave over a period of years.

Hathaway, 34, became a goodwill ambassador to the U.N. Women last June. The organization announced at that time that the Oscar winner would spotlight issues including parental leave, gender stereotypes and affordable childcare services. In her recent speech, she argued that men also deserve paid leave after the birth of a child, especially in an age when some families include two fathers.

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"The assumption and common practice that women and girls look after the home and the family is a stubborn and very real stereotype that not only discriminates against women, but limits men's participation and connection within the family and society," she said. "Why do we continue to undervalue fathers and overburden mothers? Paid parental leave is not about taking days off work. It's about creating the freedom to define roles, to choose how to invest time and to establish new positive cycles of behavior."

The issue of paid leave impacts everybody, she added.

"Let (the UN) lead by example in creating a world in which women and men are not economically punished for wanting to be parents," she said. "Whether you have or want kids you will benefit by living in a more evolved world with policies not based on gender. We all benefit from living in a more compassionate time where our needs do not make us weak - they make us fully human."

Discussion Questions

1. As the article indicates, the federal Family and Medical Leave Act (FMLA) states that caregivers are entitled to 12 weeks of unpaid leave per year for childbirth and other reasons. In your estimation, why would employees be reluctant to take such leave if they are legally entitled to it?

In you author's opinion, the reasons are obvious. First, the FMLA only provides for unpaid leave, and many employees cannot afford to live for a prolonged period without a paycheck. Second, many employees are reluctant to take leave for fear of retribution from their employer, even though the FMLA expressly forbids employers to punish employees for taking family and/or medical leave.

2. Is the issue of family leave best addressed by the states, or by the federal government? Explain your response.

This is an opinion question, so student responses may vary. The argument for federal regulation is uniformity of law, resulting in relative ease of interpretation and application of the law. The argument for state regulation has, at its foundation, states' rights.

3. In your reasoned opinion, should men be legally entitled to leave after the birth of a child? Why or why not?

This is an opinion question, so student responses may vary. Arguably, fathers should be entitled to such leave as well for the purpose of "bonding" with and caring for the newborn.

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Of Special Interest

This section of the newsletter addresses China's recent decision to protect the intellectual property rights of President Donald Trump and his business dealings in China.

Ethical Dilemma

"China Grants Trump Dozens of New Trademarks"

Note: In addition to the video, please see the following article included at the above-referenced internet site:

"China Grants Trump Dozens of New Trademarks"

http://money.cnn.com/2017/03/08/news/trump-china-trademarks/

According to the article, the Chinese government has granted preliminary approval for 34 Trump-related trademarks in businesses ranging from mining and construction to restaurants, hotels and golf courses.

Nine of the applications were approved on February 27, and 25 were approved on March 6, according to Chinese trademark documents.

The Trump Organization, President Trump's company, applied for 38 trademarks in China in April 2016, during the presidential campaign. Four were rejected last month, though it is unclear what was in those applications or why they were not approved.

Trump Organization lawyers have said that the business is simply trying to protect the Trump trademark from anyone who might improperly squat on it.

In a recent statement, Alan Garten, a Trump Organization lawyer, said the company has been "actively enforcing its intellectual property rights in China for more than a decade."

Trump's overseas business ties have been heavily scrutinized by ethics lawyers and Democratic lawmakers, who are concerned about conflicts of interest for the president. Trump declined to sell any of his business interests before taking office.

His attempts to secure trademarks in China attracted attention after the Chinese government granted a construction-related trademark in November. Trump had sought the trademark for years, but it was not granted until after he was elected.

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Senator Ben Cardin, a Maryland Democrat, said Wednesday that he finds the trademark approvals a "major concern" that could violate the Constitution, which prohibits federal office holders from accepting any "present, emolument, office or title," from a foreign state.

Cardin claimed the timing of the approvals were a "deliberate decision" by China. He said he worries Trump "is jeopardizing the office of the presidency" by violating the Constitution.
Garten said the Trump Organization's "core real estate" trademarks have been registered in China since 2011, years before Trump announced his candidacy for office.

"The latest registrations are a natural result of those longstanding, diligent efforts and any suggestion to the contrary demonstrates a complete disregard of the facts as well as a lack of understanding of international trademark law," Garten said.

The newest trademark protections were granted for several variations of the Trump name, including his full name in English, just the last name "Trump" in English, and two well-known Chinese translations of his name.

The approved trademarks cover a range of industries as varied as construction, mining, shipbuilding, shoe repair, restaurants, hotels, golf courses, day care centers, animal training, toy rental, advertising and financial services.

Trump was granted preliminary approval, meaning that objections to the trademarks can be raised for three months from the date that the authorities post their initial decisions online. If there are no objections, then the trademarks become officially registered in China.

Discussion Questions

1. Research and describe the Emoluments Clause of the United States Constitution.

According to Article I, Section 9, Clause 8 of the United States Constitution:

"No Title of Nobility shall be granted by the United States; And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State."

The Merriam-Webster Dictionary defines an "emolument" as "the returns arising from office or employment usually in the form of compensation or perquisites."

2. In your reasoned opinion, why did the drafters of the United States Constitution create the Emoluments Clause?

Our Founding Fathers created the Emoluments Clause to prevent the president of the United States from facing a "conflict of interest" situation where he or she might have to address an issue

affecting him or her personally and the United States as a whole. A problem arises when what is in the best interest of the president is not necessarily in the best interest of the country as a whole. For an excellent article addressing the Emoluments Clause, please see Teaching Tip 2 ("The Heritage Guide to the Constitution: 'Emoluments Clause'") in this newsletter.

3. In your reasoned opinion, do Trump business dealings in China violate the Emoluments Clause of the United States Constitution? Why or why not?

This is an opinion question, so student responses may vary. President Trump has purportedly transferred management, but not ownership, of his business empire to his sons. The ultimate question is whether that affectively addresses the Emoluments Clause issue related to his business dealings.

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Of Special Interest

This section of the newsletter will assist you in addressing Article 2 ("In Late-Night Dissent, Justice Breyer Sounds Off Against Solitary Confinement") and the Ethical Dilemma ("China Grants Trump Dozens of New Trademarks") of the newsletter.

Teaching Tips

Teaching Tip 1 (Related to Article 2—"In Late-Night Dissent, Justice Breyer Sounds Off Against Solitary Confinement"): The Eighth Amendment to the United States Constitution

In discussing Article 2 with your students, make sure to reference the following language of the Eighth Amendment to the United States Constitution:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Teaching Tip 2 (Related to the Ethical Dilemma—"China Grants Trump Dozens of New Trademarks"): "The Heritage Guide to the Constitution: 'Emoluments Clause'"

http://www.heritage.org/constitution/#!/articles/1/essays/68/emoluments-clause

For an excellent assessment of the Emoluments Clause, please refer to the following article from the Heritage Foundation:

"The Heritage Guide to the Constitution: 'Emoluments Clause'"

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

Article VI of the Articles of Confederation was the source of the Constitution's prohibition on federal titles of nobility and the so-called Emoluments Clause. The clause sought to shield the republican character of the United States against corrupting foreign influences.

The prohibition on federal titles of nobility—reinforced by the corresponding prohibition on state titles of nobility in Article I, Section 10, and more generally by the republican Guarantee Clause in Article IV, Section 4—was designed to underpin the republican character of the American government. In the ample sense James Madison gave the term in The Federalist No. 39, a

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republic was "a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during good behavior."

Republicanism so understood was the ground of the constitutional edifice. The prohibition on titles of nobility buttressed the structure by precluding the possibility of an aristocracy, whether hereditary or personal, whose members would inevitably assert a right to occupy the leading positions in the state.

Further, the prohibition on titles complemented the prohibition in Article III, Section 3, on the "Corruption of Blood" worked by "Attainder[s] of Treason" (i.e., the prohibition on creating a disability in the posterity of an attained person upon claiming an inheritance as his heir, or as heir to his ancestor). Together these prohibitions ruled out the creation of certain caste-specific legal privileges or disabilities arising solely from the accident of birth.

In addition to upholding republicanism in a political sense, the prohibition on titles also pointed to a durable American social ideal. This is the ideal of equality; it is what David Ramsey, the eighteenth-century historian of the American Revolution, called the "life and soul" of republicanism. The particular conception of equality denied a place in American life for hereditary distinctions of caste—slavery being the most glaring exception. At the same time, however, it also allowed free play for the "diversity in the faculties of men," the protection of which, as Madison insisted in The Federalist No. 10, was "the first object of government." The republican system established by the Founders, in other words, envisaged a society in which distinctions flowed from the unequal uses that its members made of equal opportunities: a society led by a natural aristocracy based on talent, virtue, and accomplishment, not by an hereditary aristocracy based on birth. "Capacity, Spirit and Zeal in the Cause," as John Adams said, would "supply the Place of Fortune, Family, and every other Consideration, which used to have Weight with Mankind." Or as the Jeffersonian St. George Tucker put it in 1803: "A Franklin, or a Washington, need not the pageantry of honours, the glare of titles, nor the pre-eminence of station to distinguish them....Equality of rights...precludes not that distinction which superiority of virtue introduces among the citizens of a republic."

Similarly, the Framers intended the Emoluments Clause to protect the republican character of American political institutions. "One of the weak sides of republics, among their numerous advantages, is that they afford too easy an inlet to foreign corruption." The Federalist No. 22 (Alexander Hamilton). The delegates at the Constitutional Convention specifically designed the clause as an antidote to potentially corrupting foreign practices of a kind that the Framers had observed during the period of the Confederation. Louis XVI had the custom of presenting expensive gifts to departing ministers who had signed treaties with France, including American diplomats. In 1780, the King gave Arthur Lee a portrait of the King set in diamonds above a gold snuff box; and in 1785, he gave Benjamin Franklin a similar miniature portrait, also set in diamonds. Likewise, the King of Spain presented John Jay (during negotiations with Spain) with the gift of a horse. All these gifts were reported to Congress, which in each case accorded permission to the recipients to accept them. Wary, however, of the possibility that such gestures might unduly influence American officials in their dealings with foreign states, the Framers institutionalized the practice of requiring the

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consent of Congress before one could accept "any present, Emolument, Office, or Title, of any kind whatever, from...[a] foreign State."

Like several other provisions of the Constitution, the Emoluments Clause also embodies the memory of the epochal constitutional struggles in seventeenth-century Britain between the forces of Parliament and the Stuart dynasty. St. George Tucker's explanation of the clause noted that "in the reign of Charles the Second of England, that prince, and almost all his officers of state were either actual pensioners of the court of France, or supposed to be under its influence, directly, or indirectly, from that cause. The reign of that monarch has been, accordingly, proverbially disgraceful to his memory." As these remarks imply, the clause was directed not merely at American diplomats serving abroad, but more generally at officials throughout the federal government.

The Emoluments Clause has apparently never been litigated, but it has been interpreted and enforced through a long series of opinions of the Attorneys General and by less-frequent opinions of the Comptrollers General. Congress has also exercised its power of "Consent" under the clause by enacting the Foreign Gifts and Decorations Act, which authorizes federal employees to accept foreign governmental benefits of various kinds in specific circumstances.

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Kubasek et al., Dynamic Business Law	Chapters 5 and 43	Chapters 42 and 43	Chapter 2	Chapters 2 and 5
Kubasek et al., Dynamic Business Law: Summarized Cases	Chapters 5 and 43	Chapters 42 and 43	Chapter 2	Chapters 2 and 5
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