

PREFACE

More than 24 years ago, Congress enacted the Family and Medical Leave Act (FMLA), and this important law's comprehensive statutory and regulatory framework continues to be as dynamic as ever today. What started out as only a few dozen FMLA claims filed in each of the statute's early years have escalated to thousands of claims filed in federal and state courts annually. It is absolutely crucial, therefore, for employees, employers, labor unions, and the attorneys advising each of them to keep up with the various interpretations and applications of this rather complex law. There are only a few statutory and regulatory schemes (the Internal Revenue Code certainly comes to mind) that can compete with the myriad factual situations and practical difficulties arising every day in the workplace as a result of FMLA. So, a little over 10 years since publishing the initial Treatise on the topic, this Second Edition of the Treatise is the perfect starting point (and possibly finish line) for any practitioner looking for guidance in this area.

While the most recent Treatise Supplement (in 2015) discussed in detail the transitions through the various versions of the Final Regulations issued in 1995, 2009, 2013 and 2015, these regulatory distinctions are becoming less and less important—if at all—going forward. We will explain how we navigate through these evolving versions shortly, but first, a brief synopsis is in order. After being governed by the 1995 Regulations for about fourteen years, we were forced to learn the “new” 2009 Regulations¹ (which involved a major revamping of the regulations) and then the still “newer”

¹73 Fed. Reg. 67,934 (Nov. 17, 2008).

2013 Regulations² (which implemented the National Defense Authorization Act for Fiscal Year 2010³ and the Airline Flight Crew Technical Corrections Act⁴), and finally the “newest” 2015 Regulations⁵ that expanded the definition of “spouse” (necessitated by the U.S. Supreme Court’s decision in *United States v. Windsor*,⁶ which found Section 3 of the Defense of Marriage Act (DOMA)⁷ to be unconstitutional). Ironically, only a few months after the 2015 Regulations became effective, the U.S. Supreme Court decided *Obergefell v. Hodges*,⁸ which essentially mooted the portion of the DOL’s definition of “spouse” in the 2015 Regulations. Those Regulations explained that if a marriage (even between persons of the same sex) was valid in the State in which the marriage was *celebrated*, then the marriage must be recognized by an employer in another State (even if the State in which the employee currently *resided* did not recognize same-sex marriage). Now, however, the Court’s decision in *Obergefell*, requires every State to recognize and authorize same-sex marriage. Therefore, the “place of celebration” versus “place of residence” distinction in the DOL’s 2015 Regulations is no longer necessary.

We ultimately decided that this Second Edition would default to the 2015 Final Regulations and should only identify or distinguish a previous version of the regulations (i.e., the 1995, 2009 or 2013 Regulations) in the main text when necessary or in a footnote if pertinent (through the use of a bracketed (“[]”) explanation and identification of the appropriate year). Accordingly, the previous versions and sections of the Regulations are usually not noted herein because practitioners and the courts should all be using the 2015 Final Regulations at this point. Only when an older case discussed or relied on a prior version, or where a distinction is otherwise material to the discussion or analysis, are the prior regulatory versions

²78 Fed. Reg. 8,833 (Feb. 6, 2013).

³Pub. L. No. 111-84, §565(a), 123 Stat. 2190, 2309 (Oct. 28, 2009).

⁴Pub. L. No. 111-119, §2, 123 Stat. 3476 (Dec. 21, 2009).

⁵80 Fed. Reg. 9,989 (Feb. 25, 2015).

⁶133 S. Ct. 2675 (2013).

⁷1 U.S.C. §7.

⁸135 S. Ct. 2584 (2015).

or sections cited and delineated in this Treatise. Nonetheless, every reader should always confirm that they are relying on and citing the appropriate regulatory section and the correct version of the Final Regulations. When reading any court decision or other authority discussing a regulatory section (especially those issued or written prior to and through 2013), make sure that the regulatory language they use still exists in the same form today in the 2015 Regulations and/or that the regulatory section has not moved or renumbered.

Finally, significant developments have occurred in the area of paid sick leave requirements in cities and states around the country. Beginning with San Francisco, California, in 2006, and most recently with Rhode Island in 2017 (effective in 2018), dozens of cities and nine states (plus the District of Columbia) took charge of this issue by requiring employers to provide paid sick leave benefits to employees.⁹ To make this issue even more complicated, several states have conversely *prohibited* their cities from enacting paid sick leave ordinances. On Labor Day in 2015, President Obama issued Executive Order 13706,¹⁰ which mandated paid sick leave benefits for all employees performing work on federal contracts or subcontracts entered into after January 1, 2017. The Final Regulations promulgated under Executive Order 13706 were issued on September 30, 2016.¹¹ Such legislation covering private sector employees has been proposed—unsuccessfully to date—at the federal level for several years. This remains a dynamic legislative area, with new bills filed every year. While the editors do not take sides with regard to pending legislation, it is certain that future supplements to this Second Edition will fully analyze any such federal leave legislation that is enacted.

We want to thank all of the editors and contributors whose work is reflected in this new Treatise. The Chapter Editors reviewed the work of Contributing Authors, edited and merged their drafts, and in many cases provided original research and authorship to the final product. Additional Contributors

⁹More information regarding state legislation is contained in Chapter 9 and in Appendix 6.

¹⁰Exec. Order No. 13706, 80 Fed. Reg. 54,697 (Sept. 7, 2015).

¹¹81 Fed. Reg. 67,598 (Sept. 30, 2016).

worked on the Midwinter Meeting Reports of the Subcommittee on the Family and Medical Leave Act, Committee on Federal Labor Standards Legislation, of the Section of Labor and Employment Law of the American Bar Association. As co-chairs of the Subcommittee on the Family and Medical Leave Act, Maria Audero, Melissa Pierre-Louis, and Sara Faulman, also have the task of recruiting the Contributors and Chapter Editors, as well as preparing the Subcommittee Report annually. Those Reports have always been an important resource in the creation of this Treatise.

Even more gratitude must be expressed to the Senior Editors, Susan Salzberg (U.S. Department of Labor), Melissa Pierre-Louis, Gina Chang, and Sara Faulman, all of whom reviewed chapters submitted by the Chapter Editors, often contributing original research and authorship themselves and assisting us with determining if, when, and how to cite to the various regulatory versions issued by the DOL.

Our utmost gratitude is due our spouses—Rachel Paul and Sandra Bush—for their encouragement, support, and tolerance during the long hours when we were immersed in this project.

Finally, we wish to express our deepest gratitude to Ann Gerster, Steffan Welch, David Wagoner, and the entire editorial staff at Bloomberg BNA. We could not have even remotely carried out the detailed responsibilities involved with proof-reading, cite-checking and typesetting that they are able to accomplish with ease (albeit only through an unknown—but undoubtedly immense—number of work hours) based on their experience with other Bloomberg BNA publications.

We dreamed about this new hardbound Second Edition in our Preface to the 2015 Supplement and are now proud and excited to have given birth to this comprehensive work. It was a truly a labor of love and probably could have qualified us for actual, legally-protected FMLA leave at various points along the journey. This Second Edition incorporates cases and other noteworthy developments through December 2016 and also includes additional significant items through September 2017. We sincerely hope all practitioners find this Treatise to be an invaluable resource with regard to the FMLA and related

laws and regulations. Good luck in your adventures exploring the FMLA's intricacies.

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Editors-in-Chief

December 2017

