



Employment Law and Domestic Violence

A Practitioner's Guide



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Julie Goldscheid & Robin Runge

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Employment Law and Domestic Violence: A Practitioner's Guide

What Will I Learn From This Guide?

This guide is for attorneys working in a range of settings, including those representing employees and employers in the public and private sectors, those representing unions, and those representing victims of domestic violence. It defines domestic violence and provides information about the effect of domestic violence upon the workplace. It describes some of the ways in which employers have addressed the effect of domestic violence in their workplaces. The final sections of this guide review the most common applications of state and federal employment laws to situations involving employees who are victims of domestic violence.

It is our hope that as a result of reviewing this guide, you will be better able to:

- ▶ Recognize domestic violence issues among your existing employment law cases;
- ▶ Identify the key civil legal remedies and other issues that you will need to explore in order to effectively assist victims with employment law concerns; and
- ▶ Identify and use other resources to pursue specific legal remedies and secure social services and other benefits for your clients.

Throughout this publication, the terms “victim” and “survivor” are used interchangeably to refer to victims of domestic violence. Sexual assault and stalking are distinct crimes but frequently occur in conjunction with domestic violence. Thus, we address them collectively in this publication.

As An Employment Lawyer Why Should I Learn About Domestic Violence?

Domestic and sexual violence long have existed in our homes and our communities. However, the U.S. legal system only recently has begun to address the broad impact of these crimes on all aspects of victims’ lives—including their work lives. Beginning in the mid-1990s, studies of victims’ work experiences have helped shape our understanding of the employment-related effects of domestic violence, sexual assault, and stalking. Over the last ten years, much local, state, and federal legislation has been introduced and enacted to address the effect of this problem on employees who are victims and on their workplaces. There has also been a dramatic increase in education about and awareness of the impact of domestic violence on the workplace and in the development of workplace policies by employers and unions. In some cases, current or former employees who were victims of domestic violence have brought suit against their employers.

Domestic violence is a pattern of behavior in which one intimate partner uses physical violence and/or sexual or economic abuse to control the other partner in the relationship. It is not defined by physical acts alone; it includes conduct and patterns of behavior such as threats, intimidation, isolation, and other coercive and controlling acts. In all forms, domestic violence affects families, communities, and workplaces. It knows no economic, racial, ethnic, religious, age, gender, sexual orientation, or gender identity limits. The reach of domestic violence in the U.S. is epidemic. Studies consistently show that one in four women will be a victim of domestic violence

in her lifetime.¹ Similarly, between one-third to one-fourth of lesbian, gay, bisexual, and transgender (LGBT) people in relationships experience domestic violence.² Not surprisingly, in 2005, a national benchmark survey of 1200 employed adults (age eighteen and over) by the Corporate Alliance to End Partner Violence found 21% of respondents (men and women) identified themselves as victims of intimate partner violence.³

The impact of domestic violence on its victims' abilities to obtain and maintain employment is well-documented. Up to half of employed victims of domestic violence report that they lost their jobs due at least in part to the domestic violence,⁴ and almost 50% of sexual assault survivors lose their jobs or are forced to quit their jobs in the aftermath of the crime.⁵ Up to two-thirds of employed victims surveyed have reported that their abusers harassed them at work.⁶ Over half of employed victims of domestic violence reported missing work because of the abuse, and 47% were specifically prevented from working by the abuser.⁷

Domestic violence affects the workplace in a variety of ways. Survivors seeking to address the violence in their lives may need to miss work to go to court to seek safety for themselves and their families. They may miss work to heal from injuries or illnesses caused by the violence, or to obtain counseling to cope with the associated trauma. Victims may need time off from work to care for family members who witnessed or experienced domestic violence. Absent a clear policy protecting the right to take

Susan had been married to her husband for 10 years. During their marriage he beat her very severely once or twice a year. Several years ago, as a result of the abuse, she lost some of her hearing in one ear. She never told anyone, and she worked hard to hide the evidence of the violence at work. She sometimes lied about her bruises or about why she was taking vacation time. Recently, Susan's husband choked her, and she lost consciousness. When she came to, she had extreme pain in her back and neck so she went to see the doctor the next day. Although she called her employer to ask for a sick day, she had no more time off remaining and was fired from her job.

leave, victims may not feel comfortable disclosing the reason for missing work. They may exceed their limited sick or annual leave, leading to job loss. A batterer may stalk the victim at work, calling repeatedly or even threatening the victim's coworkers at the workplace, causing disruption and seriously interfering with productivity. Perpetrators of domestic violence may sabotage their partners' employment to make them more dependent, for example, by refusing to drive their partners to work or by causing them to arrive late. Survivors may experience difficulty focusing and concentrating at work because of their fear that the perpetrator may come to the workplace

¹ Patricia Tjaden & Nancy Thoennes, U.S. Dep't of Just., NCJ 181867, *Extent, Nature, and Consequences of Intimate Partner Violence* (2000), <http://www.ojp.usdoj.gov/nij/pubs-sum/181867.htm>.

² National Coalition of Anti-Violence Programs, 2007 *National Domestic Violence Publications Letter*.

³ Group SJR, Corporate Alliance to End Partner Violence, National Telephone Benchmarking Survey (Oct. 2005), http://www.caepv.org/about/program_detail.php?refID=5.

⁴ U.S. Gen. Acct. Off., *Domestic Violence: Prevalence and Implications for Employment Among Welfare Recipients* 19 (1998), <http://www.gao.gov/archive/1999/he99012.pdf> (collecting studies).

⁵ S. Rep. No. 103-138, n. 69 (citing E. Ellis, B. Atkeson & K. Calhoun, *An Assessment of the Long Term Reaction to Rape*, 50 J. Abnormal Psychology 263, 264 (1981)).

⁶ See, e.g., U.S. Gen. Acct. Off., supra note 4, at 8; Christopher Blodgett & Jennifer Stapleton, Wash. State Univ. & Spokane County Domestic Violence Consortium, *Intimate Partner Violence: It's A Workplace Issue!* 20 (2005), <http://www.peaceatwork.org/resources/DVImpactonWorkplace-SpokaneStudy-2005.pdf>; Jennifer E. Swanberg & T.K. Logan, *Domestic Violence and Employment: A Qualitative Study*, 10 J. Occupational Health Psyc. 3 (2005).

⁷ Judith McFarlane et al., *Indicators of Intimate Partner Violence in Women's Employment*, 48 Am. Assoc. Occupational Health Nurses J. 217 (May 2000).

or harm them or their children when they return home.⁸ These dynamics pose liability and productivity concerns for employers if left unaddressed.

Although most studies of the impact of domestic violence on employment have focused on the experiences of victims, perpetrators of sexual and domestic violence are employees too. Their abusive behavior may have a dramatic, negative effect on their own as well as their victims' workplaces. For example, a 2003 study by the Maine Department of Labor found that 78% of surveyed perpetrators used workplace resources at least once to express remorse or anger, check up on, pressure, or threaten their victims; 74% had easy access to their intimate partner's workplace; and 21% of offenders reported that they contacted their victims at the workplace in violation of a no-contact order.⁹ These acts raise issues of both productivity and liability if employers fail appropriately to respond.

Employer Responses: Policies, Procedures, and Benefits

Employers are responding to the effects of domestic violence on their employees and workplaces. A 2007 study of corporate leaders commissioned by Safe Horizon, the Corporate Alliance to End Domestic Violence, and Liz Claiborne Inc. found that 63% of corporate leaders considered domestic violence a major problem in today's society; 55% cited its harmful effect on productivity; 70% believed it has a harmful effect on employee attendance; and 43% said their company's bottom line performance had been damaged as a result.¹⁰ This awareness of the problem, combined with concerns regarding liability, has led employers to develop a range of responsive policies and procedures.

Across the country and around the world, private and public employers and unions, both large and small, have begun to develop effective policies and protocols for addressing the effect of domestic and sexual violence on the workplace. Attorneys for unions and businesses have a key role to play in the development of these initiatives and policies. For example, some employers have adopted procedures that permit an employee to use accrued paid or unpaid sick time, vacation time, personal time, or disability leave to address the effect of the violence on their lives. Leave provisions in collective bargaining agreements similarly have been invoked to authorize domestic violence-related leave.

Attorneys for employers can and should take an active role in developing and implementing workplace policies and procedures that address the possibility that domestic violence will affect the workplace. Commitment from the highest levels of the organization is critical to send the message that domestic violence is a serious workplace concern. Human resources and security managers charged with developing overall employer policies and procedures should see that the issue is addressed not only in written policies but in employee training and in emergency response protocols.¹¹ An employer's failure to prepare for and to respond quickly and appropriately to domestic violence in the workplace can lead to a plethora of potential areas of liability, as described later in this publication.

When an employer becomes concerned that domestic violence may impact the workplace, the prudent employer should develop a comprehensive safety plan designed to provide maximum protection to both the employee who is the target of the violence and the employee's co-workers. Effective employer responses include developing a multi-disciplinary task

⁸ See generally, Deborah A. Widiss, *Domestic Violence and the Workplace: The Explosion of State Legislation and the Need for a Comprehensive Strategy*, 35 Fla. St. U. L. Rev. 669, 675-80 (2008) (collecting studies); Julie Goldscheid, *Gender Violence and Work: Reckoning with the Boundaries of Sex Discrimination Law*, 18 Colum. J. Gender & L. 61, 73-78 (2009) (collecting studies).

⁹ Maine Dep't of Labor, *Impact of Domestic Offenders on Occupational Safety & Health: A Pilot Study*, (Feb. 2004), http://www.maine.gov/labor/labor_stats/publications/dvreports/domesticoffendersreport.pdf.

¹⁰ See Corporate Alliance to End Partner Violence, *CEO & Employee Survey 2007*, described at http://www.caepv.org/about/program_detail.php?refID=34.

¹¹ See, e.g., www.caepv.org, www.endabuse.org, www.safeatworkcoalition.org for model policies and practices.

force or committee with representatives from all levels and relevant departments, such as human resources and security, that is charged with developing a tailored response plan. The plan should recognize and encourage workplace modifications designed to prevent the perpetrator from harming the intended victim or any other employee and should include an immediate review of current security arrangements for any necessary enhancements. Those enhancements may include installing or changing locks or key cards; increasing overall security measures, including the temporary hiring of additional security personnel; making the identity of the perpetrator known to security personnel; and providing instructions to preclude the entrance of the perpetrator onto the employer's premises. Depending upon the seriousness of the problem, the police may be called to patrol; a private investigative firm may be engaged; and, in some cases, a psychologist with expertise in dealing with the particular problems posed by the perpetrator may be folded into the response team. Employers should strive to protect victim confidentiality to the maximum extent possible. In some cases, there may be a tension between the goal of confidentiality and the need to protect the safety of everyone in the workplace. Victims should be informed about this limitation, and the employer should develop a communication plan for the victim and her co-workers that furthers the goal of keeping all employees safe without unnecessarily publicizing the victim's personal information.

When assessing safety risks resulting from domestic violence, employers should keep in mind that generally, victims are in the best position to judge whether abusers pose a safety risk. Consequently, affected employees should be consulted whenever possible as part of the employer's efforts to determine what plans or interventions will make the victim and their co-workers most safe. An employer and the victim together can strategize to determine whether steps such as a transfer to another city, state or worksite, if available, or a change in working

hours, are likely to increase workplace safety. The employee who is experiencing abuse may be referred to a local domestic violence program. If the employer has an employee assistance program (EAP), its counselors should be trained in dealing with domestic violence; the EAP also may be a valuable resource for the victim.

Employers should be prepared to respond with appropriate discipline, up to and including termination, when their own employees are perpetrators, particularly when they use employer resources or commit crimes of domestic violence while on company time. Almost every employer forbids the use of company time and resources in the commission of crimes and acts of domestic violence. This includes domestic-related abuse. Like "drug-free workplace" polices, domestic violence workplace polices may require employees to report acts of domestic violence (such as an arrest for domestic violence or the issuance of a domestic violence protection order against an employee) even if they are committed outside the workplace. In some states, taking action against an employee based on an arrest alone may infringe the employee's rights and could subject an employer to tort liability, particularly if the underlying allegations later are determined to be unfounded. Attorneys should be aware of the potential legal issues and the applicable law in their jurisdictions and should counsel the employer in accordance with those legal requirements.

While the employers' obligations and the applicable legal requirements are generally very similar in the public and private sectors, some additional policy concerns may apply to public employers. For example, a public sector employer might deem acts of domestic violence "conduct unbecoming a public employee" and take the position that taxpayer dollars should not be spent on an employee who commits abusive acts or that the commission of those acts renders the employee unfit for public service. A public employer's policy might require a perpetrator to be disciplined for domestic violence, up to and including termination.¹²

¹² See Robin H. Thompson, *Domestic Violence and its Effects on the Workplace*, in Am. Bar Ass'n, *The Impact of Domestic Violence on Your Legal Practice* 364, 367 (2d ed. 2004) (citing State of Florida Model Domestic Violence Policy, September

States have taken a variety of approaches to respond to the impact of domestic violence on the workplace. Some states have policies that require or encourage employers to proactively address domestic violence, to disseminate information on available resources, or to train human resource professionals and other staff on the effects of domestic violence on the workplace.¹³ Other states require state agencies to adopt model workplace safety policies that spell out recommended responses if certain violent behaviors or threats are perceived in the workplace.¹⁴

There are potentially serious implications of an employer's failure to be pro-active when faced with the risk that domestic violence will impact the workplace. The prudent employer will consider and adopt such modifications as are appropriate to the particular case.

Federal and State Anti-Discrimination Laws

Although domestic and sexual violence victims are not specifically mentioned in most federal and state employment discrimination laws, adverse actions taken against survivors by employers may violate those laws.

Sex Discrimination

In some cases, the impact of domestic and sexual violence on the workplace may lead to actions that discriminate against the survivor based on her or his sex.¹⁵ Title VII of the Civil Rights Act of 1964 (Title VII), as amended, prohibits employers with fifteen or more employees from discriminating against an employee in hiring, terms and conditions of employment, and firing based on sex (including pregnancy), race, national origin, religion and color.¹⁶ State laws similarly prohibit discrimination based on sex or on other protected characteristics and may apply to employers with fewer than fifteen employees.¹⁷

Accordingly, an employer may be liable if a female victim of domestic or sexual violence is treated differently than another similarly situated employee. This can arise, for example, if a survivor is disciplined more severely than another employee experiencing similar performance or absenteeism issues. Sometimes, the issue arises when both an abuser and his target work for the same employer.

In *Rhode v. K.O. Steel Castings, Inc.*, 649 F.2d 317 (5th Cir. 1981) an employer was found liable for terminating a female employee who was assaulted by a co-worker with whom she was involved in an intimate relationship. The Court reasoned that absent a "sufficient explanation" of a nondiscriminatory reason for the disparate treatment, the employer's actions fell within Title VII's prohibition of sex discrimination.

An employer who disciplines the victim but not the perpetrator may risk liability, absent a legitimate business reason for the different treatment.

Domestic or sexual violence also may result in sexual harassment at work. Courts have recognized that sexual harassment is a prohibited form of sex discrimination.¹⁸ An employer can be held liable, for example, if the perpetrator is a supervisor who conditions terms and conditions of employment on submitting to sexual demands, or if the perpetrator creates a hostile working environment in circumstances in which the employee did not unreasonably fail to take advantage of corrective opportunities provided by the employer.¹⁹ Employees may be liable for third-party or non-employee sexual

¹³ See, e.g., Legal Momentum, *State Law Guide: Domestic and Sexual Violence Workplace Policies*, <http://action.legalmomentum.org/site/DocServer/policies.pdf?docID=502&JServSessionIdr006=vb55nyrjp3.app1b>.

¹⁴ See, e.g., New York Exec. Order No. 19 (Oct. 22, 2007) (requiring state agencies to develop domestic violence workplace policies in consultation with the state Office for the Prevention of Domestic Violence).

¹⁵ See generally, Goldscheid, *supra* note 8.

¹⁶ 42 U.S.C. §§ 2000e - 2000e-17 (2009).

¹⁷ Mark Rothstein, et al., *Employment Law* 296 (3d ed. 2005).

¹⁸ *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64-65 (1986).

¹⁹ *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

harassment, which may arise in the context of stalking. This may be especially true for survivors working in the retailer service industries where the public has greater access to the workplace. *See generally*, EEOC Compliance Manual §1604.11(e). Workplace issues that may at first glance be chalked up to “domestic disputes” may involve conduct that creates a sufficiently severe or pervasive hostile environment to hold an employer liable under sexual harassment laws, since those laws apply even if there is a personal relationship between the perpetrator and the victim.

Other anti-discrimination theories may also apply to domestic or sexual violence survivors. For example, an employer risks liability if it subjects an employee to an adverse action based on outdated, sex-based stereotypes about survivors.²⁰ A commonly held but inaccurate stereotype, such as that a domestic violence survivor “deserved” the abuse, that she “allowed” herself to be abused, or that a victim of sexual assault could not be counted on to “act appropriately,” can give rise to liability if it is the basis for an employment decision. A policy that adversely impacts survivors of domestic or sexual assault could violate anti-discrimination laws under a disparate impact theory.²¹

Survivors May Be Protected By Additional Anti-Discrimination Laws

It is particularly important to screen for intersecting forms of discrimination experienced by survivors of domestic violence because employers may terminate survivors in whole, or in part, because of other types of bias when survivors request leave, accommodation, or support from their employers that is related to domestic or sexual violence. For example, LGBT survivors may

have to “come out” to their employers, or disclose their status as LGBT-identifying individuals, when informing their employers of the domestic or sexual violence in their lives. This may pose a real risk to survivors, because as of the date of this publication, individuals can be legally terminated in 31 states based on their sexual orientation, and in 39 states based on their gender identity.²² Additionally, survivors who are members of immigrant communities or who have limited English proficiency may experience additional forms of discrimination and harassment by employers, including threats made against them based on their national origin or immigration status. It is important to screen for these issues to prepare for potential problems ahead of time and to permit clients to make educated decisions about disclosure to their employers.

State and Local Laws Prohibiting Discrimination Against Domestic or Sexual Violence Victims

In recent years, some states and localities have enacted legislation specifically prohibiting employers from discriminating against victims of domestic violence, sexual assault, and stalking.²³ For example, in *Reynolds v. Fraser*, the court found the employer liable under a New York City law that specifically prohibits discrimination against victims. The employer terminated a probationary employee after she left her abuser and resided in a domestic violence shelter.²⁴ She was terminated for allegedly violating her employer’s “sick leave” policy requiring employees on sick leave either to remain in their residence or to inform the employer of the new residence. When the employer’s monitor visited the agency that ran the shelter, the monitor was informed of the shelter policy not to disclose the shelter’s address unless the victim signed a confidentiality agreement, which she did not do.²⁵

²⁰ *See Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (plurality opinion); *see also, e.g., Bouley v. Young-Sabourin*, 394 F. Supp. 2d 675 (D. Vt. 2005) (recognizing that eviction of domestic violence victim violated sex discrimination laws under disparate treatment theory)

²¹ *See Griggs v. Duke Power Co.*, 401 U.S. 424, 421-32 (1971) (recognizing disparate impact theory of liability); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2009).

²² *See, e.g.*, 820 Ill. Comp. Stat. 180/1-45 (West 2009); N.Y. Exec. Law §§ 292, 296 (2009); N.Y.C. Admin. Code § 8-107.1 (2009); R.I. Gen. Laws § 12-28-10 (2009); Westchester County, N.Y., Code §§ 700.02, 700.03 (2009).

²³ Human Rights Campaign, http://www.hrc.org/issues/workplace/equal_opportunity.asp (August 2007).

²⁴ *Reynolds v. Fraser*, 781 N.Y.S.2d 885 (Sup. Ct. N.Y. County 2004).

²⁵ *Id.*; *see also, e.g., Quick v. Horn*, 873 N.Y.S.2d 51 (Sup. Ct. N.Y. County 2008) (recognizing that New York City law prohibits an employer from terminating an employee due to her status as a domestic violence victim).

“The ability to hold on to a job is one of a victim’s most valuable weapons in the war for survival, since gainful employment is the key to independence from the batterer. . . . The end result here, petitioner’s loss of a job at the point when she was finally getting her living situation under control, is exactly the kind of fallout that Local Law No. 1 was enacted to prevent.” *Reynolds v. Fraser*, 781 N.Y.S.2d 885 (Sup. Ct. N.Y. County 2004).

Accordingly, the court ordered Ms. Fraser to be reinstated. In jurisdictions where these laws apply, an employer cannot treat an employee differently because she is the victim of domestic violence, sexual assault, or stalking. Some of these laws also treat firing or penalizing a victim because her abuser disrupted the workplace as a form of prohibited discrimination.²⁶

Disability-Based Discrimination

Title I of the Americans with Disabilities Act (ADA) prohibits employers from discriminating against qualified individuals with disabilities in hiring, firing, and terms and conditions of employment.²⁷ The ADA covers employers with 15 or more employees, including state and local governments.²⁸ It defines a person with a “disability” as an individual with an impairment that substantially limits one or more major life activity, an individual with a record of such impairment, or an individual who is regarded as having such impairment.²⁹ Domestic violence survivors may experience injuries or illnesses that may be disabilities under the ADA, such as post-traumatic stress disorder, depression, and head or neck injuries. Additionally, survivors may be people

with pre-existing disabilities or conditions that are triggered or exacerbated by abuse or its aftermath. The ADA requires employers to take affirmative steps to provide a “reasonable accommodation” for a qualified disabled employee, which is a workplace modification or adjustment that enables an employee with a qualified disability to perform the essentials of her job.³⁰ State laws have equivalent protections for disabled individuals, which may apply to employers with fewer employees.

State Laws Providing Reasonable Accommodations for Victims of Domestic Violence

Some jurisdictions, such as Illinois and New York City, require employers to make “reasonable accommodations” for victims of domestic violence.³¹ This type of accommodation may include, for example, modifying the employee’s schedule, work location, or phone number. Before providing a reasonable accommodation, the employer may ask for “certification” establishing that the employee is a victim. Employers must keep information they receive, and the request for leave, confidential.

Federal, State, and Local Job-Guaranteed Leave Laws

The Federal Family and Medical Leave Act

The federal Family and Medical Leave Act (FMLA) is the only federal law that provides employees with job-guaranteed leave from work. Although this law does not expressly mention domestic violence, it can offer job-protected leave to victims of domestic violence to heal from mental or physical injuries caused by the violence, or to care for a child who is healing from injuries if the employee is eligible and if the injuries rise to the level of a “serious health condition.”³² Federal regulations

²⁶ See, e.g., 820 Ill. Comp. Stat. 180/30 (West 2009); N.Y.C. Admin. Code § 8-107.1 (2009).

²⁷ 42 U.S.C. §§ 12101-12117 (2009).

²⁸ 42 U.S.C. §§ 12111(5), 12131(1) (2009).

²⁹ 42 U.S.C. § 12102(1) (2009). See also 42 U.S.C. § 12111(8) (defining “qualified individual” as “an individual who, with or without reasonable accommodation, can perform the essential functions” of the job).

³⁰ 42 U.S.C. §§ 12111(9); 12112 (2009).

³¹ See 820 Ill. Comp. Stat. 180/30(b)(3) (West 2009); N.Y.C. Admin. Code § 8-107.1 (2009).

³² 29 U.S.C. § 2612 (2008); see, e.g., *Municipality of Anchorage v. Gregg*, 101 P.3d 181 (Alaska 2004) (stating that employer who

define a “serious health condition” as an illness, injury, impairment, or physical or mental condition that causes incapacity and requires either an overnight stay in a hospital or similar facility or continuing treatment by a health care provider.³³

The FMLA provides up to twelve weeks of unpaid, job-guaranteed leave, with benefits continuations, every twelve months to employees who: have worked for their employer for at least twelve months and 1250 hours in the previous twelve months; work for employers with at least fifty employees within a seventy-five mile radius; and who require leave to heal from their own “serious health condition” or to care for a child, spouse or parent with a “serious health condition”; or who require leave for the birth of the employee’s child or placement of a child with the employee for adoption or foster care.³⁴

Employees who qualify for FMLA leave are entitled to unpaid leave, though they may be able to use vacation, sick, or other accrued paid leave.³⁵ Eligible employees are entitled to job protection, meaning that they cannot be fired for exercising their right to take the leave or for taking the leave; they also must be restored to the same or an equivalent position at the end of the leave.³⁶

State and Local Paid and Unpaid Job-Guaranteed Leave Laws and Ordinances

Approximately one half of the states have adopted some form of family and medical leave law, all of which bear some resemblance to the federal FMLA.³⁷ Counsel should review relevant state laws to become familiar

with the leave available to victims of domestic or sexual violence in the state of the employee’s residence.

In addition, over the last fifteen years, several states have enacted laws providing unpaid job-guaranteed leave from work specifically for survivors of domestic and sexual violence. Although the statutes vary, each provides some form of job-guaranteed leave from work or leave as a reasonable accommodation specifically to victims of domestic or sexual violence.³⁸ Most require covered employers of a variety of sizes (from no minimum number of employees to a minimum of fifty) to provide leave to employees who are victims to go to civil court to obtain protection for themselves and their family; to seek medical attention; to obtain services from a rape crisis program, and/or to obtain legal assistance. These laws all prohibit an employer from discriminating against employees who are a victim of abuse, for example, for exercising their right to the leave. In many states, the employer may require its employees to provide certification of their qualifying need for leave.³⁹

More than half of the states also have “crime-victim leave laws” that provide victims of crimes, including victims of domestic violence, sexual assault, and stalking, unpaid time off or some form of job protection to attend and/or participate in criminal court proceedings.⁴⁰ Some only apply if the victim is subpoenaed to appear as a witness. Most of these laws apply to employers of all sizes.

Finally and most recently, states and cities have begun adopting paid sick leave laws and ordinances. California and New Jersey have paid family leave laws that enable

³³ 29 C.F.R. §§ 825.113-825.114 (2009).

³⁴ Family and Medical Leave Act, 29 U.S.C. §§ 2601-2654 (2009); 29 C.F.R. §§ 825.100-825.800 (2009).

³⁵ 29 U.S.C. § 2612(d) (2009).

³⁶ See 29 U.S.C. § 2614 (2009).

³⁷ See generally, U.S. Dep’t of Labor, *Federal vs. State Family and Medical Leave Laws*, <http://www.dol.gov/esa/whd/state/fmla/index.htm>.

³⁸ For an up-to-date listing of similar state statutes see Legal Momentum, *State Law Guide: Employment Rights for Victims of Domestic or Sexual Violence*, <http://www.legalmomentum.org/assets/pdfs/employment-rights.pdf>.

³⁹ See *id.* See also, e.g., 820 Ill. Comp. Stat. 180/1-180/20, amended by 2009 Ill. Legis. Serv. P.A. 96-635 (S.B. 1770) (West) (stating that the employer may require the employee to provide certification of the violence and that the leave is for an enumerated purpose; the certification requirement may be satisfied by the employee’s sworn statement and by documentation from a service provider, by police or court records, or by other corroborating evidence).

⁴⁰ See, e.g., Legal Momentum, *State Law Guide*, *supra* note 37 (detailing laws).

employees to be paid a portion of their salaries if they take leave for specified purposes, such as the birth of a child or to care for a child with a serious health condition.⁴¹ The District of Columbia and Milwaukee, Wisconsin recently enacted legislation that requires certain employers to provide paid sick leave for a number of purposes; these provisions enumerate domestic violence as one of the permissible purposes for taking the paid leave.⁴²

Workplace Safety

Employers also may face exposure for failing to take adequate measures to keep the workplace safe from domestic violence. As discussed below, this may also lead to tort claims or liability under workers' compensation statutes.

In addition, several states have enacted laws that enable employers to apply for restraining orders to prevent violence, harassment, or stalking of their employees.⁴³ These laws vary significantly in the terms under which an employer may seek a restraining order and with respect to whether the employee who is the victim of such violence must be consulted prior to the employer seeking a restraining order.⁴⁴ The victim should be consulted whenever possible before such an order is obtained, since obtaining a protective order sometimes places the employee at greater risk by angering the perpetrator. The availability of employer-sought temporary restraining orders may implicate legal issues such as

standing and employee privacy. Nevertheless, in some circumstances, events may cause the employer to conclude that a restraining order is necessary to protect others in the workplace.

Some states have adopted policies addressing the enforcement of civil protective orders in the workplace in the context of the employer's duty to keep the workplace safe. For example, Indiana requires management employees to make good faith efforts to maintain and enforce a protective order if an employee chooses to notify management about it.⁴⁵ Counsel should be mindful of their own states' requirements, if any, with respect to protection order enforcement laws.

Torts in Employment

In some cases, employers may face liability when abusers commit abusive acts at the victim's place of employment. In situations in which workers' compensation laws do not apply,⁴⁶ employees who are victims of sexual or domestic violence that occurred at work may allege that their employer was negligent by failing to take reasonable steps after knowing or having reason to know of the risk of abuse at work or by intentionally exposing the employee to emotional distress. Common claims include negligence; negligent failure to warn; negligent hiring, retention, and supervision; and intentional infliction of emotional distress.⁴⁷ For example, in *Yunker v. Honeywell, Inc.*, the employer had rehired the abuser-employee after he finished serving a prison term for the strangulation death of a female co-worker.

⁴¹ Cal. Unemp. Ins. Code §§ 3300-3306 (2009); N.J. Stat. Ann. § 43:21-39.1 (West 2009).

⁴² D.C. Code §§ 32-131.01- 32.131.17 (2009); City of Milwaukee Common Council Ordinance #080420 (2008); *but see* [http://mmac.org/ImageLibrary/Decision_and_Order_of_Judge_Cooper_dated_6-12-09_\(A3336894\).pdf](http://mmac.org/ImageLibrary/Decision_and_Order_of_Judge_Cooper_dated_6-12-09_(A3336894).pdf) (granting injunction against Ordinance's implementation and enforcement).

⁴³ *See, e.g.*, Legal Momentum, *State Law Guide: Workplace Restraining Orders*, <http://www.legalmomentum.org/assets/pdfs/restraining.pdf>.

⁴⁴ *See, e.g.*, Ark. Code Ann. § 11-5-115 (2009); N.C. Gen. Stat. 95-261 (2009) (allowing an employer to seek a civil no-contact order on behalf of an employee who has been subject to unlawful conduct, such as physical injury or threats of violence, at the workplace). The North Carolina law requires the employer to consult with the employee who is the target of the violence to determine whether the employee's safety would be jeopardized. *Id.*

⁴⁵ Ind. Exec. Order No. 99-6 (2009).

⁴⁶ The next section discusses the applicability of workers' compensation.

⁴⁷ *See* Stephanie L. Perin, *Employers May Have to Pay When Domestic Violence Goes to Work*, 18 Rev. Litig. 365, 371 (1999); John E. Matejkovic, *Which Suit Would You Like? The Employer's Dilemma in Dealing with Domestic Violence*, 33 Cap. U. L. Rev. 209 (2004).

During his second period of work with the company he murdered another female co-worker who had spurned his advances.⁴⁸ The appeals court allowed the victim's representative to maintain a cause of action of negligent retention against the employer.⁴⁹

Generally, whether an employer may be held liable to employees who suffer injury by a non-employee abuser depends on whether the employer knew of or should have foreseen the risk of violence and took appropriate responsive actions. The risk of violence at work may be more foreseeable when the abuser is an employee, particularly if they have a known history of abuse. For example, in *Crapp v. Elberta Crate & Box Co.*, the appeals court overturned a grant of summary judgment in favor of the employer after an employee shot his female co-worker at work.⁵⁰ The court determined that the employer may have breached its duty of ordinary care to the victim-employee when it arranged for the perpetrator to return to work to pick up his final check after he had beaten the woman at work. In that case, the employer knew the employee-abuser had a history of violence against women and failed to warn the female employee that the abuser would be returning.⁵¹ On the other hand, the employer in *Clark v. Carla Gay Dress Co.*, was not liable for an abusive husband's shooting of the victim at her workplace.⁵² Though the employer had been informed of the abuser's violent tendencies, none of the facts made the shooting foreseeable by the employer.⁵³

A victim-employee may succeed in bringing a claim for intentional infliction of emotional distress against an employer if the employer's reckless or intentional behavior exposed the victim to severe emotional distress. For example, in *Gantt v. Security U.S.A. Inc.*, the court upheld an employee's claim of intentional infliction of emotional distress after determining that the employer deliberately allowed the abuser to access and contact the victim at work and insisted that she have contact with him, despite the employer's knowledge of both the victim's protective order against him and of her fear for her life.⁵⁴

Public Policy Exception For At-Will Employment

Most states recognize a public policy exception to the general rule that employers may dismiss employees at will.⁵⁵ Some states recognize that a decision to terminate an employee because of their status as a victim of domestic violence falls within this exception.⁵⁶ However, other courts have found that terminating a domestic violence survivor violates public policy only if the state maintains a specific statutory or constitutional provision or an explicitly expressed policy.⁵⁷ This may be an area of increasing litigation as more states issue policy mandates specifically addressing domestic violence.

Workers' Compensation

When employees are injured while on the job they may be entitled to compensation either through the workers' compensation system or from a tort claim.

⁴⁸ *Yunker v. Honeywell, Inc.*, 496 N.W.2d 419 (Minn. Ct. App. 1993).

⁴⁹ *Id.* at 424.

⁵⁰ 479 S.E.2d 101, 102-03 (Ga. Ct. App. 1996).

⁵¹ *Id.* at 102; accord *Yunker*, 496 N.W.2d at 424 (upholding negligent retention claim after employee strangled and killed co-worker, when the murderer's post-imprisonment employment demonstrated a propensity for abuse and violence against the employee he eventually killed).

⁵² 342 S.E.2d 468, 472 (Ga. Ct. App. 1986).

⁵³ *Id.*; accord *Midgette v. Wal-Mart Stores, Inc.*, 317 F. Supp. 2d 550 (E.D. Pa. 2004) (finding no employer liability when employer had no reason to know that an employee was in imminent danger of being shot by her husband, and where it had not assumed a duty to protect her).

⁵⁴ 356 F.3d 547, 553-57 (4th Cir. 2004).

⁵⁵ See, e.g., Rothstein, et al., *supra* note 17, at 774.

⁵⁶ See, e.g., *Aspessos v. Memorial Press Group*, 15 Mass. L. Rptr. 322, 2002 Mass. Super. LEXIS 404 (Mass. Super. Ct. 2002); see also, e.g., Sandra S. Park, *Working Towards Freedom from Abuse: Recognizing a "Public Policy" Exception to Employment-at-Will for Domestic Violence Victims*, 59 N.Y.U. Ann. Surv. Am. L. 121 (2003).

⁵⁷ See, e.g., *Imes v. City of Asheville*, 594 S.E.2d 397 (N.C. Ct. App. 2004), *aff'd* 606 S.E.2d 117 (N.C. 2004); accord *Green v.*

State laws generally permit employees to pursue one or the other, but not both types of remedies. Workers' compensation is a state-run system of workplace insurance that each employer is required to carry. In many states it is the presumptive remedy for workplace injuries. To be eligible for workers' compensation, the victim must have been subjected to domestic or sexual violence within the scope of her or his employment. For example, the Georgia Court of Appeals found that where the circumstances of the employment are such that there is an increased risk of sexual assault and the assault was not personal, the assault is compensable under the Georgia Workers' Compensation Act.⁵⁸ However, if employees can prove that they were equally exposed to the risk of sexual assaults in and outside of their employment and that the risk of sexual assault was unconnected with their job responsibilities, they may be able to proceed with a tort claim, rather than workers' compensation recovery.

Unemployment Insurance Benefits

Unemployment insurance is a state-run social insurance program that provides temporary income to workers who lose their jobs through no fault of their own and who are able and available to work.⁵⁹ Workers generally are not able to qualify for unemployment insurance when they leave work "voluntarily," unless they have "good cause." In many states, this "good cause" must be work related; personal reasons cannot constitute "good cause" for leaving a job.⁶⁰ In those states, survivors of domestic violence and assault who must leave work to flee violence or protect themselves from violence and stalking may not qualify for unemployment insurance unless they can show a connection between the violence and their work. Even where domestic violence is "good

cause" to leave work, employees may not qualify for unemployment compensation benefits because they are not "able and available" to work as state unemployment laws require; that is, they are moving, caring for small children, healing from injuries, residing in safe houses, in medical facilities for treatment, and/or unable to engage in an intensive search for work. In still others, survivors may be compelled to refuse an offer of work because it interferes with achieving safety.

In the last fifteen years, more than half of the states and the District of Columbia have amended their unemployment insurance codes to clarify the circumstances in which victims of domestic or sexual violence are eligible for benefits.⁶¹ The laws vary tremendously with respect to their eligibility and proof requirements. For example, some states' definitions of "domestic violence" explicitly include sexual assault and/or stalking.⁶²

States that do not explicitly protect domestic violence survivors, but that do permit benefits when an employee has left for "personal reasons," may permit survivors to establish that domestic violence is a valid reason to leave work.⁶³ In other states, unemployment insurance laws specifically cover only job separations that are for reasons deemed "work-connected." In those states, lawyers may argue for coverage, for example, if the abuser has been physically present at the workplace, interrupted the work day with harassing phone calls, or approached coworkers. Many state unemployment insurance systems have informal policies regarding eligibility that may apply to victims of abuse.

⁵⁸ *Employers Ins. Co. of Alabama v. Wright*, 133 S.E.2d 39 (Ga. Ct. App. 1963).

⁵⁹ See Rebecca Smith, *Unemployment Insurance for Victims of Domestic Violence*, in Am. Bar Ass'n, *The Impact of Domestic Violence on Your Legal Practice* 364, 367 (2d ed. 2004).

⁶⁰ *Id.*

⁶¹ See *Legal Momentum*, *supra* note 37 (listing statutes).

⁶² See, e.g., 2003 Ind. Acts 189 (2009); N.C. Gen. Stat. § 94-14(1f) (2009); Wash. Rev. Code §§ 26.50.010, 50.20.050, 50.20.100, 50.20.240 & 50.29.020 (2009).

⁶³ See, e.g., Alaska Admin. Code tit. 8, § 85.095 (2009); Utah Code Ann. § 35A-4-405 (2009); Va. Code Ann. § 60.2-618 (2009).

The Federal Legislative Response: The Next Frontier

In every Congress since 1995, some form of a bill to provide employment-related protections to victims of domestic violence in the workplace has been reintroduced, in recognition of the dramatic impact that these crimes have on the lives of its victims and on their ability to maintain employment.⁶⁴ The next frontier in protecting victims of domestic violence in the workplace is the passage of this type of legislation, its implementation through regulation, and the enhanced rights such legislation would bring to domestic violence victims.

Conclusion

Domestic and sexual violence has a substantial impact on the workplace. Any attorney representing employees, employers, or unions should be aware of the intersection between domestic violence and the workplace, of the emerging legislative responses, and of the various liability theories. Attorneys representing victims of domestic and sexual violence should be aware of their clients' employment rights and responsibilities. Employers' attorneys should be proactive in advising their clients about how to respond to a workplace problem that involves domestic violence. This guide is a starting place for developing an understanding of this evolving area of law. Comprehensive resources relating to the topics outlined in this guide already exist and are constantly being updated to reflect changes in law. We hope the following information will be useful to you in locating additional resources.

Additional Resources

Legal Momentum

www.legalmomentum.org

ABA Commission on Domestic Violence

www.abanet.org/domviol

Corporate Alliance to End Partner Violence

www.caepv.org

⁶⁴ See, e.g., H.R. 5262, 106th Cong. (2000) (proposing leave to address domestic violence and access to unemployment benefits).

How Do I Identify Domestic Violence Among My Clients?

Given the prevalence of domestic violence in our society, it is likely that some of your clients are in, or have been in, violent relationships that affect the legal advice you will provide. However, your clients may not disclose this information to you because they may not think it is related to the advice sought or they may be embarrassed or ashamed.

To ensure that you are ethically representing your client and to avoid malpractice, it is critical that you learn if she/he is a survivor and consider how this information affects your representation.

To effectively screen your clients for domestic violence, incorporate questions about domestic violence in your standard intake process to minimize the stigma and encourage disclosure. It is not easy to bring up these issues, but it is critically important. Think carefully about your manner of speaking and your actions before you begin to ask these questions.

Here are some examples of questions to integrate into your standard interview for any new client:

- Do you feel safe at home?
- Has anyone ever followed or threatened you?
- Has anyone ever pushed, slapped, hit or hurt you in some way?
- Has anyone ever forced you to do something you did not want to do?
- Is there anything that goes on at home or work that makes you feel afraid?
- Does anyone prevent you from eating or sleeping, or endanger your health in other ways?
- Has anyone ever hurt your pets or destroyed your clothing, objects in your home, or something you especially cared about?
- Has your intimate partner taken the children without permission, threatened to never let them see you again, or otherwise harmed them?

Interview your client alone. Let your client know that you ask a series of standard questions of all of your clients when you embark on representation. Explain why you are asking about domestic violence:

- It is an epidemic.
- It affects how you provide representation.
- You care and can provide referrals and support.

What Should I Do If My Client Discloses That She Or He Is A Victim Of Domestic Violence?

Let your client know that your conversation about the violence is confidential and that it is not your client's fault. You do not and should not provide your client with counseling or tell your client what you think she or he should do about the situation. Instead, provide information about resources in your community for domestic violence survivors and their children such as a hotline, shelter, or domestic violence legal services. (see below)

What if I Suspect That My Client Is A Victim Of Domestic Violence But Has Not Disclosed?

Remain supportive and let your client know that if, at any time, they need resources about domestic violence, your client should feel comfortable asking you. Remind them that if they are a victim, that information is important for you to know so that you may best represent them.

Should I Be Concerned For My Client's Safety And Mine If My Client Discloses That She Or He Is Currently Being Threatened By A Batterer?

The danger of violence, including the risk of death, escalates when a domestic violence survivor attempts to leave a batterer. Seeking legal assistance is a step towards independence, which threatens a batterer's sense of power and control and may lead to increased violence. If you represent a client who is planning to leave or to take any legal or financial steps to separate from a batterer, alert your client to the increased likelihood of violence. Moreover, if a client's safety is at risk while you are representing them, your safety may be at risk as well.

Safety Planning For Your Client

For advocacy, counseling and referrals 24 hours a day, anyone may contact the **National Domestic Violence Hotline: 1-800-799-SAFE (7233) or 1-800-787-3224 (TTY)**. Callers will reach an advocate who can talk with them about their situation, their safety, and their options. All conversations with advocates at the National Hotline are strictly confidential.

If your client requests safety planning information, you may wish to provide information from one of these resources:

ABA Tort Trial and Insurance Section and ABA Commission on Domestic Violence Safety Plan
<http://www.abanet.org/tips/publicservice/DVENG.pdf>

Metropolitan Nashville Police Department Domestic Violence Separation Safety Plan
http://www.police.nashville.org/bureaus/investigative/domestic/safety_plan.asp

Women's Law Initiative, Safety Planning
<http://www.womenslaw.org/safety.htm>

For information on Internet safety, see the National Network to End Domestic Violence:
<http://www.nnedv.org/internetsafety.html>

Safety Planning For Attorneys Representing Victims Of Domestic Violence

For your safety and that of your client and your staff, safety planning is crucial. Be aware of your own safety. Most batterers seek to control their former or current partners, rather than their lawyers, and many batterers appear to be well behaved in court. Nevertheless, lawyers for victims of domestic violence may be threatened by batterers and their family members. Take precautions if a problem arises. Carefully review your office security procedures.

- If the batterer is self-represented and is coming to your office, do not hesitate to ask a law enforcement officer to sit outside your office or seek similar precautions. You may wish to obtain a protection order that includes the batterer staying away from you and your office.
- Instruct your staff as to how much interaction they should have with a batterer who represents himself and calls your office. All staff should be particularly careful not to reveal last names or personal contact information.
- Find out the safest way to contact your client and the names of other individuals who will know how to reach her.
- Ask for your client when you call and speak only to your client about the case. Do not leave messages with other family members or on an answering machine or voice-mail unless your client has told you this is safe. If questioned by family members, do not indicate that you are a lawyer; rather, give an innocuous reason for the call, such as taking a survey. Avoid leaving your last name if you do leave a message.
- Always ask your client first if it is safe to talk. The batterer may be present, even if the batterer no longer lives with your client. Develop a system of coded messages to signal danger or the batterer's presence, or if you should call the police.
- Block identification of your number when calling your client. Suggest that your client block hers.
- Keep your client's whereabouts confidential, including during discovery.
- If your client fails to respond to your calls, make extensive (but confidential) efforts to confirm that your client is safe. If your client has decided to drop the case, try to verify that your client has not been threatened or coerced. Let your client know that she should not be embarrassed to call you in the future.

- If your client wants you to, or if it may be a life/death matter, call the police if your client is in danger, and, where possible, confirm that a non-responsive client is safe.
- Talk to your clients in advance about what to do if they disappear—do they want you to try and locate them?

Additional Resources For Attorneys Screening For Domestic Violence

Check your local telephone directory or search online for information about local resources in your community for victims of domestic violence. These may include:

- local police department
- victim witness program
- local domestic violence hotline
- domestic violence shelter and/or counseling program.

Request information pamphlets and other outreach materials from these organizations. By making these materials available in your waiting room, you will increase the safety and security of your clients as well as increase the likelihood of their disclosure to you.

Each state has at least one statewide coalition on domestic violence that may be a resource. Most state domestic violence coalition websites provide information on local programs and resources for victims of domestic violence. Information about state coalitions and other national domestic violence organizations may be found on the website of the **National Coalition Against Domestic Violence** at www.ncadv.org.

For help that is targeted to LGBT victims of violence, contact the **National Coalition of Anti-Violence Programs** at www.ncavp.org.

The **American Bar Association Commission on Domestic Violence** provides resources for attorneys nationwide on domestic violence including, publications, a listserv, and technical assistance and trainings for attorneys representing victims of domestic violence. Information about these resources may be found on our website: www.abanet.org/domviol.



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