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Accomodating Employers' Interests Into the Discussion of Employment Protections For Victims of Domestic Violence

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ACCOMMODATING EMPLOYERS' INTERESTS INTO THE DISCUSSION OF EMPLOYMENT PROTECTIONS FOR VICTIMS OF DOMESTIC VIOLENCE

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INTRODUCTION

The landscape of employment law is shifting as states increasingly pass legislation that requires employers to afford special treatment to employees who are victims of domestic violence ("victim-employees").[1] New Jersey and California provide salient examples of this shifting landscape. On July 17, 2013, New Jersey Governor Chris Christie signed the New

* J.D. Candidate, Brooklyn Law School, 2015; B.A., Virginia Commonwealth University, 2009. I would like to thank my friends, family, and roommates for their unwavering support and encouragement while I wrote and edited this Note. I am grateful to the editors and members of the *Journal of Law and Policy* for their wisdom, suggestions, and revisions.

[1] *See* Beth P. Zoller, *Domestic Violence Victims Emerging As A New Protected Class*, JDSUPRA (Mar. 15, 2013), http://www.jdsupra.com/legalnews/domestic-violence-victims-emerging-as-a-42895/. This Note considers only employment protections for employees who are themselves victims of domestic violence. In fact, the question is far more complicated than that. Many of the laws herein discussed have been amended to apply to employees whose family member is a victim of domestic violence. *See, e.g.*, OR. REV. STAT. § 659A.270(2) (2011) (*as amended by* 2013 Or. Laws Ch. 321 (H.B. 2903) (June 6, 2013) (originally applying to a "parent or guardian of a minor child or dependent who is a victim of domestic violence")). Also, many of the laws herein discussed apply with equal force to victims of a broader swath of intimate partner violence. *See, e.g.*, HAW. REV. STAT. § 378-71 (2014) (defining covered employees as victims of "domestic abuse, sexual assault, or stalking."). These distinctions likely have large impacts on the employers who are covered by these laws, but this Note does not seek to address those issues.

Jersey Security and Financial Empowerment Act ("NJ SAFE Act"),[2] which requires employers to provide any victim-employee up to twenty days of unpaid leave within a calendar year.[3] On October 10, 2013, California Governor Jerry Brown signed California Senate Bill 400 ("S.B. 400"),[4] which prevents employers from discriminating against victim-employees and requires employers to reasonably accommodate victim-employees.[5] The New Jersey and California bills exemplify the three current state-level approaches to providing employment protections to victim-employees: (1) requiring a statutorily defined amount of unpaid leave ("the statutory leave approach"); (2) preventing discrimination on the basis of status as a victim of domestic violence ("the antidiscrimination approach"); or (3) requiring employers to reasonably accommodate victim-employees ("the reasonable accommodation approach").[6]

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[2] New Jersey Security and Financial Empowerment Act of 2013, P.L. 2013, c. 82.

[3] *Id. See also New Jersey SAFE Act Becomes Law*, LABOR & EMP'T LAWFLASH (Morgan Lewis LLP, Princeton, N.J.), Aug. 1, 2013, at 1, https://www.morganlewis.com/pubs/LEPG_LF_NJSAFEActBecomesLaw_02aug13.pdf. The NJ SAFE Act came into effect on October 1, 2013. John McDonald, *Domestic Violence and Sexual Assault, N.J. Becomes the Latest to Provide Leave for Victimized Employees*, FORBES EMP'T BEAT BLOG (Sept. 26, 2013, 4:16 PM), http://www.forbes.com/sites/theemploymentbeat/2013/09/26/domestic-violence-and-sexual-assault-nj-becomes-the-latest-to-provide-leave-for-victimized-employees/.

[4] Brian E. Ewing, Constangy Brooks & Smith LLP, *California Broadens Employment Discrimination Prohibitions to Include Victims of Domestic Violence and Stalking*, LEXOLOGY (Oct. 16, 2013), http://www.lexology.com/library/detail.aspx?g= 6f4f2ba2-5e42-42bc-9641-65d88bb77709. S.B. 400 came into effect on January 1, 2014 and amended California Labor Law sections 230 and 230.1. *See* CAL. LAB. CODE §§ 230, 230.1 (2014).

[5] S.B. 400, 2013–14 Cal. S., Reg. Session (Cal. 2013) [hereinafter Cal. S.B. 400]. Cal. S.B. 400 added to the Labor Code that "[a]n employer shall not discharge or in any manner discriminate or retaliate against an employee who is a victim of domestic violence," and "[a]n employer shall provide reasonable accommodations for a victim of domestic violence." *Id.*

[6] *See generally* LEGAL MOMENTUM, STATE LAW GUIDE: EMPLOYMENT RIGHTS FOR VICTIMS OF DOMESTIC OR SEXUAL VIOLENCE (updated June

Thirty-four states have passed legislation under one of these three approaches.[7] As such, victims of domestic violence are rapidly becoming another subset of the population that the law sees as deserving of special treatment.[8] The commonality between each of the three approaches is that they each require employers to provide some form of employment protection—or special treatment—to victim-employees. The primary goal of these statutes has been to provide job security for victims of domestic violence so that they can become financially independent from, and eventually, leave their abusers.[9] While this goal is noble, it begs the question: do these statutes impose too great of a cost on employers?

To date, employers and their advocates have opposed these employment protections.[10] Many commentators have criticized this wholesale opposition because domestic violence is not a

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2013) [hereinafter LEGAL MOMENTUM, STATE LAW GUIDE], *available at* http://www.scribd.com/doc/160011402/State-Law-Guide-Employment-Rights-for-Victims-of-Domestic-or-Sexual-Violence (describing the various state and local level employment protections available to victims of domestic violence). *See also* Marcy L. Karin, *Changing Federal Statutory Proposals to Address Domestic Violence at Work Creating A Societal Response by Making Businesses A Part of the Solution*, 74 BROOK. L. REV. 377, 392–95 (2009) (discussing trends in state laws). Each of the current state-level approaches was modeled off of existing federal law: the statutory leave approach is modeled after the Family Medical Leave Act; the antidiscrimination approach is modeled after Title VII of the Civil Rights Act; and the reasonable accommodation approach is modeled after the Americans with Disability Act. *See* 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, 700, 707, 709 (2008).

[7] *See* LEGAL MOMENTUM, STATE LAW GUIDE, *supra* note 6, at 1–36.

[8] Zoller, *supra* note 1.

[9] *See infra* notes 26–29 and accompanying text.

[10] *See, e.g.*, Letter from California Chamber of Commerce et al. to Members, California Senate Committee on Judiciary (Apr. 19, 2013) [hereinafter California Chamber of Commerce, Letter in Opposition], *available at* http://www.calodging.com/images/uploads/pdfs/SB_400_SEN_Jud_Oppose.pdf (opposing SB 400 on the behalf of employers). *See also* Karin, *supra* note 6, at 398 (discussing specific opposition to this type of legislation).

purely domestic problem and instead directly affects employers' bottom line[11] Although employers do have a valid reason to oppose employment protections, since such protections can increase the cost of business,[12] overall those protections are in fact beneficial. When protections are drafted with employers' interests in mind, they can trade small-term costs for long-term gains.

Employers should also recognize that wholesale opposition is no longer an effective strategy for a number of reasons. First, there has been an "explosion" of state-level statutes that provide employment protections for victim-employees.[13] Over two thirds of the states have some form of this statute.[14] Second, the federal government has recently signaled two ways that it supports providing protections for victims of domestic violence: (1) on February 15, 2013, the Office of Personal Management

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[11] *See, e.g.*, Karin, *supra* note 6, at 383–85. One possible explanation for employer opposition is that it is simple path dependence. This theory asserts that because employers have opposed employment protections in the past—like unpaid leave for pregnant workers—they blindly continue to do so now. Professor Deborah Widiss provides two examples of how path dependence may be operating in this area of law. *See* Widiss, *supra* note 6, at 705, 708–09. First, Widiss argues that "proposing domestic violence victim status as an additional protected class predisposes businesses to oppose such bills." *Id.* at 708. Second, Widiss describes how the invocation of a statutory leave requirement raises the spectre of the Family and Medical Leave Act ("FMLA") and "triggers an assumption" that, like the FMLA, these leave laws should exempt smaller businesses. *Id.* at 702–05.

[12] *Hearing on S.B. 229 Before the S. Comms. on Labor & Pub. Emp't and Hum. Servs.*, 2011 Leg. (Haw. 2011) (letter testimony of Poka Laenui, Exec. Dir., Wai'anae Coast Comm. Mental Health Ctr.), *available at* http://www.capitol.hawaii.gov/session2011/testimony/SB229_SD1_TESTIMONY_LAB-HUS_03-22-11_.PDF. In his letter opposing a 2011 Hawaii Bill that amended the state labor code to require employers to afford victims of domestic violence reasonable accommodation, Poka Laenui, Executive Director of the Wai'anae Coast Community Mental Health Center, argues that "this bill [will be used to] transfer upon employers cost of doing business the burden of underwriting what is essentially a social-criminal and financial societal issue." *Id.*

[13] Widiss, *supra* note 6, at 669, 698.

[14] *See* LEGAL MOMENTUM, STATE LAW GUIDE, *supra* note 6, at 1–36.

("OPM") required all federal agencies to prohibit discrimination of federal employees on the basis of their status of domestic violence;[15] and (2) federal agencies have issued guidance for how existing federal laws can provide protection to victim-employees in limited factual scenarios.[16] Rather than continue their strategy of wholesale opposition to employment protections, employers and their advocates should support limited protections for victim-employees. Such protections can and should be drafted in a manner that ensures that they address employer concerns, while imposing only minimal costs on those employers.

The New York State Senate provides an excellent example of how, on the state level, employers could shape the debate around employment protections for victims of domestic violence. During its 2013 legislative session, the New York Senate considered two bills.[17] The first, Bill 2509, would require employers "[t]o permit victims of domestic or sexual violence to take [up to 90 days] unpaid leave . . . to address on-going domestic or sexual violence issues."[18] The second, Bill 3385, on the other hand, would only require employers to provide a reasonable amount of leave to victim-employees, provided that it does not cause an undue burden on their operation.[19] It seems

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[15] See *infra* Part I.B for a discussion of OPM's new policy.

[16] Part II of this Note discusses how the U.S. Department of Labor and the Equal Employment Opportunity Commission have issued fact sheets demonstrating how existing federal law applies to victims of domestic violence.

[17] Katharine H. Parker & Jacqueline M. Dorn, Proskauer Rose LLP, LAW360, *NY Jumps On Domestic Violence Protection Bandwagon*, LAW360 (May 15, 2013), http://www.law360.com/articles/438685/ny-jumps-on-domestic-violence-protection-bandwagon. *See also* Bisha A. Nurse, Day Pitney LLP, *New York Senate Committee Proposes Protected Leave for Domestic Violence Victims*, THE EMP'R'S LAW BLOG (Apr. 18, 2013), http://www.employerslawblog.com/Entry.aspx?eID= 55.

[18] S.B. 2509, 2013–14 N.Y. S., Gen. Assembly (N.Y. 2013) [hereinafter N.Y. 90-Day Leave Bill]. This bill was referred to the Labor Committee on January 8, 2014. *See New York Senate Bill 2509*, LEGISCAN, http://legiscan.com/NY/bill/S02509/2013 (last visited Mar. 5, 2014).

[19] S.B. 3385, 2013–14 N.Y. S., Gen. Assembly (N.Y. 2013)

likely that employers would rather provide unburdensome leave than three months of leave. This single legislative session presents a lucid example of how employer advocacy could mean the difference between providing reasonable leave that is not overly burdensome or being required to provide up to three months of leave.

This Note creates a blueprint for a fine-tuned law that decreases the economic impact of domestic violence, normalizes the cost of providing protection, and requires only low-cost solutions. While other scholars have taken the position that some statutory approaches present a better solution for employees and employers,[20] none have thus far endeavored to catalog the state-level statutes to show which statutes are deserving of employer support. Examination of how state statutes have dealt with the issue so far demonstrates that a federal law could be drafted so as to alleviate many of employers' concerns while

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[hereinafter N.Y. Accommodation Bill]. The bill makes clear that one required reasonable accommodation is permitting employees to be "absent from work for a reasonable time" to seek medical attention, obtain services from a victims' rights organization, obtain counseling, participate in safety planning, or obtain legal services. *See id.* This bill was last referred to the Committee on Investigations and Government Operations. *See New York Senate Bill 3385*, LEGISCAN, http://legiscan.com/NY/bill/S3385/2013 (last visited Mar. 5, 2014).

[20] *See, e.g.*, Widiss, *supra* note 6, at 718–23. Widiss advocates for a targeted and comprehensive approach that pairs sets of legislation to address the goals of employees, employers, and the general public. *Id.* Widiss provides three examples of such pairings: first, coupling a law that would make status as a victim of domestic violence a protected classification with workplace restraining orders, *id.* at 720; second, drafting unpaid leave and unemployment issuance statutes to provide protections based on employer size, *id.* at 720–21; and third, using unemployment issuance statues in conjunction with reasonable accommodation statues so that when an accommodation would represent an undue burden on the employer, the employee is still protected, *id.* at 721. *See also* Elissa Stone, Comment, *How the Family and Medical Leave Act Can Offer Protection to Domestic Violence Victims in the Workplace*, 44 U.S.F. L. REV. 729, 736 (2010) (advocating for the statutory leave approach); *but cf.* Lisalyn R. Jacobs & Maya Raghu, *The Need for A Uniform Federal Response to the Workplace Impact of Interpersonal Violence*, 11 GEO. J. GENDER & L. 593, 607 (2010) (arguing that the statutory leave approach is inadequate on its own).

accommodating their economic interests.

Part I describes how domestic violence affects employers' bottom line, and how consequently, employers have an economic interest in employment protections for victims of domestic violence. Part I also asserts that internal policies are insufficient to deal with the costs of domestic violence because such policies unfairly create extra costs for proactive employers. Part II shows how existing federal law ignores employers' interests while providing victim-employees with protection. Part III explores the statutory leave approach and discusses how key statutory provisions can solve employer concerns without great cost. Part IV discusses the weaknesses of the antidiscrimination approach. Part V explores the reasonable accommodation approach and discusses the ways the approach inherently addresses employers' interests and concerns. Part VI concludes with a summary of the statutory provisions that employers should consider supporting.

I. EMPLOYERS HAVE AN ECONOMIC INTEREST IN EMPLOYMENT PROTECTIONS FOR VICTIM-EMPLOYEES AND INTERNAL POLICIES ARE INADEQUATE TO CORRECT THE PROBLEM.

Prior to a discussion about which statutory approaches would best address employer interests, two questions must be answered: First, do employers have an interest in addressing domestic violence in the lives of their employees? Second, why are employers unable to address this problem internally?

A. Domestic Violence Directly and Indirectly Affects Employers' Bottom Line

The first question—should employers really support employment protections for victims of domestic violence?—may seem callous, but the answer should not be treated as a foregone conclusion. Clearly, domestic violence affects every aspect of a victim's life.[21] Domestic violence is—at root—about the abuser

[21] *See* Elizabeth M. Schneider, *Domestic Violence Law Reform in the*

controlling, dominating, and coercing the victim.[22] Domestic violence can take the form of economic control,[23] or it can start at home and then spill into the victim's work life.[24] It is estimated that "a staggering twenty-nine percent of male and forty percent of female workers report[] having been subjected to intimate partner violence at some point in their lives."[25]

While criminal codes have long protected victims' physical safety, there have been fewer legal solutions for the ways that domestic violence affects a victim's ability to attain or maintain a job.[26] Over time, states have adopted laws to address the economic instability in the lives of those affected by domestic violence, primarily by providing victims with employment protections.[27] A driving theory behind these statutes is that by

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Twenty-First Century: Looking Back and Looking Forward, 42 FAM. L.Q. 353, 354 (2008) (arguing that domestic violence impacts every aspect of victims' lives and "every aspect of the law including criminal law, torts, reproductive rights, civil rights, employment law, international human rights, and especially family law."). For qualitative studies of how actual victims' lives are impacted see, for example, Robin R. Runge, *The Legal Response to the Employment Needs of Domestic Violence Victims an Update*, HUM. RTS., Summer 2010, at 13 [hereinafter Runge, *Employment Needs Update*] and Jennifer E. Swanberg & T. K. Logan, *Domestic Violence and Employment: A Qualitative Study*, 10 J. OCCUPATIONAL HEALTH PSYCHOL. 3, 3 (2005).

[22] Schneider, *supra* note 21, at 356.

[23] *Id.*

[24] Jessie Bode Brown, *The Costs of Domestic Violence in the Employment Arena: A Call for Legal Reform and Community-Based Education Initiatives*, 16 VA. J. SOC. POL'Y & L. 1, 21–24 (2008). Brown discusses how domestic violence can spill into the workplace in the following ways: the victim-employee misses work "because of the abuse [he or she] faces at home;" the abuser calls the victim-employee while he or she is at work; the abuser is a coworker who abuses the victim-employee at work; or the abuser shows up at the victim-employee's workplace and perpetrates violence there. *Id.* at 17. There is also ample evidence that domestic violence affects a victim-employee's productivity while at work. *See infra* notes 42–60 and accompanying text.

[25] Jacobs & Raghu, *supra* note 20, at 597.

[26] *See* Brown, *supra* note 24, at 2.

[27] *See* Ill. S. Transcript, 93rd Gen. Ass., Reg. Sess. No. 49 (2003). On the floor of the Illinois State Senate, then-state senator Barack Obama described the Victims' Economic Security and Safety Act, 820 ILL. COMP.

facilitating job retention, victims are more likely to become financially independent,[28] and thereby more likely to end the cycle of violence in their lives.[29]

While it is clear that violence directly and indirectly affects victims' lives, it is less intuitive that employers are similarly affected.[30] In fact, domestic violence can directly affect employers, as evidenced by the tragic murder of Zina Haughton.[31] When Zina's husband, Radcliffe Haughton, became increasingly violent at home, and even came to her work and slashed her tires, she filed a restraining order.[32] Four days later, Radcliffe again came to Zina's work and started a fire inside the workplace with a propane tank.[33] He then shot his estranged wife and six other women, killing a total of four, including himself.[34] While some scholars assert that incidents like these

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STAT. § 180/30 (2003), as "a modest attempt to deal with the problems that victims face after [the] violence has occurred." Ill. S. Transcript, 93rd Gen. Ass., Reg. Sess. No. 49 (2003). *See also, e.g.*, N.Y.C. ADMIN. CODE § 8-107.1 (McKinney 2013). In the legislative findings section of the New York City Human Rights Law, the City Council states, "In recent years, a growing body of evidence has documented the devastating impact of domestic violence on the ability of victims . . . to participate fully in the economy." *Id.*

[28] *See* Widiss, *supra* note 6, at 675–76.

[29] *See, e.g.*, WASH. REV. CODE § 49.76.010 (2013) (stating, in the legislative findings of the Washington domestic leave law, that "[o]ne of the best predictors of whether a victim of domestic violence, sexual assault, or stalking will be able to stay away from an abuser is his or her degree of economic independence").

[30] *See* Julie Goldscheid, *Gender Violence and Work: Reckoning with the Boundaries of Sex Discrimination Law*, 18 COLUM. J. GENDER & L. 61, 77–78 (2008).

[31] Dinesh Ramde, *Radcliffe Haughton Had History of Abuse; Killed 3, Himself At Azana Day Spa In Wisconsin*, HUFFINGTON POST (Oct. 22, 2012), http://www.huffingtonpost.com/2012/10/22/radcliffe-haughton-profile-abuse_n_2000235.html.

[32] Greg Botelho, *Wisconsin Police: After Domestic Violence Arrest, Suspect Kills 3—and Himself*, CNN (Oct. 22, 2012), http://www.cnn.com/2012/10/21/us/wisconsin-shooting/index.html.

[33] *Id.*

[34] *Id.*

are "relatively uncommon,"[35] when polled, the overwhelming majority of corporate security officials report concern that domestic violence directly threatens the safety of their workplaces.[36] Workplace incidents like this can lead to bad press and massive tort liability for employers.[37]

Domestic violence can also directly increase the employer's business costs even when the violence occurs elsewhere. An abuser will often attempt to weaken the victim's economic independence by disrupting his or her job performance.[38] According to one study fifty-six percent of victims report being harassed while at work by their abuser.[39] It has been observed that an abuser's controlling behavior may actually impact victim-employees' productivity more than the violence itself.[40]

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[35] *See, e.g.*, Widiss, *supra* note 6, at 686. *But see* Stacy M. Downey & Amy Johns, *New Study Examines the Role of Intimate Partner Violence in Workplace Homicides Among U.S. Women*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/niosh/updates/upd-05-03-12.html. (citing a National Institute for Occupational Safety and Health (NIOSH) study finding that the second cause of violent death for female employees while working is homicide perpetrated by an intimate partner or relative); Swanberg & Logan, *supra* note 21, at 14 ("The majority of women from this study reported that their abusers had shown up at work at some point during the last 2 years.").

[36] In the legislative findings of the Illinois Victims' Economic Security and Safety Act, lawmakers found that "[n]inety-four percent of corporate security and safety directors at companies nationwide rank domestic violence as a high security concern." 820 ILL. COMP. STAT. 180/5(23) (2012).

[37] *See* John E. Matejkovic, *Which Suit Would You Like? The Employer's Dilemma in Dealing with Domestic Violence*, 33 CAP. U. L. REV. 309, 312–34 (2004). Essentially, claims against the employer would sound in negligence, *id.* at 313, under the theory that employers owe employees and patrons a duty to protect them from foreseeable danger, *id.* at 314. These actions can yield six-digit price tags for employers. *Id.* at 313 ("Because the employer had been warned of the husband's threats and the employer did not beef up security, the jury awarded the plaintiffs $5 million.").

[38] *See* Maria Amelia Calaf, *Breaking the Cycle: Title VII, Domestic Violence, and Workplace Discrimination*, 21 LAW & INEQ. 167, 170 (2003).

[39] GEN. ACCOUNTING OFFICE, DOMESTIC VIOLENCE: PREVALENCE AND IMPLICATIONS FOR EMPLOYMENT AMONG WELFARE RECIPIENTS 8 (1998), *available at* http://www.gao.gov/archive/1999/he99012.pdf.

[40] Swanberg & Logan, *supra* note 21, at 14 ("Women's responses implied that stalking at work caused significant levels of stress and

Qualitative studies of how domestic violence affects the workplace reveal examples of abusers "physically restraining a partner from going to work . . . , making a car unavailable, or cutting up work clothes"[41] and "inflict[ing] visible injuries, reneg[ing] on promises to provide child care, or keep[ing] the victim up late at night the day before a critical event like an exam or a meeting."[42] These kinds of activities not only hurt the employee, but the bottom line of the victim's employer as well. The Bureau of National Affairs estimated that, as a result of domestic violence, employers lose between $3 and $5 billion due to lost employee productivity.[43] Others estimate that employers lose up to $13 billion per year in profits because of domestic violence.[44]

Domestic violence also has indirect effects on an employer's business costs. These indirect effects include detrimental employee health, absenteeism, and turnover.[45] The 2010 National Intimate Partner and Sexual Violence Survey, promulgated by the Center for Disease Control ("CDC"), found that domestic violence victims suffered health effects beyond the scrapes and bruises of violence, including "frequent headaches,

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psychological discomfort that in turn significantly affected job performance. In fact, the content of respondents' discussions that focused on the ramifications associated with being stalked while at work led us to surmise that the abusers' stalking behavior produced *more* anxiety and stress for women than actual physical actions taken by abuser prior to work." (emphasis added)). This can occur for one of two reasons. First, the employee is concerned that his or her abuser will terrorize him or her at work. *Id.* Second, the employee's productivity is lessened because of the residual stress from an earlier incident. *See* Carole Warshaw et al., *Mental Health Consequences of Intimate Partner Violence*, *in* INTIMATE PARTNER VIOLENCE: A HEALTH BASED PERSPECTIVE 147, 150, 161 (Connie Mitchell & Dierdre Anglin, eds., 2009).

[41] Goldscheid, *supra* note 30, at 75 (citing Swanberg & Logan, *supra* note 21, at 6–8).

[42] Calaf, *supra* note 38, at 171 (citations omitted).

[43] Illinois Victims' Economic Security and Safety Act, 820 ILL. COMP. STAT. 180/5 (2012).

[44] *Id.*

[45] *See* Brown, *supra* note 24, at 24; *see also* AM. INST. ON DOMESTIC VIOLENCE, http://www.aidv-usa.com/ (last visited Mar. 27, 2014).

chronic pain, difficulty with sleeping, . . . asthma, irritable bowel syndrome, and diabetes."[46] Studies document that victims suffer escalating emotional trauma and thus require psychiatric care.[47] Two commentators estimate that employers pay up to hundreds of millions of dollars in health care costs because of the adverse health effects caused by domestic violence.[48] In 2003, the CDC found that female victims "lose nearly 8.0 million days of paid work each year," which "is the equivalent of 32,114 full-time jobs each year."[49] This pervasive absenteeism disrupts the workplace and the employer's operations.[50]

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[46] NATIONAL CENTER FOR INJURY PREVENTION AND CONTROL, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY, 2010 SUMMARY REPORT, EXECUTIVE SUMMARY 3 (2011), *available at* http://www.cdc.gov/violenceprevention/pdf/nisvs_executive_summary-a.pdf.

[47] *See* Warshaw et al., *supra* note 40, at 148–50. It is also important to note the escalating nature of emotional damage; the crippling mental and emotional effects of domestic violence in turn make the victim more susceptible to worsening emotional abuse as well as less likely to seek available resources. *Id.* at 149–50, 155–56.

[48] Jane A. Randel & Kimberly K. Wells, *Corporate Approaches to Reducing Intimate Partner Violence Through Workplace Initiatives*, 3 CLINICS OCCUPATIONAL & ENVTL. MED. 821, 821–22 (2003).

[49] CTR. FOR DISEASE CONTROL & PREVENTION, DEP'T OF HEALTH & HUM. SERVS., COSTS OF INTIMATE PARTNER VIOLENCE AGAINST WOMEN IN THE UNITED STATES 19 (2003), *available at* http://www.cdc.gov/violenceprevention/pdf/ipvbook-a.pdf.

[50] Congress reached the same conclusions after hearings for the Violence Against Women Act. *See* Brief for Arizona and Thirty-Seven Other States as Amici Curie Supporting Petitioner, United States v. Morrison, 529 U.S. 598 (1999) (No. 99-5), 1999 WL 1032809, at *5 ("Congress found that violence against women imposes significant costs on employers by increasing absenteeism, lowering productivity, increasing health care costs, and creating higher turnover."); *id.* at *7 ("Congress also found that employers have responded to the effect on 'such bottom line issues as tardiness, poor performance, increased medical claims, interpersonal conflicts in the workplace, depression, stress and substance abuse' by directly addressing domestic violence in order to reduce their costs and protect their employees.") (quoting Domestic Violence: Hearing on S. 596 Before the Sen. Comm. on the Judiciary, 103d Cong. 15 (1993) (statement of James

Domestic violence also causes high employee turnover.[51] This can occur in several ways. First, "homicide is a leading cause of death in the workplace."[52] Over a quarter of these murders are committed by an intimate partner or close relative.[53] Second, domestic violence affects every aspect of the victim's life that makes it difficult to maintain employment.[54] Third, managers see victim-employees' pervasive absenteeism as disruptive to the workplace, which, without employment protections in place, can lead to the employee's termination.[55] The high rates of employee turnover associated with domestic violence increase employers' business costs as "well-trained employees are a valuable asset and . . . training new employees is more costly than retaining a productive and knowledgeable existing workforce."[56]

Domestic violence's effect on employers extends beyond the disruption it causes to the particular victim; it also affects the productivity of victims' coworkers.[57] For example, coworkers surveyed in Pennsylvania reported that victim-employees more often came to work late, left early, and took frequent breaks.[58] About half of these coworker employees report that they felt

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Hardeman, Polaroid Corp.)).

[51] *See id.* at *6.

[52] *Id.* at *6 n.3 (citing AFSCME & AFL-CIO, *Hidden Violence Against Women at Work*, WOMEN IN PUB. SERV., Fall 1995, at 1).

[53] *Id.* (citing R. BACHMAN & L.E. SALTZMAN, DEP'T OF JUSTICE, VIOLENCE AGAINST WOMEN: ESTIMATES FROM THE REDESIGNED SURVEY 4 (1995)).

[54] *See* Randel & Wells, *supra* note 48, at 823.

[55] *See* David K. Haase, *Evaluating the Desirability of Federally Mandated Parental Leave*, 22 FAM. L.Q. 341, 349 (1988). This point is explored in greater detail in Part V.B.3. *See infra* notes 170–75, 296–99 and accompanying text.

[56] *See* Randel & Wells, *supra* note 48, at 823.

[57] *See* STANDING FIRM, EFFECT OF PARTNER VIOLENCE ON THE WORKPLACE: A SURVEY OF EMPLOYED ADULTS IN SOUTHWESTERN PENNSYLVANIA 6–8 (May 2013), *available at* http://www.caepv.org/membercenter/files/survey_ report--exec_summary_only_w_sf_cover.pdf.

[58] *Id.* at 7.

compelled to cover the work of victims and/or abusers,[59] and a similar percentage felt that "company resources . . . [were used] to deal with or deliver . . . abuse."[60] Thus, domestic violence causes decreased productivity in the victim-employees and their coworkers.

In sum, domestic violence has powerful direct and indirect economic effects on the victims' workplace. Due to these economic effects employers have an economic interest in solutions that provide employees with the opportunity to end the cycle of violence in their lives.[61]

B. The Government and Business's Growing Support for Considering Domestic Violence a Workplace Issue

Many employers are already aware of the effect that domestic violence has on their workplace.[62] In 2007, the Corporate Alliance to End Partner Violence documented corporate opinions of the effect of domestic violence on the workplace and the economy.[63] The study revealed that sixty-three percent of polled CEOs considered domestic violence a major problem, and forty-three percent of CEOs and ninety-one percent of employees reported an effect on the company's

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[59] *Id.* at 7–8.

[60] *Id.* at 8.

[61] *See* Randel & Wells, *supra* note 48, at 823.

[62] 820 ILL. COMP. STAT. 180/5(24) (2012). In passing the Illinois Victims' Economic Security and Safety Act, the General Assembly found, "[49%] of senior executives recently surveyed said domestic violence has a harmful effect on their company's productivity, 47% said domestic violence negatively affects attendance, and 44% said domestic violence increases health care costs." *Id. See also* Randel & Wells, *supra* note 48, at 826, 829–34 (describing what employers can do and have done to internally address the effect of domestic violence on employer profits).

[63] CORPORATE ALLIANCE TO END PARTNER VIOLENCE ET AL., 2007 CEO AND EMPLOYEE SURVEY 2 (Sept. 2007) [hereinafter 2007 CORPORATE ALLIANCE SURVEY], *available at* http://www.caepv.org/membercenter/files/ceo_survey_results_overview.ppt (compiling and comparing two studies on domestic violence: the first polled 200 CEOs and/or official designees of Fortune 1500 companies, and the second randomly polled 500 employees).

bottom line.[64]

Recognizing the negative impact domestic violence has on their businesses, some employers have begun to adopt internal policies to assist their employees who are victims.[65] This includes the nation's largest employer—the federal government.[66] On April 12, 2012, President Barack Obama issued a Memorandum calling on the federal government to provide protection for federal victim-employees.[67] This Memorandum directed the Office of Personnel Management ("OPM") to issue guidance to each federal agency to modify its internal policies so as to address the effects of domestic violence.[68] Accordingly, on February 15, 2013, the OPM directed federal agencies to develop or modify internal policies to address the effects of domestic violence on federal agencies.[69] OPM's directive

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[64] *Id.* at 6–7.

[65] *See* Runge, *Employment Needs Update*, *supra* note 21, at 14 ("It is more and more common for employment policies and collective bargaining agreements to specifically mention benefits for victims of violence."); Widiss, *supra* note 6, at 685 (describing "the growing number of businesses that are voluntarily taking steps to address domestic violence . . . ."). For concrete examples of the policies that employers have adopted see *infra* notes 76–81 and accompanying text.

[66] Parker & Dorn, *supra* note 17.

[67] Memorandum from the White House Office of the Press Sec'y to the Heads of Exec. Dep't & Agencies (Apr. 12, 2012) [hereinafter Presidential Memo on Domestic Violence], *available at* http://www.whitehouse.gov/the-press-office/2012/04/18/presidential-memorandum-establishing-policies-addressing-domestic-violen.

[68] *Id.* Specifically, the Presidential Memo on Domestic Violence directed the OPM to promulgate: "recommended steps agencies can take as employers for early intervention in and prevention of domestic violence committed against or by employees, guidelines for assisting employee victims, leave policies relating to domestic violence situations, general guidelines on when it may be appropriate to take disciplinary action against employees who commit or threaten acts of domestic violence, measures to improve workplace safety related to domestic violence, and resources for identifying relevant best practices related to domestic violence." *Id.*

[69] U.S. OFFICE OF PERSONNEL MGMT., GUIDANCE FOR AGENCY-SPECIFIC DOMESTIC VIOLENCE, SEXUAL ASSAULT, AND STALKING POLICIES 1–3, 8 (Feb. 2013).

included guidance on how these policies should be developed and enacted.[70] OPM directed every policy to consider the need to provide leave, the importance of nondiscrimination against victim-employees, the need for training and awareness, and the role of safety and building security.[71] The directive also directed that "to the greatest extent possible, agencies should work in collaboration with the employee to provide leave and/or other workplace flexibilities to help the employee remain safe and maintain his or her work performance."[72] The new federal protection is in line with similar protections for employees of state and local governments.[73] President Obama stated that these protections should "act as a model" for private sector employers.[74]

Not all employers need the federal government to provide a model; many companies have adopted internal policies that provide protections to victim-employees.[75] These policies include facility safety improvements, internal counseling, and external referrals for the victims.[76] Verizon Wireless in their Employee Code of Business Conduct, for example, declares that domestic violence is a workplace issue and encourages employees to come forward with their domestic violence issues.[77] This simple policy

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[70] *Id.* at 8–10.

[71] *Id.* at 11–27.

[72] *Id.* at 11.

[73] *See generally* LEGAL MOMENTUM, STATE LAW GUIDE, *supra* note 6.

[74] *See* Presidential Memo on Domestic Violence, *supra* note 67.

[75] *See, e.g.*, Runge, *Employment Needs Update*, *supra* note 21, at 13–14.

[76] JULIE GOLDSCHEID & ROBIN RUNGE, EMPLOYMENT LAW AND DOMESTIC VIOLENCE: A PRACTITIONER'S GUIDE 9–10 (2009), *available at* http://www.americanbar.org/content/dam/aba/migrated/domesticviolence/PublicDocuments/ABA_CDV_Employ.authcheckdam.pdf; Stacey Pastel Dougan & Kimberly K. Wells, *Domestic Violence: Workplace Policies And Management Strategies*, QUARTERLY E-NEWSLETTER (ABA Comm. on Domestic Violence, Chicago, IL), Spring 2007, at 2–3, 6, *available at* http://www.caepv.org/membercenter/files/domestic_violence_-_workplace_policies_and_management_strategies_(aba_article).pdf.

[77] *Best Practices—Verizon Wireless*, CORP. ALLIANCE TO END PARTNER

change can serve as "the starting point for fostering trust."[78] Other examples of employer policies include State Farm permitting flexible work hours and special time-off policies for victims of domestic violence[79] and Cigna holding an annual "Worksite Violence/Partner Violence Month."[80] The Corporate Alliance to End Partner Violence surveyed effective employer policies and suggested policies that "[d]efine a policy for flexible work hours" and "[c]onsider what special accommodations may be able [available] for victims."[81] In addition to adopting internal policies, industry leaders have also formed advocacy groups such as Employers Against Domestic Violence[82] and the Corporate Alliance to End Partner Violence[83] to collectively advocate for protections for victims of domestic violence.

VIOLENCE, http://www.caepv.org/getinfo/bestprac.php?memID= 49 (last visited Mar. 27, 2014) [hereinafter *Verizon Wireless Best Practices*].

[78] *Id.*

[79] *Best Practices—State Farm Insurance Companies*, Corp. Alliance to End Partner Violence, http://www.caepv.org/getinfo/bestprac.php?memID= 89 (last visited Mar. 27, 2014) [hereinafter *State Farm Best Practices*].

[80] *Best Practices—Cigna*, Corp. Alliance to End Partner Violence, http://www.caepv.org/membercenter/files/creatingapvworkplacepolicy.pdf (last visited Mar. 27, 2014) [hereinafter *Cigna Best Practices*].

[81] 2007 CORPORATE ALLIANCE SURVEY, *supra* note 63.

[82] Employers Against Domestic Violence is a Massachusetts alliance of corporate partners, victim rights organizations, and governmental agencies, "[c]ommitted to proactively addressing the causes and effects of violence in the workplace." *Who We Are*, EMP'RS. AGAINST DOMESTIC VIOLENCE**,** http://employersagainstdomesticviolence.org/about/who-we-are/ (last visited Mar. 27, 2014). It includes business leaders, such as Blue Cross Blue Shield of Massachusetts, the Boston Red Sox, John Hancock Financial Services Liberty Mutual Group, Massachusetts General Hospital, Verizon Wireless, and many others. *See Membership Organizations*, EMP'RS. AGAINST DOMESTIC VIOLENCE, http://employersagainstdomesticviolence.org/member-organizations/ (last visited Mar. 27, 2014).

[83] The Corporate Alliance to End Partner Violence is comprised of business leaders, such as Chase Bank, Lincoln Mutual Life Insurance Co., the National Football League, Prudential, State Farm Insurance Companies, and the Target Corporation. *Our Members*, CORP. ALLIANCE TO END PARTNER VIOLENCE, http://www.caepv.org/about/members.php (last visited Mar. 27, 2014).

These internal policies and advocacy groups indicate that some employers are beginning to recognize that they have an economic interest in ensuring there are adequate protections for victim-employees.[84] One such solution, which some employers are enacting, is accommodations for victims.[85] The new protections for federal employees should be viewed as a shift in federal policy, which could have important ramifications for businesses.[86] Given the growing consensus in corporate and government sectors, it is not difficult to imagine a federal law that treats domestic violence as a workplace issue and requires employers to bear additional costs.[87] It would therefore be shrewd of employers to decide now which employment protection best accommodates their interests without imposing greater costs.

C. Legislation Would Spread the Cost of Protecting Employees.

The prevalence of these organizations and internal policies begs the salient question: do employers need a law to tell them to do what they are already doing? Allowing employers to solve

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[84] Dougan & Wells, *supra* note 76, at 2. Of course, employers are not unanimous in their recognition that domestic violence is a workplace issue. *See* Meg Hobday, *Domestic Violence Comes to Work: The Need for A Work-Related Response*, 67 BENCH & BAR OF MINN., no. 3, Mar. 2010, at 20, 22 ("According to a 2005 Survey of Workplace Violence Prevention, only 29.1 percent of businesses have policies addressing workplace violence generally, and less than half of those address domestic violence specifically."). Many employers still oppose treating domestic violence as a workplace issue. Parts III, IV, and V address some of the arguments that employers have raised in opposition to treating employment.

[85] Both the State Farm policy and the recommendation provided by the Corporate Alliance to End Partner Violence discussed above are examples of this. *See* 2007 CORPORATE ALLIANCE SURVEY, *supra* note 63; *State Farm Best Practices*, *supra* note 79.

[86] *See* Parker & Dorn, *supra* note 17.

[87] *See generally* Karin, *supra* note 6 (discussing how reframing the issue as a workplace issue is more likely to garner public support, the support of the business community, and the support of the federal government).

domestic violence issues with internal policies alone presents several problems. First, the majority of employers have no internal policies.[88] Second, studies show that even when internal policies exist, employees are often unaware of them.[89] Third, there is compelling evidence that employers tend to underestimate the prevalence of domestic violence in their staff.[90] Fourth, adopting a policy may cause the employer to incur costs that might decrease its competitiveness in the market.[91] Finally, smaller employers are often without the resources to adopt internal policies to deal with the problems of domestic violence.[92]

The last two issues presented by only having internal policies are of greatest concern for employers. First, an employer who provides her employees a protection that is not required by statute is incurring an additional business cost.[93] As is discussed below, this cost will generally be minor,[94] but it should not be ignored. At times, employers adopt internal policies out of a natural sense of wanting to protect employees.[95] An employer that adopts a policy that affords extra accommodations to victim-

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[88] *See* A. Kevin Troutman, *How Employers Should Address Domestic Violence at Work*, FISCHER & PHILLIPS LLP (Dec. 3, 2012), http://www.laborlawyers.com/how-employers-should-address-domestic-violence-at-work.

[89] *See* 2007 CORPORATE ALLIANCE SURVEY, *supra* note 63, at 6 (finding that "72% of executives say their companies offer programs and services that address domestic violence but less than half of employees (47%) are even aware of this fact").

[90] *See* Widiss, *supra* note 6, at 682.

[91] *See* Goldscheid, *supra* note 30, at 120.

[92] *See* Karin, *supra* note 6, at 418.

[93] *See* Goldscheid, *supra* note 30, at 120 (discussing the costs associated with accommodation statutes).

[94] *See id.* ("[These] costs generally will be modest."); *see also infra* notes 238–48 and accompanying text.

[95] *See, e.g.*, Betsy Weintraub, *The Hidden Safety Hazard—Domestic Violence*, FISHER & PHILLIPS LLP (Nov. 1, 2012), http://www.laborlawyers.com/the-hidden-safety-hazard-domestic-violence (advising employer clients to adopt policies because "[a]s a human being, [they] have an even bigger responsibility to watch out for dangers to your employees . . . .").

employees incurs a cost that is in addition to industry-wide costs of business.[96] As such, the employer is potentially penalized in the market for what is essentially a moral decision.

The second concern—that smaller resource-poor employers are unable to introduce domestic violence policies—is related.[97] Smaller employers have a double bind: either adopt internal policies, which they cannot afford, or continue to allow domestic violence to affect their bottom line. Thus, where there is no statutory employment protection for victims of domestic violence, employers who adopt an internal domestic violence policy and small employers are penalized by the unregulated marketplace. Professors Marcy Karin and Deborah Widiss argue that the issue should be framed as a public health issue in which all of society has a stake.[98] If you look at domestic violence through this lens it allows you to view a putative federal employment law as a common cost of business that all employers should pay, not merely those that elect to or can afford to.[99] Legislation would redistribute the cost of protecting victims and make employment protections a cost of doing business.

II. EXISTING FEDERAL EMPLOYMENT LAWS ONLY HAVE A LIMITED APPLICATION TO THE ISSUES RAISED BY DOMESTIC VIOLENCE'S EFFECT ON THE WORKPLACE.

The problem should now be clear: domestic violence is not merely a domestic problem; instead, it directly and indirectly affects employers' bottom line.[100] While some employers are able to address domestic violence with internal policies, those

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[96] *See* Goldscheid, *supra* note 30, at 120.

[97] *See* Karin, *supra* note 6, at 418.

[98] Karin, *supra* note 6, at 399–400 ("Making this change would broaden the conversation on this issue beyond the current focus on expanding protections for victims . . . ."); Widiss, *supra* note 6, at 693–94 (suggesting an alternative to a cost-benefit analysis).

[99] Widiss, *supra* note 6, at 685–86.

[100] *See supra* Part I.A.

policies represent an extra cost of business.[101] Further, resource-poor businesses are unlikely to assume the cost of broad employment protections in light of an unregulated market.[102] There are also likely shortsighted employers that would rather avoid the short-term costs of an employment policy than reap the benefit of ameliorating the effect of domestic violence on their workplace. Given these concerns, scholars have asserted that employers have an interest in federal legislation that normalizes the cost of providing victim-employees with some form of protection.[103] The question then becomes how should the law address these issues?

There is a valid question as to whether this issue should be resolved at the state or federal level.[104] So far, legislation has only been passed at the state level.[105] In recent years federal bills have been introduced into both houses of Congress, but these attempts have not progressed.[106] If employers and their advocates were to begin to advocate for limited employment protections for victims of domestic violence, they would need to determine whether their interests are better served by a federal or state

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[101] *See supra* notes 88–96 and accompanying text.

[102] *See, e.g.*, Widiss, *supra* note 6, at 726 (arguing that in an unregulated market—one without a statute that requires an employer to provide some form of protection to employees—"certain costs are too great for at least some employers to bear"); *see also supra* notes 97, 98 and accompanying text.

[103] Widiss, *supra* note 6, at 726 ("Recognizing the larger public interests at stake, legislatures should consider public funding, or other cost-spreading mechanisms, to supplement costs that they deem unreasonable for either individual employers or individual employees to bear as a result of a perpetrator of domestic violence's criminal actions.").

[104] *See* Karin, *supra* note 6, 379 (arguing that a federal statute is better suited to address the problem).

[105] Parts III, IV, and V of this Note describe the statutes that have been passed at the state level.

[106] *See* Robin R. Runge, *The Evolution of A National Response to Violence Against Women*, 24 HASTINGS WOMEN'S L.J. 429, 453 (2013) (describing early efforts to have the Violence Against Women Act include employment protections for victims of domestic violence); Widiss, *supra* note 6, at 703 n.113 (describing more recent federal bills that would require employers to grant employment protections for victims of domestic violence).

statute. This Note avoids that question and instead focuses only on the issue at a federal level.[107] As the 2013–14 New York state legislative session shows,[108] no matter the forum, because of the different approaches for dealing with the issue, employers have room to advocate for some laws instead of others.

Federal law can address the issue either be applying existing law to victims of domestic violence or with new legislation. The first solution—to apply or amend existing federal employment protection laws so that they cover victims of domestic violence—is inadequate. Over the last several years, scholars and commentators have theorized how existing federal law such as Title VII of the Civil Rights Act of 1964 ("Title VII"),[109] the Americans with Disabilities Act ("ADA"),[110] and the Family Medical Leave Act ("FMLA")[111] can be interpreted or amended to provide protections for domestic violence.[112] Scholars have generally concluded that as these laws are currently drafted, they are incapable of addressing the myriad of issues presented by domestic violence in the workplace.[113]

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[107] *Cf.* Karin, *supra* note 6, at 379–80, 397–98, 399–400, 428. Karin advocates that a "federal law would set a national standard to address a national problem." *Id.* at 397.

[108] *See supra* notes 17–19 and accompanying text.

[109] Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e17 (2012).

[110] Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2012).

[111] Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601–2654 (2012).

[112] *See, e.g.*, Denise R. J. Finlay, *Employment Discrimination Against Domestic Violence Survivors: Strengthening the Disparate Impact Theory*, 88 N.D. L. REV. 989 (2012) (arguing discrimination against victims of domestic violence is actionable under disparate treatment theory of Title VII because domestic violence is gendered violence); Stone, *supra* note 20, at 736 (2010) (calling for an amendment to FMLA that would trigger the same entitlement to leave for an incident of domestic violence as the birth or adoption of a child).

[113] *See, e.g.*, Goldscheid, *supra* note 30, at 123 (arguing that even when Title VII is seen as protecting victims of domestic violence from gender-stereotype based discrimination, Title VII as it has been interpreted is incapable of protecting against subtle forms of gender bias which drive many

A survey of case law shows that when courts attempt to apply existing federal law to the issues presented by domestic violence, those laws are inadequate. For example, in *O'Donnell v. Gonzales*,[114] the U.S. District Court of Massachusetts permitted an employee of the Federal Bureau of Prisons to survive summary judgment on an ADA claim that alleged the employer's failure to accommodate the victim's Post-Traumatic Stress Disorder ("PTSD") and depression.[115] Plaintiff-employee had produced documentation both of her status as a victim of domestic violence and her diagnosis of PTSD and depression.[116] Her abuser was a coworker and ex-paramour.[117] When the Bureau found out about the violence, management assigned the victim-employee to a 6:00 AM-to-2:30 PM shift and the abuser-employee to a 4:00 PM-to-midnight shift.[118] Considering this insufficient, and after an incident where her abuser spray-painted threats and derogatory statements outside of plaintiff's work area,[119] plaintiff requested accommodation for her depression and PTSD in the form of either an unspecified period of leave or the removal of her ex-paramour from the work force.[120] The court held that an unspecified period of leave was unreasonable, but that plaintiff had established a question of material fact as to whether, under the ADA, it was reasonable for one employee to request the removal of another employee.[121]

The *O'Donnell* case provides an example of how incompatible the ADA may be with issues of domestic violence. Without a statute that expressly limits a court's discretion of what constitutes a reasonable accommodation in the particular context of domestic violence, employers could be found liable

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of the adverse employment actions taken against victim-employees).

[114] O'Donnell v. Gonzales, Civil Action No. 04-40190-FDS, 2007 WL 1101160 (D. Mass. Apr. 2, 2007).

[115] *Id.* at *11.

[116] *Id.* at *2.

[117] *Id.* at *1.

[118] *Id.* at *2.

[119] *O'Donnell*, 2007 WL 1101160 at *4.

[120] *Id.* at *8.

[121] *Id.* at *8, *10–11.

under the ADA for failure to drastically reorganize their workforce.[122] A reasonable accommodation statute better serves employers when it is drafted to clearly outline what employers are required to do to reasonably accommodate victims of domestic violence.

More recently, the agencies that enforce federal employment statutes—the Equal Employment Opportunity Commission ("EEOC")[123] and the United States Department of Labor ("U.S. DOL")[124]—have issued specific guidance for when existing federal laws may trigger employer liability.[125] Neither of these agency Fact Sheets creates new law or extends existing equal employment law; instead, they discuss the application of existing doctrine to fact patterns that include victims of domestic violence.[126]

On November 1, 2012, the EEOC issued a Fact Sheet describing certain employer actions that could incur liability under Title VII and/or the ADA.[127] The EEOC cautions against actions such as termination of a woman because of the "drama [she may] bring to the workplace" or rejection of a qualified

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[122] *Cf.* CAL. LAB. CODE § 230(f)(2) (West 2014) (requiring state employers to provide reasonable accommodation of victim-employees). As discussed below this statute constrains judicial discretion by providing a list of examples of reasonable accommodations. *See infra* note 264–88 and accompanying text.

[123] The federal agency that enforces both the ADA and Title VII of the Civil Rights Act of 1964.

[124] The federal agency that enforces FMLA.

[125] U.S. EQUAL EMP'T OPPORT'Y COMM'N, CCH-EPGD P 5354, *Questions and Answers: The Application of Title VII and the ADA to Applicants or Employees Who Experience Domestic or Dating Violence, Sexual Assault, or Stalking* (2012), 2013 WL 45267 [hereinafter EEOC Fact Sheet]; DEP'T OF LABOR, Frequently Asked Questions about the Revisions to the Family and Medical Leave Act, *available at* http://www.dol.gov/whd/fmla/finalrule/NonMilitaryFAQs.pdf [hereinafter DOL FAQ].

[126] Mary Swanton, *EEOC Warns Employers of Discrimination Related to Domestic Violence*, INSIDE COUNSEL (Jan. 2013), *available at* http://www.insidecounsel.com/2012/12/21/eeoc-warns-employers-of-discrimination-related-to. *See also* DOL FAQ, *supra* note 125.

[127] EEOC Fact Sheet, *supra* note 125.

male applicant who, as a victim, is viewed as weak.[128] The Fact Sheet next provides examples of how workplace sexual harassment of and sexual violence against victims of domestic violence could incur employer liability under Title VII.[129] The Fact Sheet also describes how certain employer actions can violate the ADA, such as passing over an applicant after learning of her counseling because of prior violence, or failing to intervene when coworkers tease an employee on account of his violence-related scars.[130] Finally, the Fact Sheet describes how failure to provide reasonable accommodation to a victim-employee may incur liability under the ADA. Examples include when an employee "requests a schedule change or unpaid leave" on account of depression resulting from former violence.[131] However, the Fact Sheet fails to address whether courts may, as the *O'Donnell* court did, consider the scope of reasonable accommodation and find fault with companies who fail to provide large-scale accommodations, such as staff reorganization. As it is written, the EEOC Fact Sheet provides only factual instances that may give rise to a claim, but it avoids the more difficult question of what constitutes the reasonable accommodation of victim-employees.

The U.S. DOL has issued similar guidance for when and how the FMLA can be used by victims of domestic violence in limited factual scenarios.[132] This guidance states, "FMLA leave may be available to address certain health-related issues resulting from domestic violence."[133] However, only "serious health

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[128] *Id.* at *1–2.

[129] *Id. at* *2. This application comes as no surprise, as Title VII has long been held to prohibit sexual harassment of and sexual violence against any employees. *See, e.g.*, Meritor Savs. Bank v. Vinson, 477 U.S. 57, 73 (1986).

[130] EEOC Fact Sheet, *supra* note 125, at *2.

[131] *Id.* The *O'Donnell v. Gonzales* case provides an example of how this could trigger employer liability. *See* O'Donnell v. Gonzales, Civil Action No. 04-40190-FDS, 2007 WL 1101160 (D. Mass. Apr. 2, 2007).

[132] *See* DOL FAQ, *supra* note 125, at 10.

[133] *Id.* Just as with the EEOC fact sheet, this provides examples of applicability in the context of victim-employees: "[A]n eligible employee may be able to take FMLA leave if he or she is hospitalized overnight or is

conditions" are likely to trigger entitlement to leave,[134] and thus the FMLA only has a limited applicability to the issues raised by domestic violence.[135] Domestic violence affects employers in direct and indirect ways, and FMLA's application to domestic violence will likely cover only the most egregious examples of direct effects.[136] It is unlikely that even "broken wrist[s] or black eye[s]" will be covered by the most liberal interpretation of FMLA.[137] Furthermore, the FMLA cannot be easily read to permit leave to separate from or bring criminal actions against an abuser.[138] Even at its most broad, the FMLA appears incapable of providing leave to attend court hearings or stay at a domestic violence shelter.[139] Thus, the FMLA is incapable of providing leave for the employee determined to break the cycle of abuse. Employers looking for a federal solution to the indirect effects of domestic violence—like absenteeism and diminished productivity—must look beyond the FMLA.

Review of these Fact Sheets shows two things. First, employers should take note that there appears to be a shift in federal policy toward greater protections for victims of domestic violence. Second, these Fact Sheets create no new law and merely apply existing doctrine to limited factual scenarios. For

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receiving certain treatment for post-traumatic stress disorder that resulted from domestic violence." *Id.*

[134] *See* 29 U.S.C. §§ 2612 (a)(1)(A)–(D) (2009) (listing the reasons for leave, with "serious health condition" being the only applicable reason). Serious health conditions include only injuries that require hospitalization or continuing treatment. *Id.* § 2611(11).

[135] *See* Hobday, *supra* note 84, at 22 (arguing that "none of the current federal employment laws directly applies to [victim-employees]").

[136] *See* Stone, *supra* note 20, at 737 (positing that even "a broken wrist or black eye" may not be serious enough to meet the statute's requirement of a *serious medical condition*).

[137] *Id.* at 737.

[138] *Id.*

[139] *See, e.g.*, Stone, *supra* note 20, at 736–37 (arguing that, because the only way for a victim to trigger a right to leave under FMLA is with a serious medical condition, "employees are not entitled to the leave that could allow them the time to take the first corrective steps in leaving their abusive partner").

years commentators have agreed that the application of existing federal laws to domestic violence will fail to address many issues caused by domestic violence in the workplace.[140] The Fact Sheets issued by the agencies that enforce these statutes confirm these concerns because the Fact Sheets provide solutions to only a very limited number of factual scenarios. Instead of allowing employers and domestic violence victims to continue to suffer under current inadequate federal law, Congress should pass new legislation that is more directly targeted toward limiting domestic violence's effect on the workplace.[141]

This legislation could be modeled after one of the current statutory approaches that exist at the state level: the leave approach, the antidiscrimination approach, and/or the reasonable accommodation approach.[142] The remainder of this Note explores the strengths and weaknesses of these approaches, as well as specific ways that statutes can be drafted so as to ensure that employers' concerns are being addressed without too great of a cost.

III. THE STATUTORY UNPAID LEAVE APPROACH

A. The Approach Generally

At the state level there are a variety of leave laws that may apply to victim-employees. By far the most ubiquitous of these statutes are "crime leave laws."[143] These laws, present in thirty-three states, require employers to permit leave to victims of

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[140] *See supra* notes 107, 113 and accompanying text.

[141] *See* Widiss, *supra* note 6, at 672; *see also* Runge, *Employment Needs Update*, *supra* note 21, at 23 (chronicling legislative attempts to craft new federal legislation that would apply directly to victims of domestic violence).

[142] This Note explores only these three approaches. For a discussion of other approaches, including employer protection orders, unemployment benefits for employee-victims, and the common-law exception to the at-will doctrine finding that the termination of a victim-employee because of her status violates public policy, see generally Karin, *supra* note 6.

[143] Runge, *Employment Needs Update*, *supra* note 21, at 13, 15.

crimes.[144] These laws, which were not enacted to specifically protect victims of domestic violence,[145] are imperfect. Crime leave laws only provide victim-employees with leave to attend court,[146] and therefore cannot be used to secure leave to deal with other domestic violence issues such as seeking medical care or finally new housing.[147]

Currently, thirteen states[148] offer *specific* protections to

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[144] These states are Alabama, ALA. CODE § 15-23-81 (2014), Alaska, ALASKA STAT. § 12.61.017 (2012); Arizona, ARIZ. REV. STAT. ANN. § 13-4439 (2012); Arkansas, ARK. CODE ANN. § 16-90-1105 (LexisNexis 2014); California, CAL. LAB. CODE 230.2(b) (West 2014); Colorado, COLO. REV. STAT. § 24-4.1-303(8) (2014); Connecticut, CONN. GEN. STAT. ANN. § 54-85(b) (2012); Delaware, DEL. CODE ANN. tit. 11, § 9409 (2014); Florida, FLA. STAT. § 741.313 (2013); Georgia, GA. CODE ANN. § 34-1-3 (2014); Hawaii, HAW. REV. STAT. § 621-10.5 (2014); Iowa, IOWA CODE § 915.23 (2012); Maryland, MD. CODE ANN. CRIM. PROC. § 11-102 (2011); Massachusetts, MASS. GEN. LAWS ANN. ch. 258B, § 3 (2013); Michigan, MICH. COMP. LAWS § 780.762 (2014); Minnesota, MINN. STAT. ANN. § 611A.036 (West 2014); Mississippi, MISS. CODE ANN § 99-43-45 (West 2012); Missouri, MO. REV. STAT. § 595.209(1)(14) (West 2012); Montana, MONT. CODE ANN. § 46-24-205(3) (West 2012); Nevada, NEV. REV. STAT. § 50.070 (2013); New Hampshire, N.H. REV. STAT. ANN. § 275:62 (2010); New York, N.Y. PENAL LAW § 215.14 (McKinney 2014); North Dakota, N.D. CENT. CODE § 27-09.1-17 (2013); Ohio, OHIO REV. CODE ANN. § 2930.18 (LexisNexis 2013); Pennsylvania, 18 PA. STAT. ANN. § 4957 (2013); Rhode Island, R.I. GEN. LAWS § 12-28-13 (2010); South Carolina, S.C. CODE ANN. § 16-3-1550 (2011); Utah, UTAH CODE § 78B-1-132 (2012); Vermont, VT. STAT. ANN. tit. 13, § 5313 (2010); Virginia, VA. CODE ANN. §§ 18.2-465.1 (2014); 40.1-28.7:2 (7)(B) (2014); Washington, WASH. REV. CODE § 49.76.120 (2013); Wisconsin, WIS. STAT. ANN. § 103.87 (West 2013); and Wyoming, WYO. STAT. ANN. § 1-40-209 (2013).

[145] Runge, *Employment Needs Update*, *supra* note 21, at 13, 15.

[146] *See generally* LEGAL MOMENTUM STATE LAW GUIDE, *supra* note 6.

[147] Runge, *Employment Needs Update*, *supra* note 21, at 15.

[148] These states are California, CAL. LAB. CODE § 230.1 (West 2014), Colorado, COLO. REV. STAT. § 24-34-402.7 (2013); Connecticut, CONN. GEN. STAT. ANN. § 31-51ss(b) (West 2011); Florida, FLA. STAT. § 741.313 (2013); Hawaii, HAW. REV. STAT § 378-72(a) (2014); Illinois, 820 ILL. COMP. STAT. 180/20 (2012); Kansas, KAN. STAT. ANN. § 44-1132(d) (2013); Maine, ME. REV. STAT. til. 26 § 850 (2007); New Jersey, N.J.S.A. 34:11C-1 (2013); New Mexico, N.M. STAT. ANN. § 50-4A-3 (2012); North Carolina, N.C. GEN. STAT. § 50B-5.5 (2012); Oregon, OR. REV. STAT. §

victims of domestic violence by requiring their employer to permit victims to take leave to address economic, social, and psychological problems created by domestic violence situations.[149] The unpaid leave statutes vary in their applicability to employers and employees.[150] Some statutes apply, by their terms, to any conceivable employer.[151] Other statutes limit jurisdiction to either a broad group of employers[152] or only larger employers.[153] Some statutes limit their applicability to employees who have been employed for a certain amount of time, though the majority of statutes include most employees within the jurisdiction of their leave laws.[154] Other statutes include no jurisdictional hooks, and therefore appear to apply to every employer-employee relationship.[155]

659A.272 (2014); and Washington, WASH. REV. CODE § 49.76.030 (2013).

[149] *See generally* LEGAL MOMENTUM STATE LAW GUIDE, *supra* note 6.

[150] *See generally id.*

[151] *See, e.g.*, N.M. STAT. ANN. § 50-4A-2(D) (2012) ("'Employer' includes a person, a firm, a partnership, an association, a corporation, a receiver or an officer of the court of New Mexico, a state agency, or a unit of local government or a school district.").

[152] *See, e.g.*, CONN. GEN. STAT. ANN. § 31-51ss (a)(1) (2011) ("'Employer' means a person engaged in business who has three or more employees, including the state and any political subdivision of the state."); OR. REV. STAT. § 659A.270(1) (2014) (covering employers who "employ[] six or more individuals).

[153] *See, e.g.*, COLO. REV. STAT. § 24-34-402.7(b) (2013) (applying only to employers of 50 or more); FLA. STAT. § 741.313(3) (2013) ("This section applies to an employer who employs 50 or more employees.").

[154] *See, e.g.*, COLO. REV. STAT. §§ 24-34-402.7(b) (2013) (applying only to "employees who have been employed with the employer for twelve months or more); FLA. STAT. § 741.313(3) (2013) ("This section applies to . . . an employee who has been employed by the employer for 3 or more months."). Compare those against CONN. GEN. STAT. ANN. § 31-51ss(a)(2) (2011) and N.M. STAT. ANN. § 50-4A-2(C) (2012) each defining "employee" to mean a person who is employed by or engaged in the service of the employer. *See also* OR. REV. STAT. ANN. § 659A.270(2) (2011) *as amended by* 2013 Oregon Laws Ch. 321 (H.B. 2903) (originally requiring the employee work "in excess of twenty-five hours for at least 180 days," and now applying to any employee who is a victim).

[155] *See, e.g.*, KAN. STAT. ANN. §§ 44-1131–32 (2013); ME. REV. STAT. tit. 26 § 850 (2007); N.C. GEN. STAT. § 50B-5.5 (2012).

Unpaid leave statutes also vary greatly with regard to the maximum amount of time an employer must grant a victim-employee. Some statutes require employers to only grant three days,[156] while others require close to two weeks.[157] Maine, North Carolina, Oregon, and Washington do not place a specific cap on the amount of unpaid leave they require an employer to permit but rather require the employer to grant a "reasonable amount of time."[158] Kansas, on the other hand, sets neither a numerical nor a reasonable cap on the amount of leave an employee may take.[159]

B. Potential Concerns with the Approach and Possible Solutions

The statutory leave approach presents several potential problems for employers but there are rejoinders to each of these

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[156] *See, e.g.*, COLO. REV. STAT. §§ 24-34-402.7(a) (2013) (requiring employers to permit up to three days of leave); FLA. STAT. § 741.313(3) (2013) (requiring "up to 3 working days of leave from work in any 12-month period").

[157] *See, e.g.*, CONN. GEN. STAT. ANN. § 31-51ss(b) (2011) (permitting "employer to "limit unpaid leave . . . to twelve days during any calendar year"); N.M. STAT. ANN. § 50-4A-2(B) (2012) (requiring leave "up to eight hours in one day" for "up to fourteen days in any calendar year").

[158] *See* ME. REV. STAT. tit. 26 § 850(1) (2007) (requiring "reasonable and necessary leave from work"); N.C. GEN. STAT. § 50B-5.5 (2012) (prohibiting discrimination against an employee who "took reasonable time off from work"); OR. REV. STAT. § 659A.272 (2014) ("a covered employer shall allow an eligible employee to take reasonable leave" for enumerated reasons); WASH. REV. CODE § 49.76.030 (2013) (requiring "reasonable leave from work, intermittent leave, or leave on a reduced leave schedule"); *see also* GUAM CODE ANN. 22-3-3401–3405 (2013) (requiring a reasonable amount of time). The benefits of this approach are discussed in the next section.

[159] *See* KAN. STAT. ANN. § 44-1132 (2013) ("An employer may not discharge or in any manner discriminate or retaliate against an employee who is a victim of domestic violence or a victim of sexual assault for taking time off from work to [list of permissible reasons]."). The lack of statutory clarity in how much time is required begs the question of what an employer would be required to provide.

problems.

The most intuitive concern is that employees will abuse the law and take leave for unrelated reasons.[160] Some statutes have effectively addressed this concern with two inter-connected provisions. The first permits leave only for a finite list of tasks such as: obtaining relief from the legal system,[161] seeking medical attention related to injuries,[162] seeking services from a victims' services organization,[163] seeking new or safer housing,[164] and receiving counseling.[165] The list is essentially the same in

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[160] *See* Robin R. Runge, *Redefining Leave from Work*, 19 GEO. J. ON POVERTY L. & POL'Y 445, 480 (2012) ("One of the primary complaints of employers in opposition to the FMLA was the cost of hiring, training, and maintaining staff to ensure that the reasons that employees were requesting to take FMLA leave were permitted under the statute."); *see also* Haase, *supra* note 55, at 351 (describing how the "argument is unrealistic in the case of *unpaid* leave" (emphasis added)).

[161] *See, e.g.*, FLA. STAT. § 741.313(2)(b)(5) (2013) (permitting leave to "seek legal assistance in addressing issues arising from the act of domestic violence"); KAN. STAT. ANN. § 44-1132(a)(4) (2013) (permitting leave to "make court appearances in the aftermath of domestic violence"); N.M. STAT. ANN. § 50-4A-2(B) (2012) (permitting leave "to obtain an order of protection or other judicial relief . . . or to meet with law enforcement officials, to consult with attorneys or district attorneys' victim advocates or to attend court proceedings").

[162] *See, e.g.*, COLO. REV. STAT. § 24-34-402.7(1)(a)(II) (2013) (permitting employee to "[o]btain[] medical care or mental health counseling . . . to address physical or psychological injuries."); OR. REV. STAT. §659A.272(2) (2014) (permitting employee to "seek medical treatment for or to recover from injuries").

[163] *See, e.g.*, 820 ILL. COMP. STAT. 180/20(a)(1)(B) (2012) (permitting leave to "obtain[] services from a victim services organization"); ME. REV. STAT. tit. 26 § 850(1)(C) (2007) (permitting leave to obtain necessary services to remedy a crisis caused by domestic violence).

[164] *See, e.g.*, COLO. REV. STAT. § 24-34-402.7(1)(a)(III) (2013) (permitting the employee leave to either seek new housing or "mak[e] his or her home secure from the perpetrator"); 820 ILL. COMP. STAT. 180/20(a)(1)(D) (2012) (permitting "participating in safety planning, temporarily or permanently relocating, or taking other actions to increase . . . safety"); OR. REV. STAT. §659A.272(3) (2014) (permitting leave "to relocate or take steps to secure an existing home").

[165] *See, e.g.*, COLO. REV. STAT. § 24-34-402.7(1)(a)(II) (2013); CONN.

each law that enumerates permissible reasons.[166] The second provision requires the employee to provide certification that the leave was for a permissible reason.[167] Where an employee attempts to abuse statutory leave laws, the employer will likely not be prohibited from disciplinary action.[168] As long as a statute only grants leave for an enumerated list of tasks and requires the employee to prove that the leave was correctly used, employers should not expect extensive employee dishonesty.

Another concern that employers have with the leave approach is that it forces employers to lose productive hours from their employees.[169] But scholar David Haase correctly points out that, for family and medical leave, in the long run the opposite may actually be true.[170] When no leave requirement is in place, managers make decisions regarding leave requests

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GEN. STAT. ANN. § 31-51ss(b)(1) (2011); HAW. REV. STAT. § 378-72(a)(3) (2014); 820 ILL. COMP. STAT. 180/20(a)(1)(C) (2012); OR. REV. STAT. § 659A.272(3) (2014).

[166] *See, e.g.*, CAL. LAB. CODE §§ 230.1(a)(1)–(4) (West 2014); COLO. REV. STAT. §§ 24-34-402.7(1)(a)(I)–(IV) (2013); CONN. GEN. STAT. ANN. §§ 31-51ss(b)(1)–(4) (2011); FLA. STAT. §§ 741.313(2)(b)(1)–(5) (2013); HAW. REV. STAT. §§ 378-72(a)(1)–(5) (2014); KAN. STAT. ANN. §§ 44-1132(a)(1)–(4) (2013); ME. REV. STAT. til. 26 §§ 850(1)(A)–(C) (2007).

[167] *See, e.g.*, CAL. LAB. CODE § 230.1(b) (West 2014) (permitting employers to require notice before leave, or upon employee's return, a police report, court order, or certification by medical, legal, or rights organization professional, that tends to show that advanced notice was not feasible); HAW. REV. STAT. §§ 378-72(b)–(d) (2014) (permitting employers to require certification from a medical care professional, attorney, or employee of victims' rights organization).

[168] For example, in *Sustatia v. Shannon*, 966 N.E.2d 365 (Ill. App. Ct. 2012), the Appellate Court of Illinois for the Second District held that an employer could terminate a victim-employee after she was unable to provide documentation that her leave was for one of the statutorily enumerated reasons. It is important to note that the court reached this holding even in the face of arguably vague statutory language. *Id.* at 371.

[169] A similar criticism was made against the FMLA. Haase, *supra* note 55, at 349 (noting that "it may not make economic sense for an employer to make sacrifices for employees").

[170] *Id.*

based on short-term disruptions of work.[171] However, when a leave requirement is in place the potential for shortsighted management decisions is taken off the table, and employees are granted leave for important life events, increasing their loyalty and productivity over time.[172] This argument is particularly salient when discussing domestic violence. As discussed earlier, domestic violence causes loss of productivity in victim-employees who are absent from or stalked at work.[173] The ability to take leave permits victim-employees to secure economic independence from their abusers,[174] and therefore increases their long-term productivity and full potential over time.[175] Further, leave laws can be drafted so as to require victim-employees to provide advanced notice[176] so that the employer can adjust resources. Thus, there are several ways that leave laws can be drafted so as to alleviate employers concern about lost productive hours.

Another concern is that in order to comply with unpaid leave statutes, employers must expend additional administrative

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[171] *Id.*

[172] *Id.*

[173] *See supra* Part I.A.

[174] *See supra* Part I.A.

[175] *See* Reynolds v. Fraser, 781 N.Y.S.2d 885, 889 (N.Y. Sup. Ct. 2004) ("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.").

[176] *See, e.g.*, COLO. REV. STAT. § 24-34-402.7(2)(a) (2013) (permitting employers to condition leave on "the appropriate advance notice of such leave as may be required by the employer's policy"). Some statutes waive the notice requirement when leave is not foreseeable. *See, e.g.*, OR. REV. STAT. § 659A.280 (2014). Colorado and Florida will not allow employers to require notice "in cases of imminent danger to the health or safety of the employee." COLO. REV. STAT. § 24-34-402.7(2)(a) (2013); FLA. STAT. § 741.313(4)(a) (2013). An even more refined solution to the issue can be found in the newly enacted California Labor Code. *See* CAL. LAB. CODE § 230.1 (West 2014). California requires advance notice, *see id.* § 230.1(b)(1), unless advance notice is not feasible at which point the employer may subsequently require certification that the unscheduled leave was appropriate, *see id.* § 230.1(b)(2). This certification can be in the form of a (1) police report, (2) a court order, or (3) documentation from a medical professional. *See id.* §§ 230.1(b)(2); 230(b)(2)(A)–(C).

resources to keep more thorough records in order to document: which employees are victims, how many days those employees have taken, and what the leave was used for.[177] There are two rejoinders to this concern of administrative costs. First, empirical evidence suggests that the costs of administrating leave laws are minimal.[178] In 1991, when President George H.W. Bush first vetoed the FMLA based, in part, on his concern over increased administration costs,[179] critics correctly countered that the concern was not compelling because in states that had already enacted family leave requirements, only six percent of employers reported an increase in administrative costs and only four percent reported an increase in training and compliance costs.[180] Consider, too, that in terms of a leave law for victim-employees, the administration costs would likely be less because the FMLA requires employers to provide up to twelve weeks of leave,[181] whereas most leave laws for domestic violence only require between three and fourteen days.[182] It is even possible that the additional administrative costs may be nil, because

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[177] *See* Haase, *supra* note 55, at 348 (describing employer's similar concern with the passage of the FMLA). In fact, employers' concerns about the costs that they would incur as the result of a leave requirement prompted President Bush to veto the Family and Medical Act of 1990. Maria L. Ontiveros, *The Myths of Market Forces, Mothers and Private Employment: The Parental Leave Veto*, 1 CORNELL J.L. & PUB. POL'Y 25, 25 (1992). Nevertheless, the law was passed in 1993 over these objections. 29 U.S.C. §§ 2601–2654 (1993).

[178] *See* Ontiveros, *supra* note 177, at 31.

[179] *Id.* at 25.

[180] *Id.* at 31 n.27.

[181] 29 U.S.C. § 2612(a)(1) (2012). Note, this provision has been held unconstitutional when used in a civil suit against a state employer for monetary damages when the state has not consented to such a suit. *See* Coleman v. Court of Appeals of Md., 132 S. Ct. 1327 (2012).

[182] *See, e.g.*, COLO. REV. STAT. §§ 24-34-402.7(1)(a) (2013) (requiring employers to permit up to three days of leave); CONN. GEN. STAT. ANN. § 31-51ss(b) (2011) (permitting "employer to "limit unpaid leave . . . to twelve days during any calendar year"); FLA. STAT. § 741.313(2)(a) (2013) (requiring "up to 3 working days of leave from work in any 12-month period"); N.M. STAT. ANN. § 50-4A-2(B) (2012) (requiring leave "up to eight hours in one day" for "up to fourteen days in any calendar year").

employers are already required to keep records of leave under the FMLA,[183] and therefore already have a system for documenting leave.

The second rejoinder to administrative costs is that these laws can be drafted in a way that permits employers to require certification that the employee is a victim and documentation that the leave was for a statutorily defined reason,[184] as well as to require the employee to provide advance notice of the leave.[185] These notice requirements should defer some administrative costs by shifting the record-keeping requirements onto the victim-employee, and thus deal with employer concerns.

Another concern is that smaller employers will be disproportionately affected by statutory leave requirements.[186] Exempting smaller employers from the leave requirement will solve this issue. The FMLA, for example, exempts employers who employ less than fifty employees.[187] Many of the states that have adopted statutory leave laws have similarly limited their applicability to larger employers,[188] on the basis that these resource-rich employers are more capable of assuming the cost of granting leave.[189] Other states take a different approach and require employers of different sizes to grant different periods of

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[183] Haase, *supra* note 55, at 348.

[184] *See, e.g.*, Sustatia v. Shannon, 966 N.E.2d 365, 371–72 (Ill. App. Ct. 2012) (holding that Illinois leave law permitted the employee to certify that she was a victim as well as require her to provide documentation that she used leave for one of the statutorily enumerated reasons).

[185] *See supra* note 176 and accompanying text (describing notice requirements). California's approach appears most tailored to the emergent nature of domestic violence and employers' interests in notice and record keeping). *See* CAL. LAB. CODE §§ 230(d)(2)(A)–(C) (West 2014).

[186] *See* Hilary Mattis, Comment, *California's Survivors of Domestic Violence Employment Leave Act: The Twenty-Five Employee Minimum Is Not A Good Rule of Thumb*, 50 SANTA CLARA L. REV. 1319, 1338 (2010).

[187] The FMLA applies only to employers who employ more than fifty employees. 29 U.S.C. § 2611(4)(A)(i) (2012).

[188] *See supra* Part III.A.

[189] *See* Widiss, *supra* note 6, at 700–05.

leave.[190] It should also be noted that the "cost" imposed by domestic violence leave laws is almost always less than the twelve-week "cost" imposed by the FMLA.[191] As such, it may not be as important for resource-poor, smaller businesses to advocate for the small-employer exception, as it was when employers raised the argument against the more "costly" FMLA.[192] Regardless, statutory leave laws prove amenable to the concern of disproportionate impact by either exempting smaller employers or by scaling required leave to employer size.

Some states have adopted a statutory leave statute that requires employers to grant a reasonable period of leave instead of a statutorily defined period. This hybrid approach was adopted by Hawaii, Oregon, and Maine.[193] The reasonable leave approach presents an alternative solution to the cost-bearing problem. Oregon, for example, requires covered employers to grant "reasonable leave"[194] but also permits employers to "limit the amount of leave if such leave creates an undue hardship on the employer's business."[195] As such, Oregon permits an

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[190] *See, e.g.*, HAW. REV. STAT. § 378-72(a) (2014) (requiring employers of fifty or more to grant up to thirty days and smaller employers to grant up to five). The problem with this approach is that it seems arbitrary that one employee would create such a difference in requirements. The "reasonable leave" approach, described shortly, may provide a similar, but less arbitrary approach.

[191] Only Illinois requires up to 12 weeks of leave. 820 ILL. COMP. STAT. 180/20(a)(2) (2009). As discussed most states require between three days and two weeks. It should be noted that the New York Senate and Assembly are considering companion bills that would require employers to provide up to 90 days of leave to victims. *See* Nurse, *supra* note 17; *see also* A. 7029, 2013 N.Y. Assemb. (Apr. 30, 2013); S. 2509, 2013 N.Y. Senate. (Apr. 15, 2013).

[192] Mattis, *supra* note 186, at 1338. Indeed, this is another example of how path dependence may be guiding employers' opposition to employment protections for domestic violence even where there are distinct differences between these laws and their predecessors.

[193] HAW. REV. STAT. § 378-72(b) (2014); ME. REV. STAT. tit. 26 § 850(2)(A) (2007); OR. REV. STAT. § 659A.272 (2014).

[194] OR. REV. STAT. § 659A.272 (2014).

[195] *Id.* § 695A275(1). *See also* ME. REV. STAT. tit. 26 § 850(2)(A) (2007) (providing a similar limit).

employer's size to factor into how much leave it is required to provide.[196] Hawaii resolves the proof of reasonableness issue by requiring the employee to submit a statement by a professional that certifies the need for and reasonableness of the requested time.[197]

In sum, the statutory leave approach has proven amenable to employers' cost-bearing concerns first because often the leave laws are paired with an exemption for smaller resource-poor businesses. Second, by requiring the employee to provide documentation that the leave was taken for an enumerated reason, a leave statute can ensure that the employer is only providing leave for employees who are attempting to resolve the issue of domestic violence in her life. Third, while a leave statute would certainly require the employer to assume the cost of providing leave, the potential long-term gain of permitting leave—allowing the employee to become independent from her abuser and thus more productive—greatly overshadows the short-term costs. Furthermore, as is the case in Oregon, statutes can provide that an employer is only required to provide reasonable leave that does not present an undue burden. The reasonable leave approach ensures that the short-term costs of leave are less than the long-term benefits. Thus, employers should consider supporting a federal leave requirement. Provided that a leave requirement statute is drafted as described above, a leave requirement would benefit employers without imposing excessive costs.

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[196] In fact, the Oregon leave law is a hybrid of the statutory leave approach and the reasonable accommodation approach and includes all the cost-detriment balancing benefits associated with the reasonable accommodation approach described *infra* Part V.

[197] *See* HAW. REV. STAT. § 378-72(b) (2014) ("'Reasonable period of time' . . . means: (1) Where due to physical or psychological injury . . . the period of time determined to be necessary by the attending health care provider . . . ; and (2) Where due to an employee's need to take legal or other actions . . . the period of time. . . [determined necessary] by the employee's or employee's minor child's attorney . . . ."); *id.* (c)–(d) (permitting employer to require certified documentation from the involved medical professional).

IV. THE ANTIDISCRIMINATION APPROACH

A. The Approach Generally

The antidiscrimination approach essentially treats victim of domestic violence as a status, and prohibits employers from discriminating against victim-employees in a term or condition of their employment.[198] Only five states, California,[199] Hawaii,[200] Illinois,[201] New York,[202] and Oregon,[203] have adopted the antidiscrimination approach. The Illinois Victims' Economic Security and Safety Act ("VESSA") provides a detailed example of how the antidiscrimination statutes operate:

> An employer shall not fail to hire, refuse to hire, discharge, constructively discharge, or harass any individual, otherwise discriminate against any individual with respect to the compensation, terms, conditions, or privileges of employment of the individual, or retaliate against an individual in any form or manner . . . because: (1) the individual involved: (A) is or is perceived to be a victim of domestic or sexual violence . . . .[204]

However, antidiscrimination statutes are not well suited to addressing the issue of domestic violence. As a preliminary matter, it is worthwhile to note that New York is the *only* state to have adopted *only* the antidiscrimination approach; each of the other four states (California, Hawaii, Illinois, and Oregon)

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[198] *See, e.g.*, N.Y. EXEC. LAW § 296 (McKinney 2010) ("It shall be an unlawful discriminatory practice: (a) [f]or an employer . . . because of an individual's . . . domestic violence victim status, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.").

[199] CAL. LAB. CODE §§ 230.1(a)–(e) (West 2014).

[200] HAW. REV. STAT. § 378-2(a) (2014).

[201] 820 ILL. COMP. STAT. 180/30 (2012).

[202] N.Y. EXEC. LAW § 296 (McKinney 2010).

[203] OR. REV. STAT. ANN. §§ 659A.290, 659A.885 (2014).

[204] 820 ILL. COMP. STAT. 180/30(a) (2012).

buttress their antidiscrimination statute with either a leave requirement or an accommodation statute.[205]

B. Problems with the Antidiscrimination Approach

The clearest problem with the antidiscrimination approach is that unlike other protected categories, like race or gender, the *status* at issue (being a victim of domestic violence) "is a descriptive statement regarding a certain kind of criminal or controlling behavior to which an individual has been subjected."[206] Having the status of a domestic violence victim is very different than having a status associated with an immutable characteristic such as Native American, woman, Latino, etc. Normally the antidiscrimination approach seeks to prevent employers from allowing certain immutable classifications to determine employment outcomes, even where disparate treatment would be profitable for the employer.[207] Unlike other protected classifications, which are immutable, the status of "victim" is mutable. A victim-employee is capable of attaining financial and personal independence from her abuser.[208] Indeed, encouraging an employee to become economically independent

[205] In fact, California, Hawaii, and Illinois have statues that use all three approaches. *See* CAL. LAB. CODE §§ 230, 230.1 (West 2014); HAW. REV. STAT. § 378-2 (2014); 820 ILL. COMP. STAT. 180 (2012). Oregon has a reasonable leave requirement in addition to its antidiscrimination statute. OR. REV. STAT. ANN. §§ 659A.290, 659A.885 (2014). See also *supra* notes 17–19 and accompanying text for a discussion of how New York is considering buttressing its antidiscrimination statute with more functional statutes.

[206] Widiss, *supra* note 6, at 706–07 (referring to the approach as a "strange fit").

[207] J.H. Verkerke, *Disaggregating Antidiscrimination and Accommodation*, 44 WM. & MARY L. REV. 1385, 1406 (2003).

[208] Widiss, *supra* note 6, at 707. In fact, the goal of employment protections is to provide the victim-employee with an opportunity to break the cycle of violence and undo the classification. *See, e.g.*, WASH. REV. CODE § 49.76.010 (2013) (stating, in the legislative findings of the Washington domestic leave law, "[o]ne of the best predictors of whether a victim of domestic violence, sexual assault, or stalking will be able to stay away from an abuser is his or her degree of economic independence").

should be employers' ultimate goal in advocating for these statutes. Thus, it is contrary to employer interests to advocate for a statute that is tied to status.

An interconnected problem with the antidiscrimination approach is that it is only triggered by an employer's intentional act of discrimination motivated by animus.[209] A criticism against this narrow focus, raised by employee advocates, is that it allows "savvy employers" to avoid liability as long as they dress their policies in a facially neutral manner.[210] Often, therefore, employers support this approach because it, as compared to other approaches, bears them little to no cost.[211] In the case of domestic violence, however, this "no cost" leads to "no gain." Recall two earlier discussions: first, domestic violence reduces employee productivity and thus increases costs; and second, employers should support a legal protection because it will externalize the cost of internally assisting the victim in ending the cycle of violence. The antidiscrimination approach is not in line with employers' long-term interests because it does not require affirmative action and merely prohibits discriminatory

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[209] Goldscheid, *supra* note 30, at 67. Usually this argument is raised in a discussion of the antidiscrimination approach's inability to deal with subconscious and implicit bias against immutable characteristics such as race or gender. *See, e.g.*, *id.*

[210] Anastasia Niedrich, *Removing Categorical Constraints on Equal Employment Opportunities and Antidiscrimination Protections*, 18 MICH. J. GENDER & L. 25, 52 (2011) ("So long as employers promulgate and enforce policies that 'appear credible and lacking in animus,' then courts are usually 'reluctant to second-guess' them." (quoting Marc Rosenblum, *The Prerogative to Downsize—A Commentary on Blumrosen, et. al.*, 2 EMP. RTS. & EMP. POL'Y J. 417, 436 (1998))).

[211] Widiss, *supra* note 6, at 696. Consider also that under the current standards of proof articulated by the Supreme Court's decision in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1997), an employer may dodge liability for discrimination, even when a former or current employee presents a prima facie case for discrimination, if the employer rebuts "merely by offering reasons which, if true, are nondiscriminatory." Raymond Nardo, *Evidentiary Issues in Employment Discrimination Litigation*, 9 J. SUFFOLK ACAD. L. 139, 148 (1994). Of course, even if employers have easier standards of proof at trial, this does not avoid the litigation cost of going to trial.

acts.[212] Instead, employers should embrace legislation that normalizes the cost of affirmatively assisting employees, which can assist those employees in recognizing their full potential, rather than supporting legislation tied to classification.[213]

Another criticism of the antidiscrimination approach is that it may require employers to illegally infringe on the privacy of their workers.[214] Unlike many statutory leave laws, which require the employee to submit certain documentation,[215] many of the antidiscrimination statutes provide no explanation of how an employer is supposed to know which of their employees are victims.[216] This becomes a problem in states that recognize the constructive knowledge theory of discrimination liability.[217] In the context of domestic violence, an employer may be liable under the constructive knowledge theory if there is an adverse employment action (termination, demotion, failure to promote, etc.) after signs that *should* have put the employer on notice that

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[212] *See generally* Samuel Issacharoff & Justin Nelson, *Discrimination with A Difference: Can Employment Discrimination Law Accommodate the Americans with Disabilities Act?*, 79 N.C. L. REV. 307 (2001) (taking the position that the main difference between reasonable accommodation and antidiscrimination is the requirement of positive action). *But see* Samuel R. Bagenstos, *"Rational Discrimination," Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 859–70 (2003) (arguing that the distinction is illusory).

[213] Professor Deborah Widiss takes this argument even further and notes that because the antidiscrimination approach essentially "[e]ncourages employers to treat everyone the 'same' . . . [it] could have the unintended effect of discouraging employers from providing employees who are victims of domestic violence with the flexibility they need." Widiss, *supra* note 6, at 707.

[214] *See, e.g.*, California Chamber of Commerce, Letter in Opposition, *supra* note 10.

[215] *See supra* note 176 and accompanying text (describing notice requirements).

[216] *Compare, e.g.*, N.Y. EXEC. LAW § 296 (McKinney 2014) (lacking any form of notice or documentation requirement), *with* the notice provisions described *supra* Part III.B.

[217] California Chamber of Commerce, Letter in Opposition, *supra* note 10.

domestic violence was present in the employee's life.[218] In other words, under this theory, an employer who should have known that an employee suffered from domestic violence and takes an adverse employment action against that employee can be found just as liable as an employer who intentionally takes the adverse employment action *because of* the victim's status.[219] Consider also that under some states' labor laws, an employer may not inquire into or discriminate against an employee because of his off-duty activities or aspects of his personal life.[220] Essentially this means that when an employer suspects that an employee is a victim, they have two options: discipline the employee for their erratic behavior or attempt to confirm their suspicion to ensure that the employee is properly noted as a member of a protected classification.[221] The first option will incur liability under a constructive knowledge theory and the second will incur liability under a privacy law.[222] This dilemma provides further evidence that the very nature of domestic violence makes it incompatible with an antidiscrimination approach.

V. THE REASONABLE ACCOMMODATION APPROACH

A. The Approach Generally

As of January 2013, only four jurisdictions, Illinois,[223]

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[218] *Id.*

[219] *See id.* The California Chamber of Commerce argues that under established case law, "explicit statements regarding discrimination are unnecessary if surrounding circumstances are sufficient to place employer on notice." *Id.* (citing Yanowitz v. L'Oreal USA, Inc., 116 P.3d 1123, 1133 (Cal. 2005)). The constructive knowledge theory of employment discrimination is also established in sexual harassment claims. *See, e.g.*, Splunge v. Shoney's, Inc., 97 F.3d 488, 490 (11th Cir. 1996) (holding that employers only need constructive notice of sexual harassment).

[220] *See, e.g.*, N.Y. LAB. LAW §§ 201-d(2)(a)–(d) (McKinney 2014).

[221] California Chamber of Commerce, Letter in Opposition, *supra* note 10.

[222] *Id.*

[223] 820 ILL. COMP. STAT. 180/20 (2012).

Hawaii,[224] New York City,[225] and Westchester County, New York,[226] had statutes that require employers to reasonably accommodate victims of domestic violence.[227] On October 11, 2013, California became the fifth jurisdiction to adopt the approach.[228] Essentially, reasonable accommodation statutes require an employer to alter working conditions to accommodate an employee who is a victim of domestic violence, provided that the accommodation is reasonable.[229] Hawaii's Labor Code provides an example of how these jurisdictions have crafted domestic violence reasonable accommodations statutes.[230] Section 378-81(a) provides "[a]n employer shall make reasonable accommodations in the workplace for an employee who is a victim of domestic or sexual violence . . . provided that an employer shall not be required to make the reasonable accommodations if they cause undue hardship on the work operations of the employer."[231] Subsection (b) permits the employer to "verify" that the requesting employee is in fact a

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[224] HAW. REV. STAT. § 378-81(a) (2014).

[225] N.Y.C. ADMIN. CODE § 8-107.1(3)(a) (McKinney 2013).

[226] WESTCHESTER CNTY. CODE § 700.03(a)(8) (2007).

[227] *See generally* LEGAL MOMENTUM STATE LAW GUIDE, supra note 6.

[228] *See New California Law Protects Stalking Victims from Discrimination and Retaliation*, JACKSON LEWIS LLP (Oct. 22, 2013), http://www.jacksonlewis.com/resources.php?NewsID= 4634.

[229] *See* Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538, 542 (7th Cir. 1995) (Judge Richard Posner discussing the reasonable accommodation requirement of the ADA).

[230] HAW. REV. STAT. § 378-81 (2014).

[231] *Id.* § 378-81(a). Subsection (a) also includes a list of possible reasonable accommodations:

> (1) Changing the contact information, such as telephone numbers, fax numbers, or electronic-mail addresses, of the employee; (2) Screening the telephone calls of the employee; (3) Restructuring the job functions of the employee; (4) Changing the work location of the employee; (5) Installing locks and other security devices; and (6) Allowing the employee to work flexible hours.

Id.

victim of domestic violence.[232] Subsection (c) defines *undue hardship* as "an action requiring significant difficulty or expense on the operation of an employer" and lists several factors to be considered in the determination of whether a burden is undue.[233] Practically, the way that the reasonable accommodation statutes typically function is thus. First, the employee will verify or document that he is a victim of domestic violence by presenting a restraining order or police incident report.[234] Second, the employee will request a reasonable accommodation, such as a change in work location or a change in phone number because his abuser is harassing him at work.[235] Third, the employer must provide that reasonable accommodation unless it would impose an undue burden on her business.

Employers have raised several arguments against the reasonable accommodation approach, but in fact, this approach is the most amenable to employers' interests.

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[232] *Id.* § 378-81(b).

[233] *Id.* § 378-81(c). The factors to be considered are:

> (1) The nature and cost of the reasonable accommodation needed under this section;
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> (2) The overall financial resources of the employer; the number of employees of the employer; and the number, type, and placement of the work locations of an employer; and
>
> (3) The type of operation of the employer, including the composition, structure, and functions of the workforce of the employer, the geographic separateness of the victim's work location from the employer, and the administrative or fiscal relationship of the work location to the employer.

Id.

[234] *See supra* note 176 (discussing documentation requirements).

[235] *See infra* notes 251–55, 261 (discussing the process of requesting the accommodation).

B. Problems with the Approach and Possible Solutions

1. Bearing the Cost of Third-Party Behavior

The greatest concern with a reasonable accommodation statute is that it requires the employer to assume costs because of the behavior of a third party, the abuser. However, this cost-bearing issue is actually present in any statute that affords employment protections for employee-victims. Employer costs may seem more salient with a reasonable accommodation statute because the employer is required to enact long-term changes to their business as opposed to quick periods of leave.[236] In reality, the inverse may be true.[237] Statutes that require the reasonable accommodation of victims of domestic violence may be best suited to address employers' cost-bearing concerns. This is because these statutes can be drafted so as to enumerate specific low-cost accommodations, because these statutes require a dialogue between the victim-employee and the employer, and because these statutes are best able to end the violence in the victim-employee's life, thus returning him or her to full productivity. Thus, a reasonable accommodation statute can be drafted so as to trade the short-term costs of unburdensome accommodations with the long-term benefit of productivity.

First, unlike the other approaches, the reasonable accommodation approach necessarily considers costs imposed on employers. Reasonable accommodation statutes do this by their very nature "since 'reasonableness' is determined by examining the hardship to the employer of providing the accommodation."[238] Furthermore, reasonable accommodation statutes, including the ADA provision discussed in *O'Donnell*,[239]

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[236] *See* Stewart J. Schwab & Steven L. Willborn, *Reasonable Accommodation of Workplace Disabilities*, 44 WM. & MARY L. REV. 1197, 1253 (2003) (discussing the same issue in the context of the ADA).

[237] *Id.* (suggesting the same with regard to the ADA).

[238] Brown, *supra* note 24, at 34.

[239] *See* 42 U.S.C. § 12112(b)(5)(A) (2012) (requiring employer to provide accommodations "unless such covered entity can demonstrate that the accommodation would impose an undue hardship . . . ."); *see also supra*

often include an "undue hardship" exception which prohibits courts and agencies from requiring accommodations that place unreasonable or extensive costs on the employer.[240] Undue hardship provisions thereby function so as to ensure "focus[] on the resources and circumstances of the particular employer in relationship to the cost or difficulty of providing a specific accommodation."[241]

One reasonable accommodation statute, the Illinois Victims' Economic Security and Safety Act ("VESSA"), for example, enumerates several factors that are to be considered in the reasonableness/undue burden analysis: (i) "the nature and cost of the accommodation" requested; (ii) "the [reasonable accommodation's] effect on expenses and resources, or the impact . . . on the operation of the facility;" (iii) "the overall financial resources of the employer;" and (iv) "the administrative or fiscal relationship of the facility to the employ[er] . . . ."[242] A provision such as this may help defer some of the fears that reasonable accommodation requirements will disparately impact small businesses. Hawaii, California, and Westchester County, New York provide lists of similar factors to consider in the determination of whether an accommodation is unduly burdensome.[243] California's recently amended Labor

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notes 114–22.

[240] *See, e.g.*, HAW. REV. STAT. § 378-81(a) (2014) ("An employer shall make reasonable accommodations in the workplace for an employee who is a victim of domestic or sexual violence, including [list of potential accommodations] provided that an employer shall not be required to make the reasonable accommodations if they cause undue hardship on the work operations of the employer.").

[241] EQUAL EMP'T OPPORTUNITY COMM'N, NO. 915.002, ENFORCEMENT GUIDANCE: REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT (Oct. 17, 2002), *available at* http://www.eeoc.gov/policy/docs/accommodation.html.

[242] 820 ILL. COMP. STAT. 180/30(b)(4)(B)(i)–(iv) (2012).

[243] *See* HAW. REV. STAT. § 378-81(c) (2014) (requiring consideration of: "(1) [t]he nature and cost of the reasonable accommodation needed . . . ; (2) [t]he overall financial resources of the employer; the number of employees of the employer; and the number, type, and placement of the work locations of an employer; and (3) [t]he type of operation of the employer, including the

Code provides an additional and important guiding provision: "an undue hardship also includes an action that would violate an employer's duty to furnish and maintain a place of employment that is safe and healthful for all employees . . . ."[244] Such a provision ensures that employers are not required to grant accommodations that would make the workplace unsafe for coworkers of victim-employees.[245]

In sum, as evidenced by accommodation statutes in Illinois, Hawaii, California, and Westchester, accommodation statutes can protect against unreasonably expensive accommodations provided that they are clearly drafted. If employers are faced with a bill that would require a reasonable accommodation, they should advocate for a provision that, like the corresponding provision in VESSA, requires consideration of the size of the employer as well as the cost of providing the accommodation. Further, employers should advocate for accommodation statutes, like the recently enacted California Labor Code, that clearly provide that they are not required to provide accommodations that would jeopardize the safety of their workplace.

Second, short-term accommodation costs are likely to be slight. Even without a statute requiring employers to reasonably accommodate employee-victims, many employers have adopted internal policies that require management to make certain changes in employment policies for victims of domestic violence.[246] The main goal of these internal policies has been to ensure safety on-site and during travel to work, and include

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composition, structure, and functions of the workforce of the employer, the geographic separateness of the victim's work location from the employer, and the administrative or fiscal relationship of the work location to the employer"); *see also* CAL. LABOR CODE § 230(f)(6) (West 2014) (relying on the definition provided in CAL. GOV. CODE § 12926(u) (2014) and therefore accounting for similar considerations.); WESTCHESTER CNTY. CODE § 700.03(a)(8) (2007).

[244] CAL. LABOR CODE § 230(f)(6) (West 2014).

[245] *Id.* (exempting any accommodation that would require the employer to violate Section 6400 of California's Labor Code). *See also* CAL. LABOR CODE § 6400(a) (West 2014) ("Every employer shall furnish employment and a place of employment that is safe and healthful for the employees therein.").

[246] *See, e.g.*, Randel & Wells, *supra* note 48, at 829–32.

"low-to-no cost modifications such as changing phone numbers, worksite locations, shift adjustments, or application of leave policies to domestic or sexual violence related appointments."[247] Essentially, the reasonable accommodation approach is a legal codification of the policies that many employers intuitively adopt.[248]

Furthermore, employers should advocate for a reasonable accommodation statute that only requires minimal accommodations that are narrowly tailored toward ensuring the employee's safety and economic independence. This would be accomplished by *defining* reasonable accommodations to include a finite list of actions. For example, the California's revised labor code now provides:

> [R]easonable accommodations *may include* the implementation of safety measures, including a transfer, reassignment, modified schedule, changed work telephone, changed work station, installed lock, assistance in documenting domestic violence, sexual assault, or stalking that occurs in the workplace, an implemented safety procedure, or another adjustment to a job structure, workplace facility, or work requirement in response to domestic violence, sexual assault, or stalking, or referral to a victim assistance organization.[249]

Employers should advocate that a future federal accommodation law would instead read, "Reasonable accommodations *shall only* include . . . [section] 230(f)(2)'s enumerated list]." This would ensure that employers are only required to assume lost-cost accommodations.

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[247] Goldscheid, *supra* note 30, at 120.

[248] *See, e.g.*, Randel & Wells, *supra* note 48, at 833 (describing Liz Claiborne's policy that "allows for flexible hours and time off for employees who need to seek safety and protection, arrange new housing, attend court appearances, or take care of other such matters . . . [as well as] provid[es] secure work areas, special parking spaces, [and] escorts to and from transportation").

[249] CAL. LABOR CODE § 230(f)(2) (West 2014) (emphasis added).

Third, the reasonable accommodation approach, because it requires communication between the victim-employee and his or her employer, is best suited to lessen domestic violence's effect on employee-productivity. Generally employees are afraid to disclose incidents of domestic violence to their superiors.[250] Without legal protection, an employee likely equates disclosure with the risk of termination.[251] If a reasonable accommodation statute requires the employee to request the accommodation and provide documentation of their domestic violence,[252] then the employee is provided with an incentive to break the silence.[253] This is important because then there can be a discussion about the needs of that particular employee and what steps they can take to better their situation.[254] For example, California Labor Law section 230 is amended so as to require the employer to engage "in a timely, good faith, and interactive process with the employee to determine effective reasonable accommodations."[255]

The interactive process that is part and parcel to the reasonable accommodation approach provides three benefits.

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[250] Margaret Graham Tebo, *When Home Comes to Work Experts Say Employers Should Seek A Balanced Approach in Dealing with Workers Facing Domestic Violence*, 91-A.B.A. J., Sept. 2005, at 42, 44.

[251] Stephanie L. Perin, Note, *Employers May Have to Pay When Domestic Violence Goes to Work*, 18 REV. LITIG. 365, 396 (1999).

[252] It is not unreasonable to predict that employers would be successful if they were to advocate for reasonable accommodation statutes to include provisions that employees prove with certified documents that they are victims of domestic violence. As described *supra* Part III.B, many of the statutory leave approach laws permit employers to condition the granting of leave on the employees' ability to certify their status as a victim of domestic violence.

[253] *See* Goldscheid, *supra* note 30, at 116–17 ("[A]n employee will be more likely to disclose in an environment with a clearly articulated policy that explains the employer's . . . support for victims . . . .").

[254] Karin, *supra* note 6, at 408.

[255] CAL. LABOR CODE § 230(f)(4) (West 2014). This statutory provision appears to have been inspired by the Federal Code of Regulations' guidance for ADA reasonable accommodation requirements. *See* 29 C.F.R. § 1630.2 (2012). The federal code provides "it may be necessary for the covered entity to initiate an informal, interactive process with the individual." *Id.* § 1630.2(o)(3).

First, if an employer is aware of the possibility of violence in the workplace, they can take proactive steps toward avoiding that violence.[256] These steps would likely cost less than dealing with an incidence of violence after it has occurred.[257] Second, when victim-employees inform their supervisors about their situation, the supervisor can refer the victim-employee to external services. The workplace is an "effective vehicle for disseminating information about available resources."[258] A qualitative study by Jennifer E. Swanberg and T. K. Logan found that once a supervisor is aware of the situation in the employee's life, they often go out of their way to offer support.[259] The following quotes from victim-employees in the Swanberg and Logan study provide salient examples of how managers responded to the information by providing slight accommodations and referrals to victim-services:

> Yeah, I told my boss. She uhm, that was really like the first incident and she let me take a couple days off from work. She was supportive . . . I could not have [moved to a shelter] without her.
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> . . .
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> [T]here was another lady in HR, and I've talked to her and told her. The woman that I report to . . . talked with the county attorneys and explained to her what was going on. They have me working at another location now and I don't mind going to that location. I told her that I really needed to work . . . she mentioned to me that

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[256] *See* Jacobs & Raghu, *supra* note 20, at 604 ("It is in the employer's interest to have as much information as possible about a potentially disruptive situation, so that it can take steps to avoid such a situation, instead of having to respond to an actual incident.").

[257] *See id.*

[258] Hobday, *supra* note 84, at 21. Consider also that employer-side attorneys often advise employers to collaborate with employees in drafting solutions. *See, e.g.*, Veena A. Iyer, Commentary, *Intimate Partner Violence at Work*, 27 WESTLAW J. EMP., no. 18, Apr. 2013, at *1, *7.

[259] Swanberg & Logan, *supra* note 21, at 12 ("Among all of the women who confided in supervisors or managers . . . a strong majority (86%) received formal or informal support from the workplace.").

> they would set up a laptop [at the shelter] for me and a phone . . . I said that I would be willing to work in the warehouse or work anywhere just so I can work. And they had me, I have to go to [another city] every day and they pay me for the driving time.
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> . . .
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> I have a manager . . . . [S]he's taking me to a seminar on domestic violence . . . . She helps me . . . because her daughter's going through it, she can relate.[260]

These examples illustrate that when management learns of the employee's situation, they can involve external services.[261] When an employee seeks these external services, they are more likely to end the cycle of abuse and return to their full level of productivity. Therefore, by opening the lines of communication, the reasonable accommodation approach likely hastens the resolution of the issue. Third, there is a potential benefit to workplace morale when the workplace is more open. Swanberg and Logan's study also concluded that employees were more focused on their work just knowing that they had their supervisors' support.[262] Thus, the interactive process that is part and parcel to the reasonable accommodation approach involves a trade of short-term accommodation costs with long-term productivity gains.[263]

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[260] *Id.* at 12–13. It is also worth noting that the supervisor's solution in most of these examples was to provide the victim-employees with a reasonable accommodation. *See id.* In the study the managers were under no legal requirement to provide victim-employees with accommodation, yet in the second example, the manager intuited that the best solution was to change the victim-employee's worksite. *Id.* As such, the reasonable accommodation approach most closely tracks the intuitive behavior of management.

[261] *See id.* at 13.

[262] *Id.* at 12–13.

[263] Studies have also shown that in the context of accommodating employees with disabilities, employers report "higher productivity," "greater dedication," "fewer insurance claims," and "improved corporate culture." Michael Ashley Stein, *The Law and Economics of Disability Accommodations*, 53 DUKE L.J. 79, 105 (2003).

In sum, while reasonable accommodation statutes do unquestionably require employers to assume the costs of third-party behavior, these statutes can be drafted to ensure that the costs employers bear are no greater than the gains. This is true because the approach necessarily considers the reasonableness of an accommodation and the burden it requires, the statutes can be drafted so as to only require a finite list of low-cost accommodations. Further, there are long-term benefits from an interactive process that allows for communication between the employer and a victim-employee. Thus, accommodations can require only short-term costs and yield long-term productivity gains.

2. Ad Hoc Judicial Determinations

Another potential criticism of the reasonable accommodation approach is that a court may later hold that what management determines to be an undue burden is in fact a reasonable accommodation.[264] This issue of ad hoc judicial determinations is a valid concern for any statute with a reasonableness standard, especially a statute that seeks to control employer discretion and employment policy.[265] While this concern is certainly valid, several aspects of the reasonable accommodation approach should diminish this concern.

First, some statutes, like Illinois' VESSA[266] and California's SB 400,[267] include extensive explications and definitions of both reasonable accommodation and undue burden.[268] The clearly

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[264] *See* Edward J. McGraw, *Compliance Costs of the Americans with Disabilities Act*, 18 DEL. J. CORP. L. 521, 540 (1993) (arguing that the ADA would create an "onslaught of litigation" because the reasonable accommodation approach "specifically contemplates interpretation on a case-by-case basis.").

[265] *See id.* (raising the argument in the context of the ADA).

[266] 820 ILL. COMP. STAT. 180/1 (2012).

[267] S.B. 400, 2013–14 Cal. S., Reg. Session (Cal. 2013). *See also* CAL. LAB. CODE § 230 (West 2014).

[268] *See, e.g.*, HAW. REV. STAT. §§ 378-81(a)(1)–(6) (2014) (defining reasonable accommodation by way of example, providing the following list of

articulated boundaries of reasonable and undue burden constrain judicial discretion in advance.[269] Further, under clear statutory terms, employers' attorneys are able to draft employment policies that are most likely to be determined compliant with the law.[270] Thus, where reasonable accommodation statutes are drafted with clarity, they decrease the likelihood of courts and management reaching different conclusions of the reasonableness of an accommodation.

Second, some courts have already begun to investigate the fine line between reasonable accommodation and undue burden. In 2004, the New York County Supreme Court interpreted the reasonable accommodation requirement of the New York City Human Rights Law ("NYCHRL")[271] for the first time in

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examples: "[c]hanging the contact information . . . of the employee; [s]creening the telephone calls of the employee; [r]estructuring the job functions of the employee; [c]hanging the work location of the employee; [i]nstalling locks and other security devices; and [a]llowing the employee to work flexible hours"); OR. REV. STAT. ANN. § 659A.275 (2014) ("'Undue hardship' means a significant difficulty and expense to a covered employer's business and includes consideration of the size of the employer's business and the employer's critical need for the eligible employee.").

[269] A convincing criticism of the ADA is that "it contain[ed] many ill-defined terms" and thus permitted wide judicial discretion that would increase employer's litigation costs. McGraw, *supra* note 264, at 539–40. History has proven this criticism correct. Carrie L. Flores, Note, *A Disability Is Not A Trump Card: The Americans with Disabilities Act Does Not Entitle Disabled Employees to Automatic Reassignment*, 43 VAL. U. L. REV. 195, 207 (2008) (observing that the various ambiguous terms of the ADA resulted in numerous Circuit splits). Flores goes on to note that the Supreme Court "has interpreted and qualified some of the statutory text, shedding light on mystifying terms and nuances." *Id.* at 209. Employers should learn from the history of the ADA and request that legislatures be clear in their definitions of covered employees, reasonable accommodations, and undue burdens.

[270] *Cf. The Americans with Disabilities Act: Great Progress, Greater Potential*, 109 HARV. L. REV. 1602, 1615 (1996) (arguing that under the vagueness of the ADA, "[e]mployers [were forced to] choose between making the (perhaps needless) accommodations requested by disabled employees or applicants and risking costly litigation and potential liability for discrimination by refusing such requests").

[271] N.Y.C. ADMIN. CODE §§ 8-107–107.1 (McKinney 2013).

Reynolds v. Fraser.[272] There, a former employee of the Department of Corrections brought an action accusing her employer of discrimination against her due to her status as a victim of domestic violence.[273] In this case, after increasing violence at home, plaintiff left her husband and began intermittent bouts of homelessness and refuge in shelters.[274] While at the shelter, plaintiff required surgery and a period of convalescence.[275] Defendant-employer approved the sick leave but later terminated plaintiff due to her violation of a requirement to be present at her home during sick leave.[276] The court in *Reynolds* held that the Defendant-employer failed to reasonably accommodate the plaintiff as a victim-employee, [277] and thus violated NYCHRL section 8-107.1(3)(a)'s requirement that "any [covered employer] . . . shall make reasonable accommodation to enable a person who is a victim of domestic violence . . . to satisfy the essential requisites of a job."[278] The court in *Reynolds* interpreted the reasonable accommodation provision of the NYCHRL to require that an employer waive a technical requirement (such as a requirement to remain home during sick leave) when the employer is on notice that the employee is a victim.[279] The *Reynolds* case represents the only occasion that a court has considered what a reasonable accommodation for the victim-employee is. That said, its holding appears fairly predictable and thus cuts against employer concerns that accommodation statutes will permit courts to widely second guess the decisions of management.

Finally, reasonable accommodation statutes with clearly

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[272] Reynolds v. Fraser, 781 N.Y.S.2d 885 (N.Y. Sup. 2004).

[273] *Id.* at 885, 887.

[274] *Id.* at 885–87.

[275] *Id.* The court does not describe why the plaintiff required surgery. *See Reynolds*, 781 N.Y.S.2d at 885.

[276] *Id.* at 891.

[277] *Id.* at 887.

[278] N.Y.C. ADMIN CODE § 8-107.1 (McKinney 2013).

[279] *Reynolds*, 781 N.Y.S.2d at 891. *See also* Harvey Randall, *Discrimination, Domestic Violence Victims, Probationary Employee*, 11 PUB. EMP. L. NOTES 206 (2004).

defined requirements actually allow employers to predict judicial outcomes and avoid litigation costs. An example of this is discussed in the American Civil Liberties Union (ACLU) of Hawaii's testimony in support[280] of Hawaii's 2011 Senate Bill 229 ("SB229").[281] SB229 was introduced in 2011 so as to require employers to reasonably accommodate victims of domestic violence.[282] In its testimony in support of SB229's reasonable accommodation requirement, the ACLU highlighted the success of New York City's reasonable accommodation statute.[283] The ACLU of Hawaii recounts how the national ACLU represented a plaintiff who had been employed by New York City public school systems and needed to take time off of work to "attend court proceedings and seek medical treatment."[284] The plaintiff, "Kathleen," was reprimanded for excessive absenteeism.[285] Later, the employee requested to transfer to another school "for safety reasons," and "[s]hortly after this conversation, she was fired."[286] The ACLU of Hawaii reported that, in the face of liability under NYCHRL, the school system settled the case and amended its internal policy to cover victims of domestic violence, "acknowledging that reasonable accommodations must be offered to these survivors, and publicizing its new policies throughout the school system."[287] The school system's decision to settle may indicate that it felt it was clear that it had failed to provide a reasonable

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[280] *Testimony of the ACLU of Hawaii in Support of S.B. 229, Relating to Employment Relations: Hearing on S.B. 229 Before the Comm. on Judiciary &* Labor, 2011 Leg., 26th Sess. (Haw. 2011) [hereinafter Testimony of the ACLU of Hawaii in Support of S.B. 229] (statement of Laurie A. Temple, Staff Att'y, ACLU of Hawaii), *available at* http://www.capitol.hawaii.gov/session2011/Testimony/SB229_TESTIMONY_JDL_LATE.pdf.

[281] S.B. 229, 2011 Leg. Sess. (Haw. 2011) (enacted).

[282] S.B. 229 was eventually passed and became effective January 1, 2012. *See* HAW. REV. STAT. § 378-81(a) (2014).

[283] *Testimony of the ACLU of Hawaii in Support of S.B. 229*, *supra* note 280, at 1.

[284] *Id.* at 2.

[285] *Id.*

[286] *Id.*

[287] *Id.*

accommodation that was required by law. If that is the case, then Kathleen's case, as presented by the ACLU of Hawaii, may indicate that reasonable accommodation statutes can provide employers with the ability to predict their likelihood of liability.[288]

While employers are justifiably concerned that reasonable accommodation laws will permit judges to second-guess management decisions, that concern should not guide them to wholesale reject accommodation laws. First, domestic violence accommodation statutes can be tailored to limit judicial discretion. Second, while the case law on the subject is very limited, the *Reynolds* case and Kathleen's case indicate that the jurisprudence of reasonable accommodation of domestic violence victims could be predictable and limit lawsuits.

3. Intersection with Other Laws

Another concern with the reasonable accommodation approach is that an employer, who provides reasonable accommodations to some employees and not others, may be in violation of other employment discrimination laws.[289] Consider the following hypothetical: an employer institutes a policy that provides accommodations for victims, and all covered employees are women.[290] Would a male employee prevail on a Title VII action sounding in sexual discrimination? In *Muhammad v. Walmart*, the federal district court for the Western District of New York addressed this question and referred to a potential gender discrimination claim as "completely frivolous."[291] Mr.

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[288] *See id.*

[289] *See, e.g.*, Muhammad v. Wal-Mart Stores E., L.P., No. 10-CV-6074-CJS, 2012 WL 5950368, at *3 (W.D.N.Y. Nov. 28, 2012), *rev'd and vacated sub nom.*, No. 12-4773-CV, 2013 WL 5539924 (2d Cir. Oct. 9, 2013) (reversed on other grounds). *Muhammad v. Wal-Mart* is discussed below.

[290] The overwhelming majority of victims are women. Goldscheid, *supra* note 30, at 61, 63, 66. It is therefore perfectly reasonable to imagine that for many employers, their only covered employees would be women.

[291] Wal-Mart terminated Mr. Muhammad's employment after Mr.

Muhammad claimed gender discrimination based on the disparate treatment between his "angry outburst" and an earlier violent incident involving a female employee.[292] The female employee had arrived at work in the company of her intimate partner; they had a violent altercation wherein he struck her and shoved her through the entrance of the store; they then "yelled profanities at each other."[293] Walmart had declined to take disciplinary action against the female employee because "it viewed her as being the victim of domestic violence."[294] Judge Siragusa ultimately decided the gender discrimination claims were improperly pled but, in dicta, opined that "even if they were pleaded, are completely frivolous."[295] This dictum may allow for the inference that if an employer reasonably accommodates by waiving the applicability of a rule for violence in the workplace, that accommodation is unlikely to create liability under Title VII even when it applies a different disciplinary standard to a male employee during the same shift.

In fact, a reasonable accommodation approach may actually limit employer liability under other federal laws. Consider the following example: a manager who approaches a male employee about his absenteeism learns that the employee's partner is terrorizing him.[296] Without proper guidance, the manager allows gender bias to enter into her assessment of and response to the

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Muhammad angrily confronted his supervisor, threw his identification on the floor, and left work in the middle of his shift, and in front of customers. *Muhammad*, 2012 WL 5950368, at *2. Mr. Muhammad, acting pro se, filed a complaint sounding in racial and disability discrimination. *Id.* at *4. During the pendency of litigation Mr. Muhammad's attorney purported that there was a claim for gender discrimination. *Id.* at *5. The district court sanctioned the attorney for improperly raising what he termed a "completely frivolous" and unplead cause of action. *Id.* at *6. On appeal, the Second Circuit vacated the sanctions but did not speak to the merits of the claim. *Muhammad*, 2013 WL 5539924.

[292] Muhammad, 2012 WL 5950368, at *3, *5.

[293] *Id.* at *3.

[294] *Id.*

[295] *Id.* at *6.

[296] This example is a modification of an example given by the EEOC. *See* EEOC Fact Sheet, *supra* note 125, at *2.

situation.[297] She perceives the male employee as weak and terminates him. This fact pattern, which was included in the EEOC Fact Sheet, would expose the employer to liability under Title VII because the manager's action is based on gender stereotypes.[298] However, a reasonable accommodation law can be drafted so as to require that a victim-employee who requests an accommodation must first document that they are a victim of an incident of domestic violence.[299] As such, in this fact pattern, the manager and the employee would have already had a conversation about the violence, and the manager would be on notice that they are required to reasonably accommodate the employee. She would therefore be less likely to make a snap decision,[300] which could expose the employer to liability. An accommodation statute that requires an interactive process "ensure[s] that any adverse employment action is based on legitimate reasons, as opposed to subtle biases."[301] The reasonable accommodation approach may therefore avoid employer liability under other employment legislation.

In sum, the reasonable accommodation approach is best tailored to employer's interests. An accommodation statute can include limiting provisions that ensure that employers only incur small accommodation costs. Further, an accommodation statute can ensure that there is a dialogue between the victim-employee and management. Qualitative studies also demonstrate that this dialogue may help the victim-employee gain access to community resources and begin the project of leaving their abuser. Ultimately, this would achieve employers' greatest interest: to limit the way that domestic violence affects the bottom line by encouraging victim-employees to take affirmative steps to ending the violence in their lives and returning to their full level of productivity.

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[297] *See* Goldscheid, *supra* note 30, at 62.

[298] *See* EEOC Fact Sheet, *supra* note 125, at *2; *see also supra* note 129.

[299] *See supra* statutes cited in note 176 and accompanying text.

[300] Schwab & Willborn, supra note 236, at 1258–60.

[301] Goldscheid, *supra* note 30, at 62. *See also id.* at 114–18.

CONCLUSION

As the employment landscape shifts around them, employers should reconsider their position on employment protections for victims of domestic violence. To date employers have opposed employment protections at the state level,[302] but there are two convincing reasons why this position is untenable. First, domestic violence negatively impacts employers' business because it cuts into their bottom line; domestic violence decreases productivity, increases turnover, and can even result in violence at the workplace.[303] While some employers have taken steps to address domestic violence internally,[304] legislation that would require all employers to provide employment protections would better serve the business community.[305] Without a law, smaller, resource-poor employers are unable to avail themselves of internal policies.[306] Further, employers that do address the problem internally are penalized in the market.[307] Instead, legislation would serve the business community because it would normalize the cost of accommodating victim-employees in the workplace; thus ameliorating domestic violence's effect on all employers' businesses, not merely those that can afford to address the problem internally.[308] Second, the federal government has signaled that it supports employment protections for victims of domestic violence.[309] If a federal law is imminent, now is the perfect opportunity for employers to enter into the debate and shape the way that the statute is drafted.[310]

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[302] *See supra* notes 10–12, 84 and accompanying text.

[303] *See supra* notes 30–61 and accompanying text.

[304] *See supra* notes 75–83 and accompanying text.

[305] *See generally supra* Part I.A.

[306] *See supra* notes 92, 97–99 and accompanying text.

[307] *See supra* notes 93–96 and accompanying text.

[308] *See supra* notes 88–96, 186–97 and accompanying text.

[309] *See supra* notes 66–74, 125, 127–39, and accompanying text.

[310] *See supra* notes 17–19, 104–08 and accompanying text (discussing how the 2013 session of the New York Senate provides an example of how employer advocacy can mean the difference between a law that requires providing reasonable leave or three months of leave).

If employers do reconsider their position and begin to advocate for limited legislation, they should look to state statutes for guidance. As has been seen at the state level, domestic violence statutes, particularly the statutory leave and reasonable accommodation statutes, can be drafted so as to trade short-term costs with long-term benefits. The antidiscrimination approach, on the other hand, is not deserving of support because it is fundamentally reliant on classifications and not aimed at solutions.[311] Employers have more to gain from a statute that requires affirmative actions that correct the problem.

The statutory leave approach has thus far been the most popular approach[312] at the state level and is deserving of employer support. There are good reasons for this. First, where a statutory leave law is drafted so as to only provide leave for enumerated reasons and require documentation that the leave is used for that reason, employers can be sure that employees will not misuse the leave.[313] Second, statutory leave laws can be drafted so as to require reasonable notice of leave; this ensures that employer operations are not disrupted by the leave.[314] Third, the statutory leave approach includes only minor administrative costs.[315] Finally, statutory leave laws have proven amenable to the concern that smaller employers will be disparately impacted; this is accomplished either by exempting the smallest employers or by providing different requirements for employers of different sizes.[316] In sum, employers should consider supporting a statutory leave law, provided that it:

(1) clearly enumerates the reasons for leave so as to permit employers to discipline employees who attempt to abuse the law;[317]

(2) shifts administrative costs onto employees by requiring

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[311] *See supra* Part IV.B.

[312] *See* statutes cited *supra* note 148.

[313] *See supra* notes 160–68 and accompanying text.

[314] *See* statutes cited *supra* note 176 (discussing notice requirements).

[315] *See supra* notes 177–85 and accompanying text.

[316] *See supra* notes 186–97 and accompanying text.

[317] For examples of how such a provision should be drafted, see the statutes cited *supra* at notes 161–64.

advance notice of leave or documentation that the leave was taken because of imminent physical injury;[318]

(3) permits only a reasonable amount of time that does not create an undue burden on the employer;[319] and

(4) requires certification of reasonableness by either a medical, legal, or social work professional.[320]

While the reasonable accommodation approach has thus far been the least popular approach,[321] it is, in fact, best suited to achieving employers' interests. First, the reasonable accommodation approach necessarily considers the costs that employers bear.[322] Second, reasonable accommodation statutes can be drafted so as to only require low-cost accommodations.[323] Third, the long-term benefits of the reasonable accommodation approach far outweigh the slight initial costs.[324] Finally, reasonable accommodation statutes can be drafted so as to require a dialogue—or interactive process—between the victim-employee and management.[325] This interactive process has a

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[318] Such a provision would permit employers to require advance notice of leave except when the leave is not foreseeable, such as "in cases of imminent danger to the health or safety of the employee." *See, e.g.*, COLO. REV. STAT. § 24-34-402.7(2)(a) (2013). If the employee takes emergency leave without advance notice, the employer would be permitted to require the employee to provide certification that the leave was taken for an appropriate reason. *See* CAL. LAB. CODE § 230.1(b)(1)–(2) (West 2014). This documentation could be a police report, a court order, or documentation from a medical professional. *See id.* § 230(b)(2)(A)–(C). *See generally* statutes cited *supra* note 176.

[319] Reasonable leave statutes are a hybrid of the statutory leave and reasonable accommodation approaches, and provide the benefits of each. For a discussion of reasonable leave statutes, see *supra* notes 158, 193–97 and accompanying text. For a discussion of the benefit of clear statutory definitions of reasonableness and undue burden, see *supra* notes 238–45.

[320] Hawaii provides an example of how this requirement would work. *See* HAW. REV. STAT. § 378-72(b) (2014); *see also supra* note 197 and accompanying text.

[321] *See* statutes cited *supra* notes 223–28.

[322] *See supra* notes 238–45 and accompanying text.

[323] *See supra* notes 246–49 and accompanying text.

[324] *See generally supra* Part V.B.

[325] *See supra* notes 248–63 and accompanying text.

positive impact on employee loyalty and productivity. In sum, employers should consider supporting a reasonable accommodation law provided that it:

(1) limits putative accommodations to a finite list, such as changing an employee's telephone number or workstation and/or installing safety devices;[326]
(2) clearly defines factors to be considered in making a determination of undue burden, such as cost of the accommodation and/or size of the employer;[327]
(3) clearly articulates that any accommodation that would require the employer to jeopardize the safety of their workplace is unduly burdensome;[328]
(4) requires that a requesting employee document their status as a victim of domestic violence;[329] and
(5) requires an interactive process between the employer and the victim-employee as to what a reasonable accommodation for that particular employee would be.[330]

Domestic violence *is* a workplace problem.[331] In 2009, "twenty-nine percent of male workers and forty percent of female workers reported having been victims of domestic violence . . . ."[332] Domestic violence disrupts employers' businesses, affects their bottom line, and costs between $3 and $13 billion per year in lost profits.[333] The time has come for employers and their advocates to support legislation that

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[326] *See, e.g.*, CAL. LAB. CODE § 230(f)(2) (West 2014). As discussed above, employers should advocate for a statute that requires only a finite list of accommodations. *See supra* note 249 and accompanying text.

[327] *See, e.g.*, 820 ILL. COMP. STAT. 180/30(b)(4)(B)(i)–(iv) (2012); *see also supra* notes 233, 238–41 and accompanying text.

[328] *See, e.g.*, CAL. LAB. CODE § 230(f)(6) (West 2014); *see also supra* notes 242–45 and accompanying text.

[329] *See, e.g.*, HAW. REV. STAT. § 378-81(b) (2014).

[330] *See, e.g.*, CAL. LAB. CODE § 230(f)(5) (West 2014); *see also supra* note 255 and accompanying text.

[331] For other scholars reaching the same conclusion from the perspective of the employee and society see generally Widiss, *supra* note 6; Karin, *supra* note 6; and Randel & Wells, *supra* note 48.

[332] Jacobs & Raghu, *supra* note 20, at 597.

[333] *See supra* notes 43–44 and accompanying text.

addresses this workplace problem. The time has come for employers to support legislation that provides employment protections to victim-employees without imposing too great a cost on business.