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# **Invisible Inequality & Economic Empowerment: Domestic Violence, Discrimination, and the Creation of a New Protected Class**

*Cameron M. Brown Britt\**

## ABSTRACT

Today, there is a large population of Americans whose plight is invisible to much of the rest of society—the survivors of domestic and sexual abuse and violence. While in the last few years survivors’ voices are beginning to be heard, the legal landscape is still lagging far behind and is sorely inadequate to provide protections and relief to survivors in many areas of life. Particularly, this is prominent in the employment landscape where federal protections for survivors are sparse. Moreover, survivor-employees are vulnerable to discrimination, unfair firing, and inadequate leave for court appearances and medical assistance. These obstacles still threaten survivors’ ability to ensure economic and financial security upon leaving their abuser. Title VII of the Civil Rights Act does not have the adequate safeguards necessary to protect survivors in the workplace. Additionally, Congress’s few attempts to pass legislation on the matter—like the Violence Against Women Act—have not been successful. Recent legislation is either struck down at the committee level, or partisan issues end up stripping the laws of much of their power.

This article explores the legal background and history of the few existing federal laws, the current avenues used by survivors to pursue employment discrimination claims, and the states that have already enacted their own expanded protections in various ways. This article then discusses the counterarguments that employers raise if federal laws were to be expanded. Finally, to remedy this lack of protection, this article proposes the creation of a new federally protected class status for “abused persons” by amending Title VII of the Civil Rights Act and the Family Medical Leave Act, adopting and amending several pieces of state law as models, and putting in safeguards to ease employers’ worries about costs and liability.

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## I. INTRODUCTION

Domestic violence is a sensitive, often avoided subject. But such violence can affect individuals in every social stratum, every gender and relationship type, and every economic class.<sup>1</sup> Domestic violence may be an invisible plight in our society, but it is nonetheless a prevalent one. With the recent attention on sexual abuse and harassment through the “#MeToo” movement on social media as well as the growing list of Hollywood offenders, public opinion is turning towards addressing such issues.<sup>2</sup> Abuse, violence, and harassment can affect anyone, regardless of whether the victim is an employee at the supermarket checkout or an actress nominated for an Emmy.

Sexual and domestic abuse and violence can vary between verbal disparagement, emotional or psychological manipulation, coercion, stalking, harassment, and physical assault.<sup>3</sup> Being a survivor of abuse can affect one’s ability to maintain a steady job, to seek medical or psychological help, or to pursue litigation.<sup>4</sup> Survivors might miss work for medical appointments or make excuses for bruises, fearing they would otherwise be perceived as a legal liability by an employer. A survivor may wish to get a police order of protection against their abuser, but the fear of

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1. Phyllis Holditch Niolon, Megan Kearns, Jenny Dills, Kirsten Rambo, Shalon Irving, Theresa L. Armstead & Leah Gilbert, *Preventing Intimate Partner Violence Across the Lifespan: A Technical Package of Programs, Policies, and Practices*, CDC NAT’L CTR. FOR INJ. PREVENTION & CONTROL: DIV. OF VIOLENCE PREVENTION 7–8 (2017), <https://www.cdc.gov/violenceprevention/pdf/ipv-technicalpackages.pdf> [hereinafter *Preventing Intimate Partner Violence*]. The burden of such violence, however, is [N]ot shared equally across all groups; many racial/ethnic and sexual minority groups are disproportionately affected by IPV [intimate partner violence] . . . the lifetime prevalence of experiencing contact sexual violence, physical violence, or stalking by an intimate partner is 57% among multi-racial women, 48% among American Indian/Alaska Native women, 45% among non-Hispanic Black women, 37% among non-Hispanic White women, 34% among Hispanic women, and 18% among Asian-Pacific Islander women. The lifetime prevalence is 42% among multi-racial men, 41% among American Indian/Alaska Native men, 40% among non-Hispanic Black men, 30% among non-Hispanic White men, 30% among Hispanic men, and 14% among Asian-Pacific Islander men. . . some sexual minorities are also disproportionately affected by IPV victimization; 61% of bisexual women, 37% of bisexual men, 44% of lesbian women, 26% of gay men, 35% of heterosexual women, and 29% of heterosexual men . . . 4.3% of people with physical health impairments and 6.5% of people with mental health impairments. This article however does not delve into the deeper intricacies as there is not enough time or space but recognizes that this is an admittedly complex and intersectional issue.

2. See Stephanie Zacharek, Eliana Dockterman & Haley Sweetland Edwards, *TIME Person of the Year 2017: The Silence Breakers*, TIME, <http://time.com/time-person-of-the-year-2017-silence-breakers/> (last visited Nov. 18, 2018) (the “#metoo” grew out of the viral hashtag on social media posts dealing with sexual violence, as a way to “de-stigmatize the act of surviving by highlighting the breadth and impact of sexual violence worldwide.” The hashtag was and is used by survivors to tell their stories on public platforms such as Facebook, Instagram, and Twitter, and to speak up about the violence that is all too common in the lives of many women and men. This viral movement led to many women and men who had been sexually harassed and assaulted by famous individuals, to speak out about their abusers and move past the shame and stigma of abuse in their lives. Time Magazine named the 2017 Person of the Year after the celebrity survivors, and the many others who followed their example, naming them collectively as “The Silence Breakers.”). For more information on #metoo, see generally *History & Vision*, ME TOO, <https://metoomvmt.org/about/> (last visited Nov. 18, 2018).

3. See *What is Domestic Violence?*, CTR. FOR FAM. JUST., <https://centerforfamilyjustice.org/faq/domestic-violence/> (last visited Nov. 18, 2018). This may include sexual abuse, sexual assault, and stalking as well, but for purposes of this article, I will be using the term “domestic violence,” as a catchall for the various types of abuse that can occur in intimate partner relationships. This term is linked more intimately to direct financial and economic abuse and security.

4. Denise R. J. Finlay, *Employment Discrimination Against Domestic Violence Survivors: Strengthening the Disparate Impact Theory*, 88 N.D. L. REV. 989, 991 (2012).

losing their job after missing work for legal and medical visits may deter many from seeking the appropriate assistance.<sup>5</sup> These are the realities that many survivors<sup>6</sup> of abuse face.<sup>7</sup>

When trying to hold down a job and provide for one's family while dealing with abuse in the home, survivors often face impossible choices.<sup>8</sup> Survivors looking to leave their abusers must face the prospect of potentially becoming unemployed due to missed days of work, inadequate protections from dismissal, or other repercussions.<sup>9</sup> This harsh reality is accentuated by the fact many states do not have adequate employment protections in place, nor has the federal government implemented substantial expansive protections for survivors of abuse and violence.

Intimate partner domestic violence<sup>10</sup> is a public policy issue that affects not only the victims themselves, but their employers and society as a whole. It is in the best interest of the public to provide increased protections for survivors.<sup>11</sup> Increased protection is beneficial in the following three ways: (1) it provides increased remedies for relief; (2) increased education and remedial avenues create cost effectiveness down the line; and (3) increased protections ensure survivors have a higher chance of achieving economic independence and security.<sup>12</sup> To achieve this goal, this article proposes making victims of abuse a federally protected class.

This article will first examine the legal history of employment protections and then discuss existing employment laws relating to survivors of abuse. Additionally, current and proposed state and federal laws will be examined. Then, a discussion of why these laws are ineffective will follow, and a solution will be recommended.

5. *Id.*

6. The term 'survivor' has been adopted in recent years by the advocate community as a way for the victims of domestic and sexual assault to "take back" their power from abusers, and to change the way that the public and survivors themselves think about violence. It is a term used to help individuals move past the incident(s) and to be stronger in the future instead of living as a victim all their lives. While working as a legal intern for the Missouri Coalition Against Domestic and Sexual Violence, I received advocacy training that indicated that neither term is used exclusively and that abused persons should be allowed to pick whatever term they most identify with. I will use both interchangeably throughout, since individuals in these situations do not always prefer one over the other. See generally Michael Pappendick & Gerd Bohner, "Passive Victim – Strong Survivor"? Perceived Meaning of Labels Applied to Women Who Were Raped, PLOS ONE 1–2 (May 11, 2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5426776/pdf/pone.0177550.pdf> (discussing the different societal connotation of survivor and victim).

7. Survivors is a neutral term. Domestic and sexual abuse and violence can affect all members of our society equally, whether they are male, female, transgender, gender nonconforming, and regardless of sexual orientation. See *Sexual Assault and the LGBTQ Community*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/sexual-assault-and-the-lgbt-community> (last visited Nov. 18, 2018); *Domestic Violence Statistics*, JOYFUL HEART FOUND., <http://www.joyfulheartfoundation.org/learn/domestic-violence/about-issue/who-does-domestic-violence-affect> (last visited Nov. 18, 2018).

8. *Victim Workplace Rights*, LEGAL MOMENTUM, <https://www.legalmomentum.org/employment-and-victims-violence> (last visited Nov. 18, 2018).

9. *Preventing Intimate Partner Violence*, *supra* note 1, at 8.

10. The Centers for Disease Control and Prevention (CDC) define Intimate Partner Violence as "a serious, preventable public health problem that affects millions of Americans. The term 'intimate partner violence' describes physical, sexual, or psychological harm [including coercive acts] by a current or former partner or spouse." *Intimate Partner Violence*, CDC: VIOLENCE PREVENTION, <https://www.cdc.gov/violenceprevention/intimatepartnerviolence/index.html> (last updated Oct. 23, 2018); see also *Intimate Partner Violence: Definitions*, CDC: VIOLENCE PREVENTION, <https://www.cdc.gov/violenceprevention/intimatepartnerviolence/definitions.html> (last updated Oct. 23, 2017).

11. *Preventing Intimate Partner Violence*, *supra* note 1, at 9.

12. *Id.* at 29–31.

This article's solution will do the following: (1) discuss current state models enacted by state statutes and how these laws should be implemented nationally; (2) propose the creation of a federally protected class status for survivors; (3) identify potential issues employers could raise and how to address them; (4) provide examples of how this solution might be successfully implemented; and (5) propose a federal test to protect survivors.

## II. HISTORICAL CONTEXT AND BACKGROUND OF DOMESTIC ABUSE LAWS

For most of Western history, domestic and sexual violence in the home has gone largely unaddressed by governments, courts, religious institutions, and the public at large.<sup>13</sup> In fact, the typical American in the heterosexual home tended to see such violence as simply the “right” of the husband to “discipline” his wife.<sup>14</sup> It was not until the women's movement of the 1970s and 1980s that public perception on what was acceptable started shifting and violence in the home was recognized.<sup>15</sup> Additionally, it was not until the early 1990s that the legal definition of rape was amended to acknowledge nonconsensual sex within a marriage as “marital rape.”<sup>16</sup> It took even longer for Americans to recognize that abuse could happen in “non-traditional” relationships as well, including female-on-male and LGBTQ+ relationship abuse and violence.<sup>17</sup>

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13. See, e.g., *Overview of Historical Laws that Supported Domestic Violence*, WOMENSAFE (2011), <http://www.womensafe.net/home/index.php/domesticviolence/29-overview-of-historical-laws-that-supported-domestic-violence>. Legalized violence dates back to the Code of Hammurabi, the early Greeks, and then the Romans. In early Roman society, a woman was deemed the property of her husband, subject to his control, and could beat divorce, or murder his wife for offences committed by her for acts against his honor or property rights. In the 15th century, the Catholic Church endorsed “The Rules of Marriage” where the husband was to beat her if she committed an offense, as a showing of his concern for her soul. English Common Law gave a man the right to beat his wife in the interest of maintaining family discipline. The phrase “rule of thumb” referred to the English law allowing such a beating with a stick no bigger than the husband's thumb.

14. Katherine M. Schelong, *Domestic Violence and the State: Responses to and Rationales for Spousal Battering, Marital Rape & Stalking*, 78 MARQ. L. REV. 79, 84 (1994). As an overwhelming majority of survivors are women, and in heterosexual relationships, this article will focus primarily on the general majority of survivors as such. This is not to deemphasize the existence of survivors from multiple types of relationships and across the gender spectrum. In fact, such relationships are even more rarely discussed, so I will address this later below, but since most of the data and legal action has been about heterosexual relationships where a female is the victim of assault, that will be the primary focus of this article.

15. See, e.g., Peggy Solic, *Private Matter or Public Crisis? Defining and Responding to Domestic Violence*, 8(10) HIST. DEPTS. AT THE OHIO STATE UNIV. & MIAMI UNIV. (July 2015), <http://origins.osu.edu/article/private-matter-or-public-crisis-defining-and-responding-domestic-violence>. While laws against beating one's family had been on the books since the 1870s, they were not strictly enforced until First Wave Feminists started bringing the problems of domestic abuse to the attention of the media and public. See Kate Wallace Nunneley, *Feminist Friday – Origins & First Wave*, JUNIA PROJECT (Mar. 6, 2015), <https://juniaproject.com/feminist-friday-the-first-wave/>.

16. Lily Rothman, *When Spousal Rape First Became a Crime in the U.S.*, TIME (July 28, 2015), <http://time.com/3975175/spousal-rape-case-history/>; see also Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. 1373, 1392 (2000).

17. INTIMATE PARTNER ABUSE & RELATIONSHIP VIOLENCE WORKING GRP., *Intimate Partner Abuse and Relationship Violence*, AM. PSYCHOL. ASS'N 3–4 (June 24, 2002), <https://www.apa.org/about/division/activities/partner-abuse.pdf> [hereinafter THE WORKING GROUP].

Nevertheless, such abuse is largely ignored by the public, no matter the gender identity or sexual orientation of the individuals involved.<sup>18</sup> When such abuse is thought to be nonexistent, it makes it more difficult for survivors to face their abusers, to candidly seek professional help, and to receive sincere assistance from their employers.<sup>19</sup> Today, nearly “20 people per minute—totaling more than 10 million per year—are physically abused by an intimate partner in the United States.”<sup>20</sup> According to the Centers for Disease Control and Prevention (“CDC”) and data from the National Intimate Partner and Sexual Violence Survey (“NISVS”), “nearly 1 in 4 adult women (23%) and approximately 1 in 7 men (14%) in the U.S. report having experienced severe physical violence . . . from an intimate partner in their lifetime.”<sup>21</sup> Additionally, nearly half of both men and women “have experienced psychological aggression, such as humiliating or controlling behaviors.”<sup>22</sup> However, research is emerging that indicates “environmental factors such as . . . community norms that are intolerant of [intimate partner violence] may be protective” and “increasing economic opportunity . . . may also be protective.”<sup>23</sup> As such, intimate partner violence has been deemed “a serious preventable public health problem that affects millions of Americans” and is now considered a priority for all areas of government and the private sector.<sup>24</sup>

In response to the increase in awareness of female abuses and assaults, Congress passed the Violence Against Women Act of 1994 (“VAWA”) as part of a broader act on violent crime.<sup>25</sup> Since its enactment, VAWA has “(1) enhanced investigations and prosecutions of sex offenses and (2) provided for a number of grant programs to address the issue of violence against women from a variety of angles, including law enforcement, public and private entities and service providers, and victims of crime.”<sup>26</sup> As public awareness has grown, VAWA has expanded as follows: creating programs aimed at preventing abuse towards women; enhancing opportunities and funding for prosecuting offenders; expanding protections to include certain population groups, such as the elderly, disabled, children, and minority groups;<sup>27</sup> granting federal funds for research on college campus violence and assault;<sup>28</sup> amending existing laws to cover a wider range of prohibited actions;<sup>29</sup> expanding the definition of “‘underserved populations’ to include discrimination based on religion, sexual orientation, or gender identity;”<sup>30</sup> passing new laws to

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18. *Preventing Intimate Partner Violence*, *supra* note 1, at 9.

19. *Id.* at 29–31.

20. *Protections Delayed: State Housing Finance Agency Compliance with the Violence Against Women Act*, ACLU 2 (May 2017), <https://www.aclu.org/report/protections-delayed-state-housing-finance-agency-compliance-violence-against-women-act> [hereinafter *Protections Delayed*].

21. *Preventing Intimate Partner Violence*, *supra* note 1, at 7.

22. *Id.* at 7–8.

23. *Id.* at 9.

24. *Id.* at 7.

25. *Protections Delayed*, *supra* note 20, at 2.

26. Lisa N. Sacco, *The Violence Against Women Act: Overview, Legislation, and Federal Funding*, CONG. RES. SERV. 2 (May 26, 2015), <https://fas.org/sgp/crs/misc/R42499.pdf>.

27. *Id.* at 3.

28. *Id.* at 4.

29. *Id.* at 10.

30. *Id.* at 12 (citing 42 U.S.C. § 13925 (2013) (current version at 34 U.S.C. § 12291 (2017))).

combat human trafficking;<sup>31</sup> expanding protection to reach American Indian tribes;<sup>32</sup> and increasing housing rights for victims of abuse.<sup>33</sup>

Additionally, the federal government has taken steps towards codifying rights for victims in the workplace.<sup>34</sup> Unfortunately, substantial legislation has yet to make it past the first few rounds of committees and votes.<sup>35</sup> For example, the Security and Financial Empowerment (“SAFE”) Act sought to “provide victims of domestic violence with up to 30 days emergency unpaid leave to seek medical attention; obtain services from a victim services organization; obtain psychological or other counseling; [participate] in safety planning or relocation; or to seek legal assistance.”<sup>36</sup> The proposal addressed concerns about proving “victim status” by requiring proof for the leave such as “the victim’s own sworn statement; documentation from an employee, agent, or volunteer of a victim services organization, an attorney, a member of the clergy, or a medical or other professional; a police or court record; or other corroborating evidence.”<sup>37</sup>

Moreover, the SAFE Act would have codified what many state and federal courts have already ruled on—that “victims who must leave the workplace as a result of violence are eligible for unemployment insurance.”<sup>38</sup> Additionally, the SAFE Act would have protected victims of domestic violence from employment and insurance discrimination.<sup>39</sup> In 2001, the Victims Economic Security and Safety Act (“VESSA”) was introduced but was not passed.<sup>40</sup> In April 2007, the Survivors Empowerment and Economic Security (“SEES”) Act was introduced in a hearing, but the bill died in the Senate Finance Committee.<sup>41</sup>

While the federal government has attempted to pass laws and has made good faith attempts to strengthen existing protections, the efforts have largely failed. As of 2018, VAWA is the only comprehensive federal law in effect to protect survivors, but it is now up for reauthorization by Congress.<sup>42</sup> Partisan issues nearly defeated the reauthorization in 2013, and they are once again threatening the current reauthorization.<sup>43</sup> VAWA was set to expire on September 30, 2018, but lawmakers “slipped a short-term extension of the existing law into a must-pass continuing resolution that kept the government funded until Dec[ember] 7,” and instead focused

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31. *Id.* at 14.

32. *Id.*

33. *Id.* at 15.

34. *State Law Guide: Employment Rights for Victims of Domestic or Sexual Violence*, LEGAL MOMENTUM: THE WOMEN’S LEGAL DEF. & EDUC. FUND 1, <https://www.legalmomentum.org/sites/default/files/reports/employment-rights.pdf> (last updated Sept. 2010) [hereinafter *State Law Guide*].

35. *Id.* at 10.

36. *Id.* at 10 (citing the Security & Financial Empowerment (SAFE) Act, H.R. 739, 111th Cong. (2009) (citing S. 1740, 111th Cong. (2009)). The bill was sent to committee but never made it to a vote. This was the third attempt to pass this bill as it had been introduced in both 2005 and 2007.

37. *Id.*

38. *Id.* at 10–11, 14. This article does not delve into the insurance consequences of cases where states have addressed the issue of unemployment pay and insurance for victims of abuse.

39. *Id.* at 10.

40. *Id.* at 11.

41. *Id.* at 10–11.

42. Ashley Killough, Maeve O’Brien & Dan Scully, *Democrats Pitch Plan to Reauthorize Violence Against Women Act*, CNN, <https://www.cnn.com/2018/07/26/politics/violence-against-women-act-reauthorization/index.html> (last updated July 26, 2018, 9:01 PM).

43. *Id.*

on the Supreme Court nomination of the now sitting Justice Kavanaugh.<sup>44</sup> The bill was “again extended by a short-term bill,” before December 7th, but the extension ran only until December 21st.<sup>45</sup> However, the government shut down on December 22, 2018 regarding funding appropriation caused VAWA to expire at midnight on Friday, December 21, 2018<sup>46</sup> Even though “both the House and the Senate passed spending deals that included clauses that would have extended VAWA until Feb. 8,” the law was contingent on the larger budget being approved which ignited a dispute “over funding for a border wall.”<sup>47</sup> As of now, Congress has failed to reauthorize VAWA, leaving domestic violence survivors largely unprotected unless they live in a state with domestic violence laws on the books.<sup>48</sup> Few states have chosen to say much about domestic violence outside of the realm of criminal or family law, but those who have taken steps to implement protections in the area of employment set a precedent that other states and the federal government should be keen to follow.

### III. EXISTING LEGAL FRAMEWORK

#### *A. The Civil Rights Act and Employment Discrimination*

In 1964, Congress passed the Civil Rights Act.<sup>49</sup> The provisions of Title VII of the Civil Rights Act forbade discrimination on the basis of sex and race in hiring, promoting, and firing. In the final legislation, § 703(a) of the Act made it unlawful for an employer to “fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges or employment, because of such individual’s race, color, religion, sex, or national origin.”<sup>50</sup> The final bill also allowed sex to be a consideration in hiring when sex is a bona fide occupational qualification for the job.<sup>51</sup> Title VII of the Act also created the Equal Employment Opportunity Commission (“EEOC”) to implement the newly minted law.<sup>52</sup>

Today, the EEOC enforces federal laws that make it illegal to discriminate against a job applicant or an employee because of the person’s race, color, religion, sex (including pregnancy, gender identity, and sexual orientation), national origin, age (40 or older), disability, or genetic information.<sup>53</sup> It is also illegal to discriminate against a person because the person complained about discrimination, filed a charge

44. Colby Itkowitz, *The Health 202: In #MeToo Era, Congress Isn’t Prioritizing Violence Against Women Programs*, WASH. POST (Sept. 21, 2018), [https://www.washingtonpost.com/news/powerpost/paloma/the-health-202/2018/09/21/the-health-202-in-metoo-era-congress-isn-t-prioritizing-violence-against-women-programs/5ba3e43e1b326b7c8a8d1587/?noredirect=on&utm\\_term=.7d8d675271f1](https://www.washingtonpost.com/news/powerpost/paloma/the-health-202/2018/09/21/the-health-202-in-metoo-era-congress-isn-t-prioritizing-violence-against-women-programs/5ba3e43e1b326b7c8a8d1587/?noredirect=on&utm_term=.7d8d675271f1).

45. Jenny Gathright, *Violence Against Women Act Expires Because of Government Shutdown*, NPR (Dec. 24, 2018, 3:21 PM), <https://www.npr.org/2018/12/24/679838115/violence-against-women-act-expires-because-of-government-shutdown>.

46. *Id.*

47. *Id.*

48. Killough, O’Brien & Scully, *supra* note 42.

49. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964).

50. *Id.* § 703(a).

51. *Id.* § 703(e).

52. *Id.* § 705.

53. *About EEOC: Overview*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <https://www.eeoc.gov/eeoc/index.cfm> (last visited Nov. 18, 2018).



of discrimination, or participated in an employment discrimination investigation or lawsuit.<sup>54</sup>

The Code of Federal Regulations (“CFR”) provides additional insight into the Civil Rights Act, and specifically, sex-based employment discrimination.<sup>55</sup> The CFR lists specific examples that would not be included under the narrow exception of “sex as a bona fide occupational qualification.”<sup>56</sup> Specifically, the regulation targets presumptions based on stereotypes, stating the following:

- (i) The refusal to hire a woman because of her sex based on assumptions of the comparative employment characteristics of women in general . . .
- (ii) The refusal to hire an individual based on stereotyped characterizations of the sexes . . . The principle of nondiscrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group.
- (iii) The refusal to hire an individual because of the preferences of coworkers, the employer, clients or customers.<sup>57</sup>

The regulation posits that laws built on such stereotypes about sex and gender “do not take into account the capacities, preferences, and abilities of individual females and, therefore, discriminate on the basis of sex,” and as such are “in conflict with and are superseded by title VII of the Civil Rights Act of 1964.”<sup>58</sup> Additionally, the regulation emphasizes that a refusal to hire or hinder “the employment opportunities of female applicants or employees in order to avoid the provision of such benefits” or a refusal to provide the same benefits or other accommodations, would be a violation of Title VII.<sup>59</sup>

### B. The EEOC in Recent Years

Recently, the EEOC published an informal guidance document on its website, entitled “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.”<sup>60</sup> The purpose of the publication was to answer basic questions regarding Title VII, the Americans with Disabilities Act (“ADA”), and issues facing employees who are victims of domestic violence.<sup>61</sup> The EEOC acknowledges in the document that, while no federal laws exist currently to “prohibit discrimination against applicants or employees who experience domestic or dating violence,

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54. *Id.*

55. 29 C.F.R. § 1604.2(a)(1) (2017).

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *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*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, [https://www.eeoc.gov/eeoc/publications/qa\\_domestic\\_violence.cfm](https://www.eeoc.gov/eeoc/publications/qa_domestic_violence.cfm) (last visited Nov. 18, 2018) [hereinafter *Questions and Answers*].

61. *Id.*

sexual assault, or stalking as such, potential employment discrimination and retaliation against these individuals may be overlooked.”<sup>62</sup> The document provides examples of possible situations that, while not explicitly covered under Title VII or the ADA, might in fact rise to the level of sex-based discrimination or temporary disability discrimination.<sup>63</sup> The EEOC cautions against terminating or not hiring victims of abuse based on stereotypes such as fearing the “potential ‘drama’” such victims might bring, or that “only women can be true victims of domestic violence because men should be able to protect themselves.”<sup>64</sup>

The guidance document also addresses situations where an employee might experience discrimination in violation of the ADA, which “prohibits different treatment or harassment at work based on an actual or perceived impairment.”<sup>65</sup> The EEOC suggests that “impairments resulting from domestic or dating violence, sexual assault[,], or stalking” could be included under the ADA definitional carve-outs, giving examples of victims dealing with depression, anxiety, facial scarring, or trauma, all relating to the abuse.<sup>66</sup> The EEOC suggests that if a person were to be denied employment, a transfer, reasonable accommodations, a raise, or other perceived differential treatment based on the person’s status as a victim, there would be a discrimination claim under the ADA.<sup>67</sup>

While this nonbinding document is purely to address general questions to the lay public, the EEOC may be heading for future policy changes as many federal regulatory bodies’ guidance documents often signal the direction the agency is headed. It may also serve as a signal to employers that the EEOC and the Department of Justice (“DOJ”) may intend to prosecute more egregious examples of discriminatory behavior that could fall under either category of sex-discrimination or disability discrimination.

Ideally, this expansion would be the route to improving the legal position of survivors in the workplace at the federal level so that the effect of these improvements would be widespread. I propose that the way to address this widespread—yet largely overlooked—problem would be to extend protected class categories to cover victims of domestic and sexual violence and abuse. This extension could be achieved either through expanding the protected class doctrine of sex/gender or disabilities, or by creating a new protected class for a limited number of circumstances.

#### IV. ANALYSIS

After an in-depth look at the issues surrounding discrimination against domestic violence victims and the laws and regulations that should be governing them, this article proposes amendments to the existing framework to better protect employees from the negative impacts of disparate treatment and disparate impact<sup>68</sup> as a victim-survivor of domestic violence.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. See *Shaping Employment Discrimination Law*, EQUAL EMP’T OPPORTUNITY COMM’N, <https://www.eeoc.gov/eeoc/history/35th/1965-71/shaping.html> (last visited Nov. 18, 2018) [hereinafter *Shaping Employment Discrimination Law*] (The disparate impact theory of discrimination was originally developed through the EEOC’s prosecution of

### A. Overview: The Problem

Interpersonal relationship violence is an issue faced not just by the individuals and immediate family of the survivors or abuser; it also effects every aspect of the survivor's life, including financial and economic security, and psychological and emotional stability.<sup>69</sup> When compared to those who do not experience domestic violence, individuals “who report [domestic violence] victimization also report more days arriving late to work, more absenteeism from work, more psychological and physical health problems that may reduce their productivity, and greater difficulty maintaining employment over time.”<sup>70</sup>

Not only is interpersonal relationship violence an issue for survivors, but it is a public policy issue for the larger community to try to protect and prevent such violence—especially in the employment setting.<sup>71</sup> Employment protections not only ensure that survivors remain financially secure, but “research also shows that abused employed women who received social and tangible support from co-workers and supervisors experienced less social isolation, improved health, and fewer negative employment outcomes.”<sup>72</sup>

Giving protection to a class of individuals who were, or are currently, in abusive relationships is vital to not only helping victims safely navigate through the legal mechanisms, but also for ensuring they do not have to go back to their abuser. It is well documented that one of the biggest ways abusers keep control over their victims is through tactics such as “deliberately try[ing] to sabotage their partners' efforts to obtain and maintain paid employment,” also referred to as economic abuse.<sup>73</sup> Economic independence and financial security are two of the biggest obstacles for survivors to overcome in successfully leaving a violent relationship, and the current federal employment laws are woefully inadequate for this class of extremely vulnerable citizens.<sup>74</sup>

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[R]ace discrimination against black workers and applicants in hiring and promotion, in selection and testing practices, and by the maintenance of segregated seniority lines by employers. In reviewing these charges, the Commission declared that discrimination did not merely take place through intentional acts of overt discrimination against individuals the generally accepted “disparate treatment” definition of discrimination. Rather, the Commission held that the discrimination also occurred when neutral policies or practices had a disproportionate, adverse impact on any protected class, usually minorities or women. . . . The Commission utilized statistics to demonstrate the disparate impact of facially neutral hiring and employment systems.).

69. Claire M. Renzetti, *Economic Stress and Domestic Violence*, NAT'L ONLINE RES. CTR. ON VIOLENCE AGAINST WOMEN 1 (Sept. 2009), [https://uknowledge.uky.edu/cgi/viewcontent.cgi?article=1000&context=crvaw\\_reports](https://uknowledge.uky.edu/cgi/viewcontent.cgi?article=1000&context=crvaw_reports).

70. *Id.* at 3.

71. *Preventing Intimate Partner Violence*, *supra* note 1, at 7.

72. Renzetti, *supra* note 69, at 4.

73. *Id.*

74. *Intimate Partner Violence: Risk and Protective Factors for Perpetration*, CDC: VIOLENCE PREVENTION, <https://www.cdc.gov/violenceprevention/intimatepartnerviolence/riskprotectivefactors.html> (last updated Oct. 23, 2018).

*B. Bringing Discrimination Claims: Then and Now*

After the passage of the Civil Rights Act, the EEOC articulated in a publication regarding employment testing that “Title VII prohibited neutral policies and practices that adversely affected members of protected groups and could not be justified by the types of proof necessary to validate any screening test.”<sup>75</sup> The Commission ruled in an early decision that requiring a sixth grade education “for a labor position was discriminatory because it had a disproportionate impact on black workers and was not shown to be necessary to do the job.”<sup>76</sup> Additionally, the Supreme Court in *Griggs v. Duke Power* ruled against the employer when the Court “invalidated an employer’s requirement that applicants have a high school diploma and/or pass aptitude tests for hire and transfer.”<sup>77</sup> Under the disparate impact theory of the *Griggs* case, an employee must prove that even if the policy or decision was facially neutral, the effect was disproportionate, unintentional discrimination.<sup>78</sup> This case held that Title VII outlaws not only overt discrimination but also practices that are fair in form but discriminatory in application.<sup>79</sup>

The *McDonnell Douglas* case established an indirect evidence test, where the plaintiff/employee must establish a prima facie case of discrimination, the employer must articulate a legitimate, non-discriminatory reason, and the plaintiff/employee must show the alleged reason is a pretext for discrimination.<sup>80</sup> The 1991 Amendments to Title VII settled some of the issues raised after this case.<sup>81</sup> If an illegitimate reason was a “motivating factor” in the decision, even if there were other motivating factors, Title VII is violated, and the burden switched to the employer to show that same decision would have been reached without the motivating factors.<sup>82</sup> If this is shown, the employee cannot receive damages from the employer, but can still recover costs and fees.<sup>83</sup> Thus, the employee who establishes that the challenged employment decision was at least in part motivated by unlawful bias has proven a violation of Title VII and will be entitled to at least some relief.<sup>84</sup>

The EEOC never anticipated dealing with many sex discrimination cases. In the years following the passage of the Act, so many cases were brought forward that the Commission began issuing guidelines like those issued for racial discrimination cases.<sup>85</sup> The EEOC issued provisions, such as its declaration “that the Title VII provision permitting sex discrimination if gender was a so-called bona fide occupational qualification (BFOQ) for the job should be narrowly construed.”<sup>86</sup> The EEOC stated the following:

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75. *Shaping Employment Discrimination Law*, *supra* note 68.

76. *Id.*

77. *Id.* (discussing *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)).

78. *Griggs*, 401 U.S. at 432.

79. *Id.* at 431.

80. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 807 (1993).

81. See *The Civil Rights Act of 1991*, EQUAL EMP’T OPPORTUNITY COMM’N, <https://www.eeoc.gov/eeoc/history/35th/1990s/civilrights.html> (last visited Nov. 18, 2018).

82. *Id.*

83. *Id.*

84. *Id.*

85. See generally *Shaping Employment Discrimination Law*, *supra* note 68 (discussing the disparate impact theory).

86. *Id.*

[A] BFOQ could not be established on the basis of assumptions or stereotyped views of the sexes; nor could it be based on preference of clients, customers or co-workers. . . . In addition, EEOC made clear that it was illegal sex discrimination to refuse to hire or promote women because they were married or had children, unless were similarly treated.<sup>87</sup>

Throughout the 1980s, the EEOC expanded its guidelines to include sexual harassment as a type of sex discrimination.<sup>88</sup> The 1991 Civil Rights Act amendments added “the disparate impact theory of discrimination” officially into Title VII and, throughout the 1990s, the “EEOC successfully challenged a number of discriminatory employment policies affecting pregnant women.”<sup>89</sup> These laws were enforced and expanded at a time when discrimination on the basis of one’s status as an abused person was not a concern under the discrimination laws, nor was it likely even thought to be an issue affecting the workplace. It is now time that the federal laws adapt and update its practices and policies to protect the needs of some of the most vulnerable of citizens.

### C. Existing Discrimination Remedies for Female Survivors and How Protected Class Status Would Improve Protections for Survivors

Under the standing laws, a survivor who believes that they have been unfairly discriminated against through hiring, firing, promotion, time-off, or other grievance would most likely succeed on a claim of gender or sex discrimination.<sup>90</sup> To claim sex discrimination as a female survivor, she would need to show that because women are disproportionately victims of domestic and sexual violence, a facially neutral policy is disproportionately discriminatory towards women.<sup>91</sup> While strides have been made to expand protections against sex discrimination, this is still a hard claim to prove as it requires a lot of legal jujitsu or an egregiously obvious act of discrimination.<sup>92</sup> However, under this article’s proposed expansion of federal discrimination laws, a victim of abuse would be granted protected class status—guaranteeing a smoother legal path should discrimination arise. This could be implemented in a variety of ways, with several options discussed below.

For example, some states have included their interpretation of the Family Medical Leave Act (“FMLA”), sick leave, vacation days, and exceptions for victims and

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87. *Id.*

88. *Enforcement Efforts in the 1980s*, EQUAL EMP’T OPPORTUNITY COMM’N, <https://www.eeoc.gov/eeoc/history/35th/1980s/enforcement.html> (last visited Nov. 18, 2018).

89. *Furthering the Protections Against Workplace Discrimination and Harassment*, EQUAL EMP’T OPPORTUNITY COMM’N, <https://www.eeoc.gov/eeoc/history/35th/1990s/furthering.html> (last visited Nov. 18, 2018).

90. For a comparison of the current available methods of bringing claims of sex discrimination under Title VII, see Maria Amelia Calaf, *Breaking the Cycle: Title VII, Domestic Violence, and Workplace Discrimination*, 21 LAW & INEQ. 167,177–90 (2003).

91. *Your Rights: Proving Discrimination*, WORKPLACE FAIRNESS, <https://www.workplacefairness.org/proving-employment-discrimination> (last visited Nov. 18, 2018) [hereinafter WORKPLACE FAIRNESS] (citing PAUL H. TOBIAS & SUSAN SAUTER, JOB RIGHTS AND SURVIVAL STRATEGIES: A HANDBOOK FOR TERMINATED EMPLOYEES (Nat’l Emp. Rights Inst. 1997)).

92. Calaf, *supra* note 90, at 177.

immediate family members of victims.<sup>93</sup> These exceptions typically include a set number of days for time off to attend court hearings, seek medical attention for themselves or dependents, and take care of other related matters.<sup>94</sup> In a state where this expansion of FMLA has not been implemented, or in federal court, a female survivor could make a disparate sex discrimination claim<sup>95</sup> against the employer in cases where the employee was let go for days missed, reprimanded or retaliated against, passed up for promotion or extra responsibilities, or not hired due to bias about victims of violence.<sup>96</sup> These claims are difficult and rarely won.<sup>97</sup>

However, if abused persons were given protected class status, this would extend protection to victims in all states and remove the high barriers to legal relief currently in place. As such, victims would be able to file for FMLA in order to receive extended medical leave for themselves or for their immediate family members without worrying about using sick leave for situations beyond a victim's immediate control. Implementing this leave would create no additional cost to the employer because FMLA for extended leave and emergency situations already exist, and the processes for filing FMLA would not differ for abused persons.

Additionally, in cases of "at will" employment firing, if the employer's reason for termination is due to days missed, a public policy argument would also pass muster here. For example, court appearances for pursuing litigation against the perpetrator of the violence or receiving medical attention related to the violent acts are generally considered to be for the good of society.<sup>98</sup> A reasonable conclusion, therefore, is that as a public policy argument, being fired for doing one's civic duty to bring justice and having one's day in court is a strong argument for protections in such cases.<sup>99</sup>

By creating a federally protected class for abused persons, this would provide an avenue for victims to ensure some economic protection from wrongful termination. As with other protected classes, however, the employer would bear the burden of production in proving that the firing was due to something unrelated to a protected status characteristic.<sup>100</sup> As discussed later, in the case of victims of domestic violence, this burden would likely include providing verifications to protect both the employer and the employee.<sup>101</sup> Additionally, the creation of a protected class would put an employer and employee on notice of the duties to the survivors and the rights of the survivor.

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93. *State Law Guide*, *supra* note 34, at 1.

94. *Id.*

95. See generally *Shaping Employment Discrimination Law*, *supra* note 68 (discussing the disparate impact theory).

96. WORKPLACE FAIRNESS, *supra* note 91.

97. Calaf, *supra* note 90, at 185.

98. Robin Runge, *The Legal Response to the Employment Needs of Domestic Violence Victims: Wrongful Termination in Violation of Public Policy*, 37(3) A.B.A.: HUM. RTS. MAG. (Mar. 13, 2012), [https://www.americanbar.org/publications/human\\_rights\\_magazine\\_home/human\\_rights\\_vol37\\_2010/summer2010/the\\_legal\\_response\\_to\\_the\\_employment\\_needs\\_of\\_domestic\\_violence\\_victims\\_an\\_update.html](https://www.americanbar.org/publications/human_rights_magazine_home/human_rights_vol37_2010/summer2010/the_legal_response_to_the_employment_needs_of_domestic_violence_victims_an_update.html).

99. *Id.*

100. Calaf, *supra* note 90, at 182.

101. Runge, *supra* note 98 (particularly the following section: "Employer and Legal Responses to Domestic Violence against Employees"). See *infra* Part V.A.

*D. Existing Discrimination Remedies for Male and  
LGBTQ+<sup>102</sup> Survivors and How Protected Class Status  
Would Improve Protections for Survivors*

Survivors who are not females or are not in “traditional” heterosexual relationships are often overlooked and left out of the victim-survivor narrative. The prevalence of violence, in fact, occurs more frequently in LGBTQ+ relationships,<sup>103</sup> often due to societal influences, power dynamics, and the fear of friends, family, and coworkers learning of an individual’s sexual orientation, gender identity, or expression.<sup>104</sup> However, both male and LGBTQ+ survivors often experience similar, if not greater (in certain contexts), discrimination.<sup>105</sup> Under the standing laws, as stated above, a male survivor who believes he has been unfairly discriminated against would likely succeed on a claim of gender discrimination. To claim gender discrimination as a male survivor, he would need to show that he was stereotyped due to his gender.<sup>106</sup>

It is common knowledge in our society that many gender roles and stereotypes are often reinforced through assumptions in every aspect of our lives, and this is no less true in the workplace. However, the creation of a protected class for abused persons would also solve the even more invisible issue facing male and LGBTQ+ survivors. Protected class status eliminates the compounded issues of gender stereotyping—“who is doing what to whom”—and allows a blanket policy protection for anyone, regardless of class, race, gender, socioeconomic standing, age, ability, or other classification, protected or otherwise.

For example, if a male survivor were to need time off for court proceedings or medical attention, and the employer knew of the abuse in the home, it is likely that the male survivor would either not be believed, or would be ridiculed, humiliated, and subjected to gender-based harassment by coworkers and superiors.<sup>107</sup> However, with protected class status in place for abused persons, the employer is put on notice, and the idea of litigating for discrimination would help to deter the more egregious disclosures or humiliation. Additionally, protected class status would ensure that such information remain confidential, much like with FMLA or ADA accommodation information,<sup>108</sup> and would be protected unless the employee chose to disclose it.

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102. This is the accepted abbreviation for Lesbian, Gay, Bisexual, Transgender, and Queer individuals, but is considered an “umbrella” term that is often used to refer to the community as a whole. LGBTQIA+, adds Intersex and Asexual identities as well as other communities. I will use the generally accepted term here, but many of these marginalized groups remain unprotected and invisible in the eyes of the law. However, that is beyond the scope of this article. See, e.g., Michael Gold, *The ABCs of L.G.B.T.Q.I.A.+*, N.Y. TIMES (June 21, 2018), <https://www.nytimes.com/2018/06/21/style/lgbtq-gender-language.html>.

103. *Preventing Intimate Partner Violence*, *supra* note 1, at 8.

104. THE WORKING GROUP, *supra* note 17, at 3–4; see also *Your Rights: Sexual Orientation Discrimination*, WORKPLACE FAIRNESS, <https://www.workplacefairness.org/sexual-orientation-discrimination> (last visited Nov. 18, 2018).

105. *Id.*

106. See generally Zlatka Rakovec-Felser, *Domestic Violence and Abuse in Intimate Relationship from Public Health Perspective: The Victims*, 2(3) HEALTH PSYCHOL. RES. 62, 64 (Nov. 6, 2014), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4768593/>.

107. *Id.*

108. Runge, *supra* note 98; *Questions and Answers*, *supra* note 60.

Gender stereotyping could also affect males in the hiring and firing process; male survivors in certain blue-collar professions may be viewed as weak or less “manly” if they try to pursue protection from domestic abuse.<sup>109</sup> The disparate impact on males under facially neutral policies are more difficult to prove here since it is much less prevalent for men to be victims—or at least identify as a victim/survivor and seek help. Thus, fewer cases exist.<sup>110</sup> The public policy argument would apply in this situation as well. Protected class status would resolve the issue of male survivor claims by providing blanket relief instead of relying on shakier claims of gender discrimination or workplace harassment.

For members of the LGBTQ+ community, there are no federal protections under Title VII—or any other affirmative federal civil rights legislation for that matter—for sexual orientation, gender identity, or expression.<sup>111</sup> However, some cases have been able to work such claims in under sex/sexual orientation/gender/gender-identity discrimination for egregious offenses.<sup>112</sup> Under the existing laws, an LGBTQ+ survivor who claims gender discrimination under the existing law is treated in the same manner as male survivors.

Gender stereotyping about “traditional” relationships and gender presentation often lead to biases and prejudices about this community.<sup>113</sup> If an employer were to deny a survivor time off, fail to hire or promote, or fire an employee because of these preexisting notions about victimhood and the LGBTQ+ community, the employee could attempt to claim sex/sexual orientation/gender/gender identity discrimination.<sup>114</sup> However, the creation of a federally protected class for abused persons would instead avoid this issue of forcing a discrimination claim under a category that is much harder to prove and less likely to bring justice to the employee.

With so many states beginning to adopt employment protections for victims of domestic and sexual violence, the better route would be to create a uniform and systematic answer to this prevalent issue at the federal level. Lower federal courts have faced some case law addressing various aspects of this issue, but there are discrepancies from court to court.<sup>115</sup> Since it is unlikely that the Supreme Court

109. Rakovec-Felser, *supra* note 106.

110. Lara Stemple & Ilan H. Meyer, *The Sexual Victimization of Men in America: New Data Challenge Old Assumptions*, 104(6) AM. J. PUB. HEALTH 19, 21 (June 2014), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4062022/pdf/AJPH.2014.301946.pdf>.

111. See *Past LGBT Nondiscrimination and Anti-LGBT Bills Across the Country*, ACLU, <https://www.aclu.org/other/past-lgbt-nondiscrimination-and-anti-lgbt-bills-across-country?redirect=maps/non-discrimination-laws-state-state-information-map> (last visited Nov. 18, 2018) [hereinafter *Past LGBT Nondiscrimination*].

112. See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (stating that discrimination against a person because that person does not conform to traditional sex stereotypes is covered by Title VII). States have also introduced and passed laws to protect LGBTQ+ persons that employees could bring claims under if a federal claim is too tenuous. See *Past LGBT Nondiscrimination*, *supra* note 110.

113. *Past LGBT Nondiscrimination*, *supra* note 111.

114. *Id.*

115. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 807–08 (1998) (explaining that no liability should be found against the employer who took reasonable care if the victim did not attempt to avoid the harm by taking advantage of any preventative programs); see, e.g., *Excel Corp. v. Bosley*, 165 F.3d 635, 639 (8th Cir. 1999) (affirming a claim against an employer who failed to take action after an employee complained that her ex-husband, a co-worker, was harassing her at work); *Fuller v. City of Oakland*, 47 F.3d 1522, 1525 (9th Cir. 1995) (finding a police department liable for failing to take action after an officer had complained that her former boyfriend, a colleague, was using information from the department’s personnel files to harass her at home and work); *Wilson v. Sw. Airlines Co.*, 517 F. Supp. 292, 303–04 (N.D. Tex. 1981) (finding customer preference insufficient to disqualify males from working as flight attendants and counter agents).



would grant certiorari to such a case any time soon as so few cases even make it to trial, let alone the appellate level, the legislature is the better avenue to create a new federally protected class for abused persons. A proposal to amend the federal law would need to include regulatory guidance for employers for implementation of such protections, as there would likely be much pushback on the logistics of how to enforce such an amendment to Title VII.<sup>116</sup>

If abused-persons/victims/survivors were granted protected class status, there would need to be formal indications of “proving” that the employee fell into this protected class. Such proof might include court documentation and copies of an order of protection, police reports and incident reports about the abuse, medical notes for injuries and disabilities related to the violence, and other such forms of verification.<sup>117</sup> Additionally, because the ADA already gives special protection to temporary disabilities like impairments resulting from pregnancy, treating sex discrimination the same way would allow for a medical leave of absence without the risk of retaliation and would provide survivors a route for relief.<sup>118</sup>

### *E. Following Suit: State Examples*

Federal courts have repeatedly dismissed claims of disproportionate discriminatory policies that are facially neutral.<sup>119</sup> As such, attempts to bring sex-based victim status discrimination claims under the existing “disparate impact” theory of employment discrimination have largely failed on the grounds that such acts are impossible to prove beyond the isolated event.<sup>120</sup> However, some states have enacted specific laws that allow a victim to leave work in order to attend court or seek medical attention, and some have even included protected class status for victims of domestic and sexual violence under the state sex/gender discrimination laws.<sup>121</sup> Specifically, several jurisdictions implemented laws allowing employees time off from work to attend court, seek medical attention, or obtain orders of protection

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116. For a discussion regarding employer motivations for and against protections for abuse victims, see Jill C. Robertson, *Addressing Domestic Violence in the Workplace: An Employer’s Responsibility*, 16 L. & INEQ. 633, 640–60 (1998).

117. See, e.g., Runge, *supra* note 98.

118. *Pregnancy Discrimination*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <https://www.eeoc.gov/laws/types/pregnancy.cfm> (last visited Aug. 11, 2018).

119. See, e.g., *Imes v. City of Asheville*, 594 S.E.2d 397, 398 (N.C. App. 2004), *aff’d*, 606 S.E.2d 117 (N.C. 2004) (demonstrating an egregious example of employer discrimination against a male victim of domestic violence); *Green v. Bryant*, 887 F. Supp. 798, 803 (E.D. Pa. 1995). *But see* *Rohde v. K. O. Steel Castings, Inc.*, 649 F.2d 317, 323 (5th Cir. 1981).

120. See, e.g., *Green*, 887 F. Supp. at 803.

121. *State Law Guide*, *supra* note 34, at 1.

including the following: Arizona,<sup>122</sup> California,<sup>123</sup> Colorado,<sup>124</sup> Connecticut,<sup>125</sup> Delaware,<sup>126</sup> D.C.,<sup>127</sup> Florida,<sup>128</sup> Georgia,<sup>129</sup> Hawaii,<sup>130</sup> Illinois,<sup>131</sup> Kansas,<sup>132</sup> Maine,<sup>133</sup> Nevada,<sup>134</sup> New Hampshire,<sup>135</sup> New Mexico,<sup>136</sup> New York,<sup>137</sup> North Carolina,<sup>138</sup> Oregon,<sup>139</sup> and Washington.<sup>140</sup>

New York specifically has exceeded the federal statute by implementing protected class status for victims of domestic violence under the New York State Human Rights Law.<sup>141</sup> In 2015, several cases were brought under this law, including *Matter of Castillo v. Schriro*, where a terminated probationary corrections officer alleged discrimination due to her disability and domestic violence victim status; the court reinstated her employment with pay.<sup>142</sup> In the same year, an employee reached a settlement agreement on a claim of discrimination due to her status as a victim of domestic violence after she received a death threat from her estranged husband and was told by her employer “not to return to work until she received a protective order.”<sup>143</sup> On October 17, 2017, lawmakers passed additional legislation to “require employers to allow people to use their paid time off for issues relating to sexual abuse, domestic violence, stalking, and human trafficking.”<sup>144</sup> The expansion of time off was introduced because of the countless survivors who ““would miss appointments with either a DA or miss appointments at the police precinct . . . because

122. ARIZ. REV. STAT. ANN. § 13-4439 (2007).

123. CAL. GOV'T CODE § 12945.2 (West 2018); *see also* S.F., CAL., ADMIN. CODE §§ 12B.1 to 12B.6 (2018), <https://sfgov.org/cmd/sites/default/files/Documents/chap12b.pdf>.

124. COLO. REV. STAT. ANN. § 24-34-401 (West 2016).

125. CONN. GEN. STAT. ANN. § 54-85b (West 2010).

126. DEL. CODE ANN. tit. 19, § 711 (West 2016).

127. D.C. CODE ANN. § 2-1402.11 (West 2017).

128. FLA. STAT. ANN. § 760.10 (West 2015); *see also* MIAMI-DADE COUNTY, FLA., CODE § 11A-26 (2018), [http://miamidadefl.elaws.us/code/coor\\_ptiii\\_ch11a\\_artiv\\_sec11a-26](http://miamidadefl.elaws.us/code/coor_ptiii_ch11a_artiv_sec11a-26).

129. GA. CODE ANN. § 34-1-3 (West 1990).

130. HAW. REV. STAT. ANN. § 378-2 (West 2013).

131. 775 ILL. COMP. STAT. ANN. 5/2-102 (West 2018); *see also* CHI., ILL., MUNICIPAL CODE § 2-160-030 (2018), <http://library.amlegal.com/alpscripts/get-content.aspx>.

132. KAN. STAT. ANN. § 44-1009 (West 1999); KAN. STAT. ANN. § 44-1132 (West 2006).

133. ME. REV. STAT. ANN. tit. 5, § 4572 (2005), *invalidated by* Carmichael v. Verso Paper, LLC, 679 F. Supp. 2d 109 (D. Me. 2010).

134. NEV. REV. STAT. ANN. § 613.330 (West 2018).

135. N.H. REV. STAT. ANN. § 354-A:7 (2018); *see also* N.H. REV. STAT. ANN. § 275:71 (2014).

136. N.M. STAT. ANN. § 28-1-7 (West 2008).

137. N.Y. EXEC. LAW § 296 (McKinney 2018); *see also* N.Y.C., NY., ADMIN. CODE §§ 8-101 to 8-131 (2018), <https://www1.nyc.gov/site/cchr/law/chapter-1.page>.

138. N.C. GEN. STAT. ANN. § 143-422.2 (West 2017).

139. OR. REV. STAT. ANN. § 659A.030 (West 2008); *see also* OR. REV. STAT. ANN. §§ 659A.270 to 659A.290 (West 2018).

140. WASH. REV. CODE ANN. § 49.60.180 (West 2007).

141. N.Y. EXEC. LAW §§ 292.30, 296.1(a) (McKinney 2018).

142. *Castillo v. Schriro*, 15 N.Y.S.3d 645, 665 (N.Y. Sup. Ct. 2015). *See also* MJPOSPIS, *Court Orders Reinstatement of Corrections Officer Subject to Discrimination Because of Disability and Domestic Violence Victim Status*, POSPIS LAW, PLLC (Aug. 10, 2015), <https://pospislaw.com/2015/08/10/court-orders-reinstatement-of-corrections-officer-subject-to-discrimination-because-of-disability-and-domestic-violence-victim-status/>.

143. *Recent Case Serves as a Reminder that Domestic Violence Victim Status is a Protected Category in New York*, HODGSON RUSS LLP ATT'YS (Dec. 29, 2015), <http://www.hodgsonruss.com/newsroom-publications-domestic-violence-protected-category.html>.

144. Kimberly Lawson, *NYC Passes Bill to Guarantee Paid Leave for Domestic Violence Victims*, BROADLY (Oct. 18, 2017, 2:54 PM), [https://broadly.vice.com/en\\_us/article/8x54kb/nyc-passes-bill-to-guarantee-paid-leave-for-domestic-violence-victims](https://broadly.vice.com/en_us/article/8x54kb/nyc-passes-bill-to-guarantee-paid-leave-for-domestic-violence-victims).

they couldn't take the time off work,"<sup>145</sup> and a way to move beyond just sick leave to expand "access to paid time off."<sup>146</sup>

Similarly, in California, not only are victims of domestic violence granted protected class status, but a new 2017 law requires that "all California employers must provide the newly issued Rights of Victims of Domestic Violence, Sexual Assault and Stalking notice to new employees upon hire and to current employees on request."<sup>147</sup> The notice outlines employees' rights to take time off, reasonable accommodations to provide safety at work, and freedom from retaliation or discrimination.<sup>148</sup>

Additionally, as of January 2018, Nevada expanded its employment protections for domestic violence victims.<sup>149</sup> The new expanded laws go beyond the scope of the federal FMLA to now apply to all employers—regardless of the number employees—and requires them "to provide 160 hours of leave to domestic violence victims during a 12-month period."<sup>150</sup> The new expanded leave applies to both employee-victims and those whose family members are victims of domestic violence.<sup>151</sup> The FMLA leave must be used within 12 months following the act of violence/abuse, and may be used for multiple purposes including "medical care, counseling, participation in court proceedings, and creating a safety plan."<sup>152</sup>

Employees may not be denied the right to use this leave or be required to find a coworker to replace them, but "employers can require the employee to provide supporting documentation, such as a police report, a copy of an application for an order for protection, an affidavit from an organization that provides services to victims of domestic violence, or documentation from a physician."<sup>153</sup> Nevada's new law also allows for reasonable accommodations to victims and specifically states that employers may not "discharge, discipline, discriminate against, deny employment or promotion to, or threaten . . . because the employee requests leave or participates as a witness or interested party in court proceedings related to the domestic violence. The same holds true for any employee who requests a reasonable accommodation."<sup>154</sup> These stand-out examples among the states provide a model for other states to emulate, and, more specifically, for the federal government to evaluate and implement at a national level.

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145. *Id.*

146. *Id.*

147. CAL. LAB. CODE § 230.1(h)(1) (West 2017), amended by 2018 Cal. Legis. Serv. ch. 423 (West); Kelly O. Scott, *Reminder: Employers Must Provide Notice of Victim Rights to Employees*, ERVIN COHEN & JESSUP LLP (Aug. 9, 2017), <http://www.ecjlaw.com/remind-employers-must-provide-notice-victim-rights-employees/>.

148. *Rights of Victims of Domestic Violence, Sexual Assault and Stalking*, LAB. COMM'RS OFF. VICTIMS OF DOMESTIC VIOLENCE, SEXUAL ASSAULT AND STALKING NOTICE (May 2017), [http://www.dir.ca.gov/dlse/Victims\\_of\\_Domestic\\_Violence\\_Leave\\_Notice.pdf](http://www.dir.ca.gov/dlse/Victims_of_Domestic_Violence_Leave_Notice.pdf).

149. *What You Need to Know about Nevada's New Domestic Violence Victims' Law*, FISHER PHILLIPS (July 25, 2017), <https://www.fisherphillips.com/resources-alerts-domestic-violence-victims-in-nevada-entitled-to-workplace-protections> [hereinafter FISHER PHILLIPS]; NEV. REV. STAT. ANN. § 608.0198 (West 2018).

150. FISHER PHILLIPS, *supra* note 149.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

## V. PROPOSAL: CREATION OF A NEW PROTECTED CLASS STATUS

While efforts to amend VAWA or to pass new laws like the SAFE Act have repeatedly failed to make it out of Congress, the EEOC would likely pursue litigation efforts against employers for clear acts of discrimination that fit under sex-based or disability discrimination.<sup>155</sup> However, while clearly egregious acts might be Title VII violations, other subtle acts that might be facially neutral—but still discriminate against victims—have no such protections.

I propose adding a temporary protected class status for victims of domestic and sexual violence to both federal laws and regulations under the theories of sex-based, sexual orientation, gender identity, and disability-status discrimination. Creating an employment discrimination cause of action for survivors of interpersonal violence furthers the basic realization that financial independence and security are key for transitioning out of an abusive relationship.<sup>156</sup> It is an important public policy objective for victims to seek justice and for abusers to comply with the law. Therefore, avenues should exist that convey the sincerity of that belief.<sup>157</sup> Additionally, it is in the best interest of society to encourage participation in the legal process because every citizen in every community deserves their day in court.<sup>158</sup>

*A. Addressing Employer Concerns*

As with any new law or regulation, many employers may have concerns regarding what it could mean for their bottom line if a new protected class were to be created.<sup>159</sup> However, the economic costs of domestic violence in the workplace are stark in contrast. According to governmental statistics, women suffer approximately \$858.6 million in lost wages annually as a result of intimate partner violence.<sup>160</sup> The cost of reduced productivity due to injury, mental health, or chronic pain issues stemming from physical abuse or stalking is approximately \$727.8 million.<sup>161</sup> The total economic costs of intimate partner violence exceed \$5.8 billion (the sum of medical and mental health care costs, lost productivity, and lost lifetime earnings from women killed by their partners).<sup>162</sup>

The CDC report on preventing intimate partner violence (“IPV”) stated that “approximately 41% of female IPV survivors and 14% of male IPV survivors experience some form of physical injury related to their experience of relationship violence.”<sup>163</sup> The report states that there are many other adverse health issues associated with domestic violence, such as “cardiovascular, gastrointestinal, reproduc-

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155. *Questions and Answers*, *supra* note 60.

156. Runge, *supra* note 98.

157. *Id.*

158. *Id.*

159. *Costs of Intimate Partner Violence Against Women in the United States*, CDC: NAT’L CTR. FOR INJURY PREVENTION & CONTROL 37–46 (Mar. 2003), <https://www.cdc.gov/violenceprevention/pdf/ipvbook-a.pdf>.

160. *Id.* There were no similar statistics reported by the CDC on the costs of intimate partner violence in the male population, or the subpopulations of the LGBTQ community.

161. *Id.* at 31–32.

162. *Id.*

163. *Preventing Intimate Partner Violence*, *supra* note 1, at 12.

tive, musculoskeletal, and nervous system conditions, . . . depression and posttraumatic stress disorder . . . [and survivors are] at higher risk for engaging in health risk behaviors,”<sup>164</sup> like drinking, smoking, and unprotected sexual activities.<sup>165</sup>

This subsequently creates considerable costs to society “associated with medical services for IPV-related injury and health consequences, mental health services, lost productivity from paid work, childcare, and household chores, and criminal justice and child welfare costs.”<sup>166</sup> However, with the creation of a federally protected class status for abused persons, these costs will be recouped in the long run. Preventing this violence before it happens is the ultimate long-term goal.

Often these associated costs fall on employers or private insurers, and without a federally instituted protection, only employers who can afford to assume the increased costs do so voluntarily.<sup>167</sup> However, were the federal government to support a protected class status of domestic violence victims, the costs would be spread out and become less burdensome. Additionally, federal protection would ensure that survivors have continued guarantees for job security, access to healthcare, and resources for addressing and ending the cycle of violence in their lives.

Employers understand the issue and agree that violence affects the workplace: “57% of senior corporate executives believe domestic violence is a major problem in society. One third of them think this problem has a negative impact on their bottom lines, and 40% said they were personally aware of employees and other individuals affected by domestic violence.”<sup>168</sup>

Improving the workplace environment through federal and organizational policies would promote safety and “can aid employees and managers in raising awareness about IPV, recognizing the potential for violence by an intimate partner of an employee occurring in the workplace, facilitate how incidents can be reported and handled, and demonstrate commitment to workplace safety . . . while providing support and resources to employees.”<sup>169</sup> Creation of a workplace culture that emphasizes help-seeking and reduces the stigma surrounding domestic violence and other related issues has been shown to reduce both moderate and severe family violence up to 54%.<sup>170</sup> This reduction benefits both employers and employees, and furthers the collective social agenda of ending intimate partner violence.<sup>171</sup>

Although employment protections can increase the cost of conducting a business in the short term,<sup>172</sup> if employers’ concerns are recognized, businesses can yield long-term gains. It is not only the employee that is affected by violence—

164. *Id.*

165. *Id.*

166. *Id.*

167. See U.S. DEP’T OF LAB., *Survey of Workplace Violence Prevention, 2005*, BUREAU OF LAB. STATS. (Oct. 27, 2006), <https://www.bls.gov/iif/oshwc/osnr0026.pdf>.

168. *The Facts on the Workplace and Domestic Violence*, FAM. VIOLENCE PREVENTION FUND, <https://police.ucsf.edu/system/files/domesticviolenceworkplace.pdf> (last visited Nov. 18, 2018).

169. *Preventing Intimate Partner Violence*, *supra* note 1, at 29.

170. *Id.* at 31.

171. See Runge, *supra* note 98; For a more in-depth discussion on employer motivations and interests for implementing domestic violence protections, see, e.g., Timothy John Durbin, *Accommodating Employers’ Interests into the Discussion of Employment Protections for Victims of Domestic Violence*, 22 J. L. & POL’Y 845, 903 (2014).

172. *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 Cmty. Mental Health Ctr.), [http://www.capitol.hawaii.gov/session2011/testimony/SB229\\_SD1\\_TESTIMONY\\_LAB-HUS\\_03-22-11\\_.PDF](http://www.capitol.hawaii.gov/session2011/testimony/SB229_SD1_TESTIMONY_LAB-HUS_03-22-11_.PDF).

employers and coworkers are often affected by the violence in victims' lives, resulting in workplace harassment, physical violence, and even death.<sup>173</sup>

The Occupational Safety and Health Act of 1970 ("OSHA")<sup>174</sup> requires employers to provide safe workplaces "free from recognized hazards that are causing or are likely to cause death or serious physical harm."<sup>175</sup> While the Act does not specifically address domestic violence, it establishes a "standard of care" that could be used in assertion of a negligence claim against an employer.<sup>176</sup> Employers might fear that if a new protected class status was created, it would result in an undue burden on the employer. However, were victims of domestic violence to be given protected class status, the federal government would likely follow the states' examples of inserting safeguards, such as a requirement that employees must put the employer "on notice" of the violent event or situation before any duty to allow time off or other protections are triggered.<sup>177</sup> Providing "reasonable accommodations" would be much like implementing the ADA; the employer must be made aware, and the request cannot create an undue burden on the employer.<sup>178</sup>

Employers may also worry about verifying "victim status" and wonder where the line is to be drawn so that employees do not abuse the law and take leave for unrelated reasons.<sup>179</sup> However, in previously proposed federal and state legislation, most bills specifically state that "the employer may request verification in the form of a police report, evidence from the court or a prosecuting attorney that the victim has appeared or is scheduled to appear in connection with an incident of domestic violence, or a written statement of the employee."<sup>180</sup>

Additionally, under most state laws and proposed legislation, the requested leave may only be for a limited list of exceptions such as: going to court, seeking medical attention related to injuries from the abuse, seeking victim services, finding new housing, and going to counseling.<sup>181</sup> The argument that allowing such leave costs employers productive hours has been countered by scholars who argue that, in the long run, the opposite may prove true.<sup>182</sup> When leave requirements are 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

173. Radcliffe Franklin Haughton, *Wisconsin Salon Shooting Suspect, Had Chicago Ties*, HUFFINGTON POST, [https://www.huffingtonpost.com/2012/10/22/radcliffe-franklin-haughton-wisconsin-n\\_2001435.html](https://www.huffingtonpost.com/2012/10/22/radcliffe-franklin-haughton-wisconsin-n_2001435.html) (last updated Oct. 22, 2012).

174. Occupational Safety & Health Act of 1970, Pub. L. No. 91-595, 84 Stat. 1590 (codified at 29 U.S.C. §§ 651 to 678 (1970)).

175. 29 U.S.C. § 654(a)(1) (1970).

176. *Healthcare: Standards and Enforcement*, U.S. DEP'T OF LAB.: OSHA, <https://www.osha.gov/SLTC/healthcarefacilities/standards.html> (last visited Nov. 18, 2018) ("The General Duty Clause of the OSH Act (the law that created OSHA) requires employers to provide workers with a safe workplace that does not have any known hazards that cause or are likely to cause death or serious injury.").

177. Runge, *supra* note 98.

178. *Id.*

179. 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.").

180. WASH. REV. CODE ANN. § 49.76.040(4) (West 2018).

181. See, e.g., FLA. STAT. ANN. § 741.313(2)(b) (West 2013); COLO. REV. STAT. ANN. § 24-34-402.7(1)(a)(II), (III) (West 2014); 820 ILL. COMP. STAT. ANN. 180/20(a)(1) (West 2017).

182. See David K. Haase, *Evaluating the Desirability of Federally Mandated Parental Leave*, 22 FAM. L.Q. 341, 349 (1988).

and productivity over time.”<sup>183</sup> The ability of domestic violence victims to take much needed leave permits them to secure economic independence and pursue justice without worrying about losing their jobs; this increases their long-term productivity and potential over time.<sup>184</sup>

This process is a delicate balancing act when it comes to protecting confidentiality, sorting between disbelief and revictimization<sup>185</sup> of the survivor and protecting the rights of both the employer and the employee. This system is not unlike the system of the FMLA, which also requires a balance of confidential information in the least intrusive way.<sup>186</sup> Most states have suggested this approach as the best protection for both parties, especially considering the possible consequences of employers stereotyping survivors, as anyone can be a victim of domestic violence.<sup>187</sup>

Additionally, under “at will” employment, survivors of domestic violence are unfairly at risk for termination at any time for any reason.<sup>188</sup> However, under the common law public policy exception, a survivor might successfully bring a wrongful discharge case where there were statutory mandates on court appearance or other state laws to justify the employee’s absenteeism.<sup>189</sup>

Employers might counter-argue that abused persons can bring claims under Title VII as a sex-based “disparate impact” due to the disproportionate number of victims of domestic violence who are women. However, not only does that isolate survivors who are not women, but plaintiffs have routinely faced difficulty proving disparate impact claims under this context because courts often conclude that the adverse decision was an isolated event.<sup>190</sup> By only having this sex-based status protection, it leaves survivors vulnerable to savvy employers who can avoid findings of outright discrimination. However, by incorporating a codified protected class

183. Durbin, *supra* note 171, at 877.

184. Runge, *supra* note 98.

185. *The Trauma of Victimization*, NAT’L CTR. FOR VICTIMS OF CRIMES (2008), <http://victimsofcrime.org/help-for-crime-victims/get-help-bulletins-for-crime-victims/trauma-of-victimization>

(“The trauma of victimization is a direct reaction to the aftermath of crime. Crime victims suffer a tremendous amount of physical and psychological trauma. The primary injuries victims suffer can be grouped into three distinct categories: physical, financial, and emotional. When victims do not receive the appropriate support and intervention in the aftermath of the crime, they suffer ‘secondary’ injuries.”).

186. Family & Medical Leave Act of 1993, 29 U.S.C. §§ 2601-2654 (2000).

187. Barl Zell Weinberger, Esq., *It’s Time to Acknowledge Male Victims of Domestic Violence*, HUFFINGTON POST, [https://www.huffingtonpost.com/bari-zell-weinberger-esq/its-time-to-acknowledge-m\\_b\\_8292976.html](https://www.huffingtonpost.com/bari-zell-weinberger-esq/its-time-to-acknowledge-m_b_8292976.html) (last updated Oct. 15, 2016); *see also Who Are the Victims?*, DOMESTICVIOLENCE.ORG, <https://web.archive.org/web/20180106022742/http://domesticviolence.org/who-are-the-victims/> (last visited Nov. 18, 2018).

188. *See, e.g.*, Sandra S. Park, *Working Towards Freedom from Abuse: Recognizing a “Public Policy” Exception to Employment-At-Will for Domestic Violence Victims*, 59 N.Y.U. ANN. SURV. AM. L. 121 (2003).

189. *See Apossos v. Mem’l Press Grp.*, No. 01-1474-A, 2002 WL 31324115, at \*2 (Mass. Super. 2002) (finding a public policy exception in wrongful discharge case based on the statutory mandate that a victim must appear in court to obtain a protection order); *see also Danny v. Laidlaw Transit Servs., Inc.*, 193 P.3d 128, 207 (Wash. 2008) (en banc) (stating that the legislature intended a “clear public policy to prevent domestic violence,” and that it a reasonable request to allow an at-will employee and domestic violence victim, time off to seek legal remedies, treatment, etc.). *See, e.g.*, *Ryan v. Dan’s Food Stores, Inc.*, 972 P.2d 395, 405 (Utah 1998); *Adams v. George W. Cochran & Co., Inc.*, 597 A.2d 28, 33–34 (D.C. 1991) (requiring a plaintiff to provide evidence that shows he or she was wrongly discharged in violation of public policy); *Allum v. Valley Bank of Nev.*, 970 P.2d 1062, 1066 (Nev. 1998); *Chavez v. Manville Prods. Corp.*, 777 P.2d 371, 377–78 (N.M. 1989); *Ortega v. IBP, Inc.*, 874 P.2d 1188, 1191, 1198 (Kan. 1994).

190. Julie Goldscheid, *Disparate Impact’s Impact: The Gender Violence Lens*, 90 OR. L. REV. 33 (2011).

status accompanied by victim leave laws, not only will employees know their rights and have a distinct cause of action to take to the court, but employers will also be aware of the prevalence of domestic violence, decrease adverse action against victims, and increase overall productivity in the workforce and participation in the justice system.

### *B. Practical Implementation: The Test*

In this section, I propose the practical implementation of creating a federally protected class for domestic violence victims buttressed by victim leave laws to increase protection for both the employer and the employee. I also outline what such a test should look like.

In the state of California, the California Labor Code § 230 allows all employees who work for an employer with 25 or more employees “to take time off work to serve on juries and to testify in court to comply with a subpoena or court order.”<sup>191</sup> The law also entitles domestic violence survivors to attend court to seek a restraining order, but the “employees must identify themselves as survivors of domestic violence to the employer” for this portion of the law to apply.<sup>192</sup> The law specifies the types of time off that the employee may take, so long as the purpose of the time off or the hearing is “to ensure one’s own health, safety, or welfare, or that of one’s child,”<sup>193</sup> including: temporary restraining orders, restraining orders, child support, child custody, or divorce hearings.<sup>194</sup> Additionally, the survivor-employee may be allowed “job-guaranteed leave” for seeking medical attention for “injuries caused by domestic violence or sexual assault,” by obtaining help from a shelter or crisis center, receiving counseling related to the incident, or implementing a safety plan.<sup>195</sup>

Under this law, the employee must provide “reasonable advance notice of the employee’s intention to take time off, unless advanced notice is not possible.”<sup>196</sup> If the employee attends an unscheduled appointment or is absent due to an emergency or crisis, “the employee may be required to provide the employer with written documentation of his or her status as a domestic violence or sexual assault survivor within a reasonable time after the absence.”<sup>197</sup> This “certification” must be kept confidential and can be any of the following:

[(1)] a police report indicating that the employee is a domestic violence or sexual assault survivor; [(2)] a court order protecting or separating the employee from the batterer or perpetrator, or other documentation from the court or the prosecuting attorney that the employee has appeared in court;

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191. *Domestic Violence and Sexual Assault: Guaranteed Leave to Go to Court & Obtain Services*, LEGAL AID AT WORK, <https://legalaidatwork.org/factsheet/domestic-violence-and-sexual-assault-guaranteed-leave-to-go-to-court-obtain-services/> (last visited Nov. 18, 2018) [hereinafter LEGAL AID AT WORK]; CAL. LAB. CODE § 230.1 (West 2017), amended by 2018 Cal. Legis. Serv. ch. 423 (West).

192. LEGAL AID AT WORK, *supra* note 191.

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*



or [(3)] documentation from a medical professional, domestic violence advocate, health care provider, or counselor that the employee was undergoing treatment for physical or mental injuries or abuse caused by domestic violence or sexual assault.<sup>198</sup>

In addition, advocates who work for domestic violence and abuse shelters are able to submit verification forms on behalf of the victim to account for days of work missed.<sup>199</sup>

Under California law, employers are prohibited from “firing, threatening to fire, demoting, suspending, retaliating[,] or discriminating against an employee who is a survivor of domestic violence or sexual assault for taking leave from work” for any of the approved reasons.<sup>200</sup> If such discrimination does occur, the employee is “entitled to get their job[] back and be paid for lost wages and work benefits caused by the illegal acts of their employer”; the employer’s refusal may result in a misdemeanor offense.<sup>201</sup>

The California model is probably the most expansive and protective model for survivors of abuse. It provides protected class status against discrimination and outlines the ways to verify and implement leave from work practically. However, this legislation does not extend to all employers in the state, leaving survivors who work in small business vulnerable to discrimination.<sup>202</sup> Under a federally created protection or amendment to Title VII, survivors of domestic violence should be afforded discrimination and leave provisions that cover all employees, regardless of the number of employees the employer has. Moreover, state laws vary in the definition of who and what they cover, so a uniform system that specifically defines who is a survivor and what protections they are entitled to would ensure that survivors are treated uniformly and fairly from coast to coast, without worrying about moving to a new state that might not afford such liberal protections.

Additionally, as small businesses create the greatest number of new jobs in the nation, they are often an entry-point into the job market, particularly for the less-skilled or less-educated.<sup>203</sup> As small businesses may be the main entry into the job market for survivors leaving an abusive partner who was the sole breadwinner, or for survivors maintaining employment in such businesses, protections at this level are just as important, if not more so, than those at larger companies. Also, because FMLA exempts small businesses with less than 50 employees, such protections are even more vital to ensuring survivors are not discriminated against and that they receive the necessary medical aid or court leave.<sup>204</sup>

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198. *Id.*

199. For a copy of a suggested letter to the employer see *Project Survive: Domestic Violence/Sexual Assault Advocate Letter Certifying Need for Absence*, LEGAL AID AT WORK, <https://legalaidatwork.org/our-programs/domestic-violence-survivors/> (last visited Nov. 19, 2018).

200. LEGAL AID AT WORK, *supra* note 191.

201. *Id.*

202. CAL. LAB. CODE § 230 (West 2014), amended by 2018 Cal. Legis. Serv. ch. 423 (West); CAL. LAB. CODE §230.1 (West 2017), amended by 2018 Cal. Legis. Serv. ch. 423 (West) (§ 230.1 only applies to businesses with 25 employees or more).

203. *Small Business Profile Advocacy: The Voice of Small Business in Government*, SBA: OFF. OF ADVOC. (Feb. 2013), <https://www.sba.gov/sites/default/files/allprofiles12.pdf>.

204. Family & Medical Leave Act of 1993, 29 U.S.C. §§ 2601-2654 (2000).

When the FMLA was passed, many members of Congress objected to the exemption and even spoke on how “medical leave policies benefit businesses by reducing turnover, thus eliminating unnecessary hiring and training costs.”<sup>205</sup> This same argument may be applied to the protection of abuse survivors. Allowing survivors time off work would not adversely affect employers as much as may be imagined, whether they are small businesses or big corporations. Studies have proven that the majority of American workers are unlikely to take the full unpaid leave off of work due to economic restraints.<sup>206</sup> Whether under the FMLA or an “abused persons protection” statute, survivors of domestic violence will not be in a financial state that allows them to take more unpaid time off than is necessary.<sup>207</sup>

Had Congress passed the SAFE Act<sup>208</sup> and the Crime Victim Employment Leave Act,<sup>209</sup> FMLA would have been amended to include victims of violent crime and domestic violence leave to attend court, creating employment rights for victims of domestic and sexual violence. These Acts roughly mirror state legislation in California, Illinois, and New York—which provide exclusive anti-discrimination provisions, reasonable accommodations for violence-related needs, and access to the legal system.<sup>210</sup> It would be a necessary addition to the implementation of a federally protected class status for abused persons.<sup>211</sup> The U.S. Department of Housing and Urban Development recently published a handbook on “Workplace and Domestic Violence Prevention and Response” that outlined HUD policies for employers and employees under the Department.<sup>212</sup> The handbook outlines responsibilities to increase awareness, guidelines to recognize early warning signs, and the historical, legal, and departmental background that led to this implementation.<sup>213</sup> While this was a departmental step for federal employees under HUD, it serves as an excellent example for both federal and state legislatures to model implementation after, and for companies and businesses to imitate until federal law catches up.

It is clear that several members of Congress are aware of the growing need for a uniform systemic response to the discrimination experienced by survivors of violence, and the fact that many states are taking their own initiative to address protections is indicative of the growing public awareness.<sup>214</sup> However, until the federal government addresses and passes legislation for protection of this vulnerable class of citizens, current policies in place will continue to prove inadequate.

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205. 139 CONG. REC. H366-03, H368 (1993) (statement of Congressman Moakley (D-Mass.), chairman of the Comm. on Rules).

206. Jane Waldfogel, *Family and Medical Leave: Evidence from the 2000 Surveys*, MONTHLY LAB. REV. 17, 20 (Sept. 2001), <https://stats.bls.gov/opub/mlr/2001/09/art2full.pdf>.

207. *Id.* at 18.

208. *See supra* Part II (Historical Context and Background of Domestic Abuse Laws).

209. Crime Victims Employment Leave Act, H.R. 5845, 110th Cong. (2008), <https://www.govinfo.gov/content/pkg/BILLS-110hr5845ih/pdf/BILLS-110hr5845ih.pdf>.

210. Security & Financial Empowerment (SAFE) Act, H.R. 739, 111th Cong. (2009), <https://www.govinfo.gov/content/pkg/BILLS-111hr739ih/pdf/BILLS-111hr739ih.pdf>.

211. *Id.*

212. U.S. DEP’T. OF HOUSING & URB. DEV., WORKPLACE AND DOMESTIC VIOLENCE PREVENTION AND RESPONSE HANDBOOK 793.1 (June 2015), <https://www.hud.gov/sites/documents/793.1.PDF>.

213. *Id.*

214. *State Law Guide*, *supra* note 34; *see generally* Durbin, *supra* note 171.

## VI. CONCLUSION

Domestic violence survivors should have the right to take time off from work to recover from injuries—physical or psychological—and pursue the necessary means to rebuild their lives and gain independence. This right should be a guarantee, regardless of which state the survivor resides in. For this reason, the federal legislature needs to extend the provisions of Title VII to cover all victim-employees, who, as a federally protected class, are shielded by both antidiscrimination and victim leave laws. The adoption and minor modifications to state laws in place is a reasonable and equitable way to extend protections to all workers, regardless of their domicile, employer, gender, or sex. Creating a new protected class for victims of abuse and assault is the best way to address the issues of discrimination and unpaid leave from a public policy standpoint. Additionally, a new protected class will benefit the individual survivor because public awareness and resources will increase, giving survivors the tools necessary to succeed in the workplace and break the cycle of violence in their lives.