

We Need More than Locks: A Call for Intimate Partner Violence Education, Training, and Reform in the Workplace

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Introduction

SOON AFTER “JAN” OBTAINED AN ORDER OF PROTECTION against her abusive husband “John,” she returned home to smashed photo frames, tossed clothes, broken furniture, and an empty box deliberately left on her bed. The box usually held John’s hunting knife. Upon entering her workplace, Jan found herself blurting out the terrifying details of John’s abuse to a security guard, who promptly asked for a copy of a Protection from Abuse Order (“PFA”) and for John’s picture. Later that day, Jan was called into a meeting with her boss and the building’s head of security to discuss her situation. The head of security asked if Jan was serious about placing a PFA on file. He explained that the process required “a lot of paperwork” and the creation and implementation of a safety plan. Jan’s boss also asked her to be discreet and not scare co-workers by telling them about her personal problems. Fearing for her job and reputation, Jan decided against officially filing the PFA. A few months later, while walking through the office’s parking lot, Jan was hit by her husband’s speeding car. Jan sustained a broken leg and a damaged spleen. Shards of glass were lodged in her head. Although Jan’s workplace responded to this incident by installing a camera in the parking lot and a lock on Jan’s office, they also cut her hours a few years later when they found

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out her husband had been released from prison, calling her presence a “safety risk.”¹

Historically, domestic violence² has been viewed as a private issue.³ Since much of the violence happens behind closed doors between intimate partners, and often valorizes certain stereotypes of victims and perpetrators, society has been able to view the abuse as marginal and not mainstream.⁴ Yet, more than one in three women and one in four men have experienced rape, physical violence, and/or stalking by an intimate partner in their lifetime.⁵ Sexual violence, stalking, and intimate partner violence (IPV) are increasingly recognized as major public health concerns in the United States.⁶ These types of violence are not confined to one economic, racial, ethnic, religious, age, gender, sexual orientation, or gender identity group.⁷ Rather, violence is pervasive among all types of individuals, relationships, families, communities, and workplaces.⁸ While intimate partner violence and assault largely occur in the home, most victims report significant impacts of this violence outside of the home.⁹ These impacts include Post Traumatic Stress Disorder (PTSD), a need for health care, legal services, and leave from work or school.¹⁰

1. *Employee Story: Jan*, WORKPLACES RESPOND TO DOMESTIC & SEXUAL VIOLENCE, <http://www.workplacesrespond.org/assess/real-world-examples/employees-speak-out/employee-story-jan> (last visited Oct. 18, 2014). “Jan” and “John” are not the story’s subjects’ real names. *Id.*

2. In this article, the terms “domestic violence” and “intimate partner violence” will often be used synonymously in order to accurately capture the development and history of each term. *See infra* Part I.A.

3. Sally Goldfarb, *Violence Against Women and the Persistence of Privacy*, 61 OHIO ST. L.J. 1, 1 (2000) (“American law has long embraced a fundamental distinction between the public and private spheres. As a result, certain issues important to women, including domestic violence and sexual assault, have traditionally been deemed private and therefore exempt from legal scrutiny.”).

4. *See* Jessie Bode Brown, *The Costs of Domestic Violence in the Employment Arena: A Call for Legal Reform and Community-Based Education Initiatives*, 16 VA. J. SOC. POL’Y & L. 1, 6 (2008).

5. MICHELE C. BLACK ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 2 (2011) [hereinafter CDC SUMMARY REPORT], *available at* http://www.cdc.gov/ViolencePrevention/pdf/NISVS_Report2010-a.pdf.

6. *Id.* at 1.

7. JULIE GOLDSCHIED & ROBIN RUNGE, A.B.A. COMM’N ON DOMESTIC VIOLENCE, EMPLOYMENT LAW AND DOMESTIC VIOLENCE: A PRACTITIONER’S GUIDE 2 (2009), *available at* http://www.americanbar.org/content/dam/aba/migrated/domesticviolence/PublicDocuments/ABA_CDV_Employ.authcheckdam.pdf.

8. *See generally* CDC SUMMARY REPORT, *supra* note 5.

9. *Id.* at 2.

10. *Id.*

Increasingly, states are implementing laws that provide leave for survivors of domestic violence and assault, allowing the employee to take time off from work to address the violence in their lives.¹¹ Other laws prevent employers from retaliating against an employee-survivor by discharging them or discriminating against them.¹² Overall, these laws help to address an important aspect of breaking a continued abusive relationship—that economic security is an essential factor in whether a victim will be able to separate herself or himself from an abusive partner.¹³

In California, lawmakers created the Victims of Domestic Violence Employment Leave Act (the “Act”), which provides both unpaid leave and anti-retaliation protection.¹⁴ The Act grants employees, only after revealing themselves as victims, the opportunity to request reasonable accommodations while at work, such as a “changed work telephone, changed work station, [and] installed lock.”¹⁵ While these accommodations are necessary advances in protection for employee-survivors, they often fall short of properly addressing a survivor’s needs.¹⁶ Because abusive events are unpredictable and attackers’ methods vary widely, simply installing a lock on an office door, for example, is insufficient. At the core of this dissemblance are an absence of education and understanding of domestic violence and its effects.

This Article argues that California should amend its current law to require employers to provide training and education about domestic violence to their employees and to reform the process for obtaining the legal protection guaranteed by the Act. Part I discusses the complex issues surrounding intimate partner violence, sexual assault, and stalking and how they affect the workplace. Part II examines federal statutes and current state law approaches, specifically California’s approach to address domestic violence in the workplace and how it misses its intended goals. Finally, Part III explores possible solutions to fill the gap in employer response. These solutions include requir-

11. See generally CONN. GEN. STAT. ANN. § 31-51ss (West 2014); HAW. REV. STAT. § 378-72 (West 2014); ME. REV. STAT. ANN. tit. 26, § 850 (West 2014); WASH. REV. CODE ANN. § 49.76.030 (West 2014).

12. See generally ARIZ. REV. STAT. ANN. § 13-4439 (LexisNexis 2010); KAN. STAT. ANN. § 44-1132 (West 2014); N.Y. PENAL LAW § 215.14 (McKinney 2014); R.I. GEN. LAWS § 12-28-10 (West 2010).

13. Deborah Widiss, *Domestic Violence and the Workplace: The Explosion of State Legislation and the Need for a Comprehensive Strategy*, 35 FLA. ST. U. L. REV. 669, 669 (2008).

14. See CAL. LAB. CODE §§ 230, 230.1 (West 2014).

15. *Id.* § 230(f)(2) (Supp. 2014).

16. See generally Widiss, *supra* note 13, at 709–11.

ing employers to provide intimate partner violence education and training for all employees, comparable to California's sexual harassment training and education mandate, and reforming the requirements for employee-provided certifications. By better shaping the services and responses available to employee-survivors, employers can simultaneously promote the health and safety of their employees while addressing the productivity issues that arise when survivors come to work.

I. Background on Domestic Violence Survivors in the Workplace

To fully understand the complex issues surrounding domestic violence and the need for reform in the workplace, one must first have a basic understanding of domestic violence and its implications. This section will examine the various types of violence, the consequences of such violence, and how those consequences often spill out of relationships and into the workplace.

A. Types of Violence

Domestic violence is generally defined as violence within an intimate relationship in which one partner uses a pattern of assault and intimidating acts to assert power and control over the other partner.¹⁷ There is a growing movement to adopt the term "intimate partner violence," as opposed to "domestic violence," to appropriately recognize the different types of relationships that may be affected, and to discard the notion that the violence between partners is "domestic" or private.¹⁸ IPV may include violent, physical attacks, as well as psychological, economic, and sexual abuse.¹⁹ It may also include control of reproductive or sexual health, such as an abuser's refusal to wear or use condoms in order to force pregnancy.²⁰ IPV can vary in frequency and severity, ranging from a single incident, which may or may not have a significant effect on the victim, to persistent severe attacks.²¹

17. Jason Palmer, *Domestic Violence*, 11 GEO. J. GENDER & L. 97, 98 (2010).

18. See Jenny Rivera, *Intimate Partner Violence Strategies: Models for Community Participation*, 50 ME. L. REV. 283, 283 n.2 (1998) ("'[D]omestic violence' . . . [is] a misnomer which unnecessarily emphasizes the private relationship aspects of violence between partners.").

19. *Id.* at 283 n.1.

20. CDC SUMMARY REPORT, *supra* note 5, at 37.

21. *Intimate Partner Violence: Definitions*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/violenceprevention/intimatepartnerviolence/definitions.html> (last updated June 24, 2014).

Sexual violence is one of the most pervasive forms of IPV.²² The Centers for Disease Control and Prevention (CDC) divide sexual violence into three categories:

1) use of physical force to compel a person to engage in a sexual act against his or her will, whether or not the act is completed; 2) attempted or completed sex act involving a person who is unable to understand the nature or condition of the act, to decline participation, or to communicate unwillingness to engage in the sexual act, e.g., because of illness, disability, or the influence of alcohol or other drugs, or because of intimidation or pressure; and 3) abusive sexual contact.²³

While sexual violence affects both men and women, women are disproportionately victimized.²⁴ Statistics demonstrate the staggering prevalence of sexual violence, with over 1.3 million women being raped in the United States in a single year.²⁵ Even more frightening, an estimated one in five women has been raped in her lifetime.²⁶

Additionally, stalking can be a type of IPV. Stalking generally refers to “harassing or threatening behavior that an individual engages in repeatedly, such as following a person, appearing at a person’s home or place of business, making harassing phone calls, leaving written messages or objects, or vandalizing a person’s property.”²⁷ While the legal definition of stalking may vary from state to state, most include a course of conduct directed at a specific person, often for the purpose of causing fear.²⁸ The CDC estimated that about 6.6 million people were victims of stalking during the year prior to the preparation of its 2010 report.²⁹ A majority of these victims report being stalked by current or former intimate partners.³⁰ These forms of violence weigh a heavy toll on victims, who often experience lifelong health consequences.³¹

22. See CDC SUMMARY REPORT, *supra* note 5, at 1–3.

23. *Intimate Partner Violence: Definitions*, *supra* note 21.

24. Lisalyn R. Jacobs, *Domestic & Sexual Violence and the Workplace*, LEGAL MOMENTUM, Feb. 13, 2014, at 1, available at <http://www.legalmomentum.org/resources/domestic-sexual-violence-and-workplace-fact-sheet>.

25. CDC SUMMARY REPORT, *supra* note 5, at 3.

26. *Id.* at 1.

27. PATRICIA TJADEN & NANCY THOENNES, NAT’L INST. OF JUSTICE & CTRS. FOR DISEASE CONTROL AND PREVENTION, *STALKING IN AMERICA: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 1 (1998)*, available at <http://www.ncjrs.gov/pdffiles/169592.pdf>.

28. *Id.*

29. See CDC SUMMARY REPORT, *supra* note 5, at 30.

30. *Id.* at 2.

31. See *id.* at 7.

B. Intimate Partner Violence Affects the Workplace

While IPV and sexual assault generally occur outside of the workplace, the effects frequently spill over into the job. Employed survivors experience a number of interferences including work disruptions, harassment while at work, and performance issues.³² The Legal Aid Society–Employment Law Center found that nearly forty percent of survivors in California reported either being fired or fearing termination due to domestic violence.³³ Another study of partner-stalking revealed that almost all of those who reported being harassed at work by their stalker also reported feeling pressure to quit or were fired as a consequence of the stalking.³⁴

Survivors of IPV may suffer frequent headaches, chronic pain, difficulty sleeping, activity limitations, and poor physical and mental health.³⁵ Almost eighty-one percent of female survivors of IPV describe significant short or long-term impacts, including serious PTSD symptoms.³⁶ PTSD symptoms are chronicled as intense physical and emotional responses to thoughts or reminders of the traumatic event, including trouble concentrating, irritability, panic attacks, depression, and sleeplessness.³⁷ Any one of these symptoms could negatively affect a survivor's job performance. Further, IPV harmfully impacts a survivor's self-esteem, and, in turn, the survivor's economic self-sufficiency.³⁸ One study suggests that the effects of IPV, namely the high levels of depression and low levels of confidence (especially for lifetime victims), tend to have long-term negative implications on victims' sense of job security.³⁹

After an abusive event, many survivors must also seek leave from their employers to receive medical attention for injuries and/or ob-

32. See generally Jennifer Swanberg et al., *Working Women Making it Work: Intimate Partner Violence, Employment, and Workplace Support*, 22 J. INTERPERSONAL VIOLENCE 292 (2007).

33. *Workplace Protections Keep Domestic Violence Survivors Safe and Financially Independent*, LEGAL AID SOCIETY-EMPLOYMENT LAW CENTER (Oct. 28, 2014), <https://las-elc.org/news/workplace-protections-keep-domestic-violence-survivors-safe-and-financially-independent>.

34. TK Logan et al., *Partner Stalking and Implications for Women's Employment*, 22 J. INTERPERSONAL VIOLENCE 268, 281 (2007).

35. CDC SUMMARY REPORT, *supra* note 5, at 3.

36. See *id.* at 38.

37. See Loring Jones et al., *Post-Traumatic Stress Disorder (PTSD) in Victims of Domestic Violence: A Review of the Research*, 2 TRAUMA, VIOLENCE, & ABUSE 99, 112 (2001).

38. CAROL A. REEVES & ANNE M. O'LEARY-KELLY, *STUDY OF THE EFFECTS OF INTIMATE PARTNER VIOLENCE ON THE WORKPLACE* 4 (2009), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/227266.pdf>.

39. *Id.*

tain legal assistance.⁴⁰ A victim may need to relocate his or her family, testify against an abuser, obtain physical or mental health care, or file for a civil restraining order.⁴¹ Most likely, pursuing these protective services must occur during regular work hours.

Additionally, workplaces often become targets for batterers and abusers. Survivors spend predictable hours on the job and are most easily located at their workplace. Over fifty percent of stalking victims report being followed at work.⁴² Perpetrators of IPV may sabotage their partners' employment in order to ensure that the victim remains dependent on the abuser.⁴³ Studies indicate that abusers use a range of tactics for the purpose of disrupting an employed survivor's ability to get to work and their performance on the job.⁴⁴ Abusers may also act to purposefully disturb a survivor's co-workers or customers.⁴⁵ Such tactics include assaulting the victim immediately prior to a work shift, hiding or stealing car keys or transportation funds, destroying work documents, frequently calling or showing up at the workplace, befriending co-workers and reciting false stories about the victim, and harassing or intimidating the victim's colleagues.⁴⁶ This type of persistent harassment before and during work hours creates additional challenges for the employee-survivor who is already trying to overcome the trauma of being victimized, and who now must worry about retaining his or her job and reputation.⁴⁷

The workplace consequences of IPV, sexual violence, and stalking extend beyond the employee. In 2003, the CDC estimated that domestic violence costs the United States more than \$5.8 billion a year in lost productivity and health care costs.⁴⁸ Employers report issues such as lost work time, absenteeism, employee turnover, and actual or per-

40. See generally CTRS. FOR DISEASE CONTROL AND PREVENTION, COSTS OF INTIMATE PARTNER VIOLENCE AGAINST WOMEN IN THE UNITED STATES 2 (2003), available at http://www.cdc.gov/ncipc/pub-res/ipv_cost/IPVBook-Final-Feb18.pdf [hereinafter COSTS OF INTIMATE PARTNER VIOLENCE].

41. Sandra S. Park, Note, *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, 122 (2003).

42. REEVES & O'LEARY-KELLY, *supra* note 38, at 48.

43. Swanberg et al., *supra* note 32, at 307.

44. *Id.* at 302.

45. *Id.*

46. See Logan et al., *supra* note 34, at 275, 281; Angela M. Moe & Myrtle P. Bell, *Abject Economics: The Effects of Battering and Violence on Women's Work and Employability*, 10 VIOLENCE AGAINST WOMEN 29, 32-33 (2004).

47. REEVES & O'LEARY-KELLY, *supra* note 38, at 48.

48. COSTS OF INTIMATE PARTNER VIOLENCE, *supra* note 40, at 2.

ceived, unsafe work environments.⁴⁹ According to findings included by the U.S. House of Representatives in the currently pending Security and Financial Empowerment Act (SAFE), ninety-four percent of corporate security and safety directors at companies nationwide ranked domestic violence as a high security concern.⁵⁰ Furthermore, forty-seven percent indicated that domestic violence negatively affects attendance at work and forty-four percent conceded that domestic violence increases health care costs.⁵¹ Although this data demonstrates the many negative consequences IPV creates in the workplace, employers are slow to recognize it as a workplace issue.

II. Laws Addressing Intimate Partner Violence in the Workplace

Although IPV and sexual violence have long existed in our communities,⁵² the U.S. legal system only recently began addressing the broad impact of these crimes on the many aspects of survivors' lives. The introduction of the federal Violence Against Women Act (VAWA)⁵³ increased public awareness about IPV and provided resources to advocates and victims. VAWA mandates funding for several initiatives, including transitional shelters and other related services for survivors,⁵⁴ trainings for police departments, prosecutors, and judges,⁵⁵ and representation for survivors in civil proceedings.⁵⁶ While VAWA provides a variety of helpful services and funds for survivors, no provision affords protections at work. In fact, presently no federal statute specifically provides discrimination and retaliation protection for IPV survivors, or permits leave from work to address matters related to

49. Moe & Bell, *supra* note 46, at 34.

50. Security and Financial Empowerment Act, H.R. 1229, 113th Cong. § 2.12 (2013). The "SAFE Act" has been introduced and reintroduced for several years, and aims to promote the economic security and safety of victims of domestic violence, dating violence, sexual assault, or stalking. *See* Security and Financial Empowerment Act, H.R. 2395, 110th Cong. (2007), H.R. 739, 111th Cong. (2009), H.R. 3271, 112th Cong. (2011). Since its introduction, the SAFE Act has been assigned to various Committees. *See* Security and Financial Empowerment Act, H.R. 1229, 113th Cong. (2013–2014).

51. H.R. 1229 § 2.10.

52. *See* Nichole Miras Mordini, Note, *Mandatory State Interventions for Domestic Abuse Cases: An Examination of the Effects on Victim Safety and Autonomy*, 52 DRAKE L. REV. 295, 304 (2004).

53. *See* Violence Against Women Reauthorization Act of 2013, Pub. L. 113-4, 127 Stat. 54, (codified as amended at scattered sections of 8 U.S.C., 18 U.S.C., and 42 U.S.C.).

54. 42 U.S.C. § 13975 (2013).

55. 42 U.S.C. § 3796gg(b)(1) (2013).

56. *Id.* § 3796gg(b)(5).

the employee's victimization.⁵⁷ Accordingly, the burden of protection has largely fallen to state lawmakers.

Over the past fifteen years, state legislatures created statutes that can be categorized in three ways: (1) laws that provide leave from work for survivors; (2) laws that prohibit employment discrimination and retaliation against survivors; and (3) laws that aim to increase awareness and safety in the workplace.⁵⁸ Over forty states enacted legislation to protect against employment discrimination and retaliation against survivors,⁵⁹ and many currently have pending legislation to improve existing law.⁶⁰ The following section discusses the piecemeal approach afforded by federal statutes in addressing the needs of survivors in the workplace, and then turns to California's statutory approach.

A. Federal Statutes

Currently, no federal law addresses protection and accommodations specifically for an employed IPV survivor in his or her workplace. In 1995, Congress introduced the first federal legislation to potentially address this gap in support for employee-survivors.⁶¹ The Battered Women's Employment Protection Act aimed to amend the Family and Medical Leave Act (FMLA) to provide access to unemployment insurance for survivors of domestic violence.⁶² This bill, and many versions of it since 1995, did not gain momentum in Congress.⁶³ Instead, survivors even today may only find incomplete relief under laws not designed to address their specific problems.

When domestic or sexual violence takes place *at work*, and the employer fails to take action in response or retaliates for an assault

57. Security and Financial Empowerment Act, H.R. 1229, 113th Cong. § 33 (2013).

58. Jennifer E. Swanberg & Mamta U. Ojha, *State Employment Protection Statutes for Victims of Domestic Violence as an Employment Matter*, UNIV. OF KY. CTR. FOR POVERTY RESEARCH DISCUSSION PAPER SERIES 1, 3 (2010).

59. *Id.* at 27.

60. See *State Law Guide—Employment Rights for Victims of Domestic or Sexual Violence*, LEGAL MOMENTUM (June 20, 2013), <http://www.legalmomentum.org/resources/state-law-guide-employment-rights-victims-domestic-or-sexual-violence>.

61. Battered Women's Employment Protection Act, H.R. 3837, 104th Cong. (1996).

62. *Id.* § 2(b)(1)(a).

63. See, e.g., H.R. 3837; Battered Women's Employment Protection Act, S. 367, H.R. 851, 105th Cong. (1997); Battered Women's Economic Security Act, S. 2558, 105th Cong. (1998); Battered Women's Employment Protection Act, H.R. 5262, 106th Cong. (2000) (leave, unemployment insurance); Security and Financial Empowerment Act, S. 1801, 108th Cong. (2003) (victims of domestic violence or sexual assault); Security and Financial Empowerment Act, S. 1796, 109th Cong. (2005) (victims of domestic violence, dating violence, sexual assault, or stalking).

that has been reported, an employer may be held liable under state and federal anti-discrimination laws. For example, under Title VII of the Civil Rights Act of 1964, employers, employing fifteen or more workers, are prohibited from discriminating against an employee in hiring, terms and conditions of employment, or firing based on sex.⁶⁴ Under Title VII, courts recognize sexual harassment as a prohibited form of sex discrimination.⁶⁵ By extension, sexual assault may constitute sexual harassment when the perpetrator is a supervisor or agent of the employer and commits the act while on the job.⁶⁶ In these cases, however, liability is usually linked to whether the perpetrator of the violence is an agent of the employer⁶⁷ and thus fails to serve employee-survivors who are abused at home by their partners.

If an employer acquires knowledge of a threat made against an employee or that the employee is in danger, the employer may have a legal responsibility to ensure the employee's safety under the Occupational Safety and Health Act of 1970 (OSHA).⁶⁸ OSHA's federal scheme mandates that an employer "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."⁶⁹ Employers may violate this duty clause if they do not adequately address threats to an employee's safety.⁷⁰ Unfortunately, while OSHA has released voluntary guidelines

64. 42 U.S.C. § 2000e (2004).

65. See *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 66–67 (1986).

66. See, e.g., *Brock v. United States*, 64 F.3d 1421, 1423 (9th Cir. 1995) ("[E]very rape committed in the employment setting is also discrimination based on the employee's sex."); *Smith v. Sheahan*, 189 F.3d 529, 533 (7th Cir. 1999) (stating that a jury could find a single incident of sexual assault enough to constitute impermissible sexual harassment); *Jones v. United States Gypsum*, No. C99-3047-MWB, 2000 WL 196616, at *3 (N.D. Iowa Jan. 21, 2000) (upholding a sexual harassment suit based on assault in genital area).

67. See *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*, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, http://www.eeoc.gov/eeoc/publications/qa_domestic_violence.cfm (last visited Apr. 19, 2014) [hereinafter EEOC Q&A]. Although the EEOC asserts that terminating a female employee because she is a victim of domestic violence violates Title VII as sex discrimination, this has not been litigated fully and only appears in a Q&A on the EEOC website. *Id.*; See also Widiss, *supra* note 13, at 705–09.

68. 29 U.S.C. § 654(a) (1970).

69. *Id.* § 654(a)(1).

70. See *Workplace Violence*, OCCUPATIONAL SAFETY & HEALTH ADMIN., <https://www.osha.gov/SLTC/workplaceviolence/standards.html> (last visited Oct. 23, 2014) ("An employer that has experienced acts of workplace violence, or becomes aware of threats, intimidation, or other indicators showing that the potential for violence in the workplace exists, would be on notice of the risk of workplace violence and should implement a workplace violence prevention program combined with engineering controls, administrative controls, and training.").

regarding workplace violence hazards in some industries,⁷¹ the agency has yet to adopt specific standards addressing concerns of workplace violence applicable to all employers.⁷² This has left employers uncertain of their responsibilities to an IPV employee-survivor in need of a safe work environment.

Another federal source for protection is the Family and Medical Leave Act. The FMLA can provide assistance to an employee-survivor who needs time off from work to recover from an IPV injury, if both the employee and the employer meet the FMLA prerequisites.⁷³ In order for the FMLA to apply, the employer must be involved in interstate commerce⁷⁴ and employ fifty or more employees.⁷⁵ For the employee, he or she must be employed for at least one year and for an average of at least twenty-four hours per week during that year, before coverage may begin.⁷⁶ The injury must also be classified as a “serious health condition that makes the employee unable to perform the functions of the position.”⁷⁷ While it may be one source of support for qualifying employee-survivors, FMLA does not specifically mention IPV, domestic violence, sexual violence, or stalking.

Lastly, employee-survivors face inadequate relief when seeking an accommodation in the workplace under the Americans with Disabilities Act (ADA). The ADA requires employers to make “reasonable accommodations” for employees with disabilities.⁷⁸ Yet, aside from guidance issued by the Equal Employment Opportunity Commission (EEOC), there have not been any reported cases of survivors of IPV successfully arguing that they have a disability, as defined by the ADA, solely based on their status as a victim.⁷⁹ In brief, the fragmented support created by federal statutes has forced states to implement varying levels of protection for their vulnerable employee-survivors.

71. See OCCUPATIONAL SAFETY & HEALTH ADMIN., DIRECTIVE NO. CPL-02-01052, ENFORCEMENT PROCEDURES FOR INVESTIGATING OR INSPECTING WORKPLACE VIOLENCE INCIDENTS (2011).

72. *Workplace Violence*, *supra* note 70 (“There are currently no specific standards for workplace violence.”); Employers subject to OSHA are those “engaged in a business affecting commerce who has employees.” 29 U.S.C. § 652(5) (1998).

73. 29 U.S.C. §§ 2601, 2612 (2012).

74. 29 U.S.C. § 2611(1) (2009).

75. *Id.* § 2611(4)(A).

76. *Id.* § 2611(2)(A).

77. *Id.* § 2612(a)(1)(D).

78. 42 U.S.C. § 12112(b)(5)(A) (2009).

79. EEOC Q&A, *supra* note 67. A disability includes, among other things, anxiety or depression stemming from a traumatic incident. *Id.*

B. California's Victims of Domestic Violence Employment Leave Act

In 1999, the California Legislature passed SB 56, a bill that prohibits discrimination and retaliation against employees who are victims of a crime and need to take time off to appear in court or obtain judicial relief related to the violence.⁸⁰ Proponents of the bill argued that victims were forced to choose between their economic security (their jobs) and their personal safety (obtaining legal or medical relief) after a violent event.⁸¹ One year later, the California Legislature made further advancements and passed the Victims of Domestic Violence Employment Leave Act. The Act specifically provided and expanded protection against discrimination and retaliation for IPV employee-survivors who had to take leave to seek medical attention or other services.⁸² In 2002, amendments to this law extended coverage to victims of sexual assault,⁸³ and, most recently, in 2014, to victims of stalking.⁸⁴

Sections 230 and 230.1 of the Act prohibit employers from discharging, discriminating, or retaliating against an employee-survivor who takes certain types of leave.⁸⁵ Permitted reasons for leave include taking time off to seek medical attention for injuries resulting from domestic violence, to seek legal assistance, or to participate in legal proceedings. The Act also allows an employee to take leave in order to obtain assistance or services from a domestic violence shelter, program, or rape crisis center, and to obtain psychological counseling. Finally, an employee may take off work to ensure his or her safety and well-being, such as relocating. The law applies only to employers with twenty-five or more employees⁸⁶ and limits the amount of time off to twelve weeks, which mirrors the period of leave authorized by the FMLA.⁸⁷ Moreover, the newest revision to the statute put in place by SB 400, effective January 1, 2014, requires employers to provide reasonable accommodations to employee-survivors who request such ac-

80. CAL. LAB. CODE § 230(c) (Deering 1999).

81. See S. 56, 1999–2000 Sess. (Cal. 1999).

82. CAL. LAB. CODE §§ 230, 230.1 (West 2001).

83. *Id.* §§ 230, 230.1(a) (West 2002).

84. *Id.* §§ 230, 230.1(a) (West 2014).

85. *Id.*

86. See generally Hilary Mattis, Comment, *California's Survivors of Domestic Violence Employment Leave Act: The Twenty-Five Employee Minimum is Not a Good Rule of Thumb*, 50 SANTA CLARA L. REV. 1319 (2010) (arguing against the Act's twenty-five employee requirement).

87. See CAL. LAB. CODE §§ 230, 230.1 (West 2014); 29 U.S.C. § 2612 (2009).

commodations for their safety while at work.⁸⁸ The Act suggests the implementation of safety measures including a transfer, reassignment, modified schedule, changed work telephone, changed work station, installed lock, assistance in documenting domestic violence, sexual assault, or stalking that occurs in the workplace, an implemented safety procedure, or another adjustment to a job structure, workplace facility, or work requirement in response to domestic violence, sexual assault, or stalking, or referral to a victim assistance organization.⁸⁹

Employers are not required to undertake any reasonable accommodation for an employee who has not disclosed his or her status as a victim.⁹⁰ Likewise, employers need not provide an accommodation that constitutes an undue hardship on the employer's business operations.⁹¹

C. Problems with the Current Law

While the most recent amendments to the Act provide improved safeguards and assistance to survivors of IPV, much more can be done. To begin, the core misunderstandings of IPV and sexual assault must be addressed before any sizeable progress can be measured in workplaces. Without proper education and discussion about these types of violence, individuals (including employers) are left to develop their own biased opinions that further isolate victims from much needed support.

More specifically, the notion that domestic and partner abuse is a private issue, rather than a public one, prevents implementation of effective solutions.⁹² The public/private dichotomy mandates that the home not be regulated by the state because it is private and under exclusive control of the family.⁹³ However, while this dichotomy and other privacy concerns are cited in response to and used to prevent

88. CAL. LAB. CODE § 230(f)(1) (West 2014).

89. *Id.* § 230(f)(2).

90. *Id.* § 230(f)(3).

91. *Id.* § 230(f)(6).

92. See generally Tülin D. Açikalin, Comment, *Debunking the Dichotomy of Nonintervention: The Role of the State in Regulating Domestic Violence*, 74 TUL. L. REV. 1045 (2000) (chronicling the history of the state's nonintervention in domestic violence due to the public/private dichotomy); Brian R. Decker, *Violence and the Private: A Girardian Model of Domestic Violence in Society*, 11 U. PA. J. L. & SOC. CHANGE 105, 109–11, 125 (2008) ("The law has thus far been problematic, preserving domestic violence first through chastisement and ultimately through the public-private dichotomy.").

93. Açikalin, *supra* note 92, at 1053.

enactment of proposed reforms,⁹⁴ victims are brutally abused and left to fend for themselves.⁹⁵ Even recently, opponents to California's latest amendments to the Act argued that "employers [are put] in a difficult legal predicament between respecting employee off-duty privacy and collecting sufficient information to determine if an employee is a victim."⁹⁶ Though the opposition's arguments failed this time around, it should be more widely recognized that IPV and sexual violence are pervasive public health issues that affect all sectors of communities.⁹⁷ Violence cannot and should not be explained away as an "off-duty" or "private" issue when it affects millions of people in the United States and spills over into many aspects of society, including workplaces.⁹⁸

The stigma of IPV is engrained in stereotypes, cultural norms, and the "autonomous family,"⁹⁹ and leads to the structured problems in current California law. Most of the protections afforded under the Act, for instance, take effect only after the employee-survivor discloses his or her status as such.¹⁰⁰ While this makes sense logically (how can an employer help a survivor when the employer is not aware help is needed?), it illustrates the misunderstanding about the complexities and vulnerabilities inherent in abusive relationships. Research demonstrates that survivors of IPV and sexual assault do not discuss the violence in their lives because they feel embarrassed, ashamed, and helpless.¹⁰¹ Many survivors also fear for their reputation.¹⁰² Survivors feel that outsiders will not understand why they remain in abusive relationships, which is a common and troubling inquiry about IPV.¹⁰³

94. See Goldfarb, *supra* note 3, at 51–52 (citing examples of public/private rhetoric in opposition to the passage of the Violence Against Women Act, including Chief Justice Rehnquist who believed that passage of the act would create an influx of domestic violence cases in federal courts).

95. Açıkalın, *supra* note 92, at 1057.

96. See 2013 Cal. S.B. 400 (NS), Cal. Committee Report (Apr. 22, 2013).

97. See generally CDC SUMMARY REPORT, *supra* note 5. Findings in the report demonstrate the varying types of violence, prevalence of each type of violence, race and ethnicities affected, and wide-reaching physical and mental outcomes. *Id.*

98. See *supra* Part I.

99. Brown, *supra* note 4, at 13.

100. CAL. LAB. CODE § 230(f)(3) (West 2014).

101. See CDC SUMMARY REPORT, *supra* note 5, at 4.

102. Logan et al., *supra* note 34, at 282.

103. See ELIZABETH BERNSTEIN ET AL., THE WORKPLACE RESPONDS TO DOMESTIC VIOLENCE: A RESOURCE GUIDE FOR EMPLOYERS, UNIONS AND ADVOCATES 34 (2002) ("Sometimes supervisors become frustrated when an employee returns to her batterer or stays in an abusive relationship."); see also Nicole Buonocore Porter, *Victimizing the Abused?: Is Termination the Solution when Domestic Violence Comes to Work?*, 12 MICH. J. GENDER & L. 275, 282 n.29 (2006) ("There are many explanations for why a woman may not leave the relationship, including fear for her safety or the safety of her children, financial concerns (which, of

Nonetheless, common reasons for staying in an abusive relationship include economic need, intermittent reinforcement and traumatic bonding, learned helplessness, fear that the abuser will kill the victim if he or she leaves, and, finally, fear that leaving the relationship will be a disruption for their children.¹⁰⁴

Regardless of these complexities, California's law requires not only that the survivor reveal him or herself as a victim, but they must also provide specific certification of their status as a victim to their employer.¹⁰⁵ When an unscheduled absence occurs or the employee would like to request time off, the employee may not be protected unless he or she supplies their employer with one of the following:

- (A) A police report indicating that the employee was a victim of domestic violence, sexual assault, or stalking.
- (B) A court order protecting or separating the employee from the perpetrator of an act of domestic violence, sexual assault, or stalking, or other evidence from the court or prosecuting attorney that the employee has appeared in court.
- (C) Documentation from a licensed medical professional, domestic violence counselor, . . . a sexual assault counselor, . . . licensed health care provider, or counselor that the employee was undergoing treatment for physical or mental injuries or abuse resulting in victimization from an act of domestic violence, sexual assault, or stalking.¹⁰⁶

This rigid certification leaves open the possibility that a victim, who is abused and misses work the following day without notice, could still be fired. Hypothetically, this victim may choose not to file a police report, obtain a court order, or receive professional care from a counselor. The employee may be a first-time victim, or lifetime victim, who does not know how to cope with or seek assistance regarding the traumatic event that occurred. He or she may also not know their rights as a survivor under California law. And, without proper certification, this employee could return to work to learn of his or her termination. Even if the employee speaks up about the abuse to a supervisor, under current law his or her word alone is insufficient to certify protected status.

Furthermore, when an employee requests a reasonable accommodation, an employer may ask for an additional signed statement

course, are exacerbated if the employee is terminated by the employer), her love for him and her guilt for allowing herself to be in the situation in the first place.”).

104. HANDBOOK OF DOMESTIC VIOLENCE INTERVENTION STRATEGIES: POLICIES, PROGRAMS, AND LEGAL REMEDIES 14 (Albert R. Roberts ed. 2002).

105. CAL. LAB. CODE § 230(f)(7) (West 2014).

106. *Id.* § 230(d)(2).

certifying that the accommodation is for the purpose of providing safety for the victim while at work.¹⁰⁷ The employer may also ask for recertification every six months.¹⁰⁸ While it is understandable that an employer may want documentation of an unscheduled absence or reasonable accommodation for legal purposes, this inflexible certification requirement places an additional burden on survivors who are already vulnerable, ashamed, and fear retaliation.

III. Proposed Solutions

California should consider further reforms for employee-survivors of IPV, sexual violence, and stalking in the workplace. This section will explore possible solutions, including a requirement that all employers educate and train employees regarding the signs, symptoms, and consequences of IPV and appropriate responses. Lawmakers may look to California's Fair Employment and Housing Act's (FEHA) sexual harassment training requirement as a blueprint for designing a similar requirement within future intimate partner violence leave legislation. California should also consider amending sections 230 and 230.1 to enable more flexible certification for employee-survivors seeking leave and reasonable accommodations.

A. Training and Education

In order for any legal protection for IPV survivors to be effective in the workplace, there must be a foundation of education and understanding of IPV's underlying issues. Just as victims fear revealing their statuses, likewise outsiders fear asking a victim about his or her experiences because of their perceived personal nature.¹⁰⁹ Many advocates and researchers suggest that some employed survivors of IPV remain silent at work about their victimization because they fear losing their job, perceive it as a personal matter, or fear being humiliated by their abuser if he or she learns of the revelation.¹¹⁰ In order for victims to overcome these significant impediments, they must not only trust their employer, but they must be made aware of the protections they are afforded under the law. Moreover, employers, supervisors, and co-

107. *Id.* § 230(f)(7)(B).

108. *Id.* § 230(f)(7)(C).

109. Even opponents to the amendments (§ 230.1) cited concerns that employers would have to "inquire into an employee's personal life, outside of work" in violation of the employee's right to privacy. *See* S. 400, 2013–2014 Sess. (Cal. 2013).

110. Swanberg et al., *supra* note 32, at 293.

workers must be equipped with the language and resources to assist when the employee-survivor decides to come forward.

Education and training of employers and employees will serve this goal. California's FEHA's sexual harassment training requirement demonstrates a useful model when imagining a training and educational program requirement in the intimate partner violence context. In California, employers having fifty or more employees must provide at least two hours of in-classroom or other effective interactive training and education regarding sexual harassment to all supervisory employees every two years.¹¹¹ When passed in 2004, proponents argued that requiring training and education would be a proactive approach to combat a pervasive and expensive issue plaguing employers and employee-survivors.¹¹² FEHA requires that the training present practical guidance regarding the federal and state statutory provisions and the remedies available to victims of sexual harassment in the workplace.¹¹³ The training and education must also include practical examples demonstrating prevention of harassment, discrimination, and retaliation.¹¹⁴ FEHA designates these guidelines as a "minimum threshold," and encourages employers to provide lengthier and more meaningful trainings.¹¹⁵ Studies demonstrate that sexual harassment training and education helps workers become more sensitive to the problem of employment-related sexual harassment.¹¹⁶ Furthermore, widespread training contributes to a more enlightened organizational culture, increasing an employee's propensity to recognize various types of unwanted sexual advances as prohibited harassment.¹¹⁷

In the context of IPV, education and training will similarly create an enlightened organizational culture about a pervasive yet taboo issue. Education and training will allow employers and employees to recognize the symptoms of abuse, dispel stereotypes and uninformed biases about IPV, and help the organization to institute best practices in the workplace. If employers are aware of the problem and are conscious of the ways in which they can help, employers can better address productivity issues, improve workplace policies, and create friendlier environments for victims. For employee-survivors, education

111. CAL. GOV'T CODE § 12950.1 (Deering 2013).

112. Assemb. B. 1825, 2003–2004 Sess. (Cal. 2004).

113. § 12950.1(a).

114. *Id.*

115. *Id.* § 12950.1(f).

116. Heather Antecol & Deborah A. Cobb-Clark, *Does Sexual Harassment Training Change Attitudes? A View from the Federal Level*, 84 Soc. Sci. Q. 826, 826–29 (2003).

117. *Id.* at 827.

will encourage awareness of their rights under California law to seek leave, receive reasonable accommodations, and keep their jobs. Employed survivors will also have the much-needed opportunity to challenge their own understanding of the abuse they suffer. Finally, for co-workers of survivors, training and education will furnish the language and skills necessary to communicate openly about IPV, sexual assault, and stalking with their victimized colleagues.

Critics of mandatory training and education for sexual harassment argue that the requirement has evolved into a mechanism for preventing or providing a defense to litigation, not a solution to a widespread issue.¹¹⁸ Others contend that sexual harassment trainings often reinforce gender stereotypes and can have effects that run counter to its goals.¹¹⁹ Admittedly, few studies evaluate whether these sexual harassment trainings actually decrease the prevalence of harassment in the workplace.¹²⁰ Scholars opine that the lack of attention to outcome evaluation may be attributed to a desire to immediately address a high-profile social problem, over the need for thoughtful analysis, goal specification, and the development and assessment of outcome criteria.¹²¹

Thus, while California's sexual harassment training and education requirements can help us to envision a similar requirement in the IPV context, it should not be an exact copy. A difference exists between training and education for sexual harassment in the workplace and one for IPV and sexual violence. Sexual harassment trainings, in theory, aim to change workplace behaviors and combat a pervasive harm that occurs *between* workers. Delivery of such training may or may not be tainted by the potential of employer liability. In the IPV context, however, the harm primarily occurs at home and thus employer liability is not implicated. Workplace education and training encourages employee-survivors to utilize the protections already available to them under the law, with the ultimate goal of promoting open communication and eliminating stereotypes more broadly. Even the

118. See Susan Bisom-Rapp, *An Ounce of Prevention Is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention in Employment Discrimination Law*, 22 BERKELEY J. EMP. & LAB. L. 1, 3, 15 (2001).

119. Justine E. Tinkler, *Resisting the Enforcement of Sexual Harassment Law*, 37 LAW & SOC. INQUIRY 1, 10–11 (2012).

120. Elissa L. Perry et al., *The Impact of Reason for Training on the Relationship Between "Best Practices" and Sexual Harassment Training Effectiveness*, 21 HUM. RESOURCE DEV. Q. 187, 187 (2010).

121. Louise F. Fitzgerald & S.L. Shullman, *Sexual Harassment: A Research Analysis and Agenda for the 1990s*, 42 J. VOCATIONAL BEHAV. 5, 16 (1993).

simple presence of workplace support tends to increase a victim's decision to disclose his or her status,¹²² enabling such legal protections.

In addition, education and training of employers will equip those in supervisory roles to see the warning signs of IPV, or PTSD symptoms associated with IPV, and can more readily help employee-survivors come forward. Studies suggest that when workplaces provide support to victims, this support increases the likelihood that victims will remain employed.¹²³ Therefore, the training and education proposed should be required for all employees, not just those in supervisory roles, as currently limited under the FEHA training requirement. Since victims tend to tell colleagues in their social work space, such as co-workers, about life events,¹²⁴ it makes sense to extend the IPV training and education beyond supervisors to those who may need the knowledge and appropriate language to address it.

In order to meaningfully attack the myths and biases surrounding IPV, all employees should understand what constitutes IPV and sexual violence, the effects and symptoms that result, and the legal remedies available. Most importantly, employees should be made aware of the applicable workplace policies, accessible resources, and how to respectfully provide aid to their colleagues.

B. Flexibility in Certification

Just as there must be a healthier understanding of IPV and sexual assault, the law itself must better address the needs of survivors. When the Victims of Domestic Violence Employment Leave Act was introduced, proponents argued that violence was unpredictable, and that "the law must be reflective of the indiscriminate nature of domestic violence."¹²⁵ As such, the law should not limit protection of employees to those who can certify their status as victims through police reports, counselors, and court orders. Victims respond to violence differently and seek help in various ways. If the law is meant to provide leave and protection to all survivors in the workplace, then it should be thoughtfully permissive and flexible.

California may look to other states that have envisioned a variety of documentation that satisfies the certification requirement. These include a statement from any health care provider, licensed attorney, clergy, and, most importantly, a signed statement from the survivors

122. Swanberg et al., *supra* note 32, at 307.

123. *Id.*

124. REEVES & O'LEARY-KELLY, *supra* note 38, at 8–9.

125. Assemb. B. 2357, 1999–2000 Sess. (Cal. 2000).

themselves.¹²⁶ Undoubtedly, employers must be permitted to efficiently run their businesses and monitor employee leave policies. Nonetheless, it seems necessary that employee-survivors should be able to certify their own status, if it must be certified at all. While protecting businesses from false claims or abuse of leave policies is a justifiable goal, it is important to remember that the purpose of leave laws is to protect survivors who may lack the ability or the courage to disclose the abuse they face. Instituting training and education in the workplace should be enough for supervisors to more readily identify the symptoms of IPV, and consequently, help them recognize any potential fraud or misuse of leave or reasonable accommodation policies, regardless of certification.

With an understanding of both employer and employee-survivor's perspectives, some states permit employers to verify the employee-survivor's status only after the employee's leave extends past a certain number of consecutive days.¹²⁷ For instance, Seattle, Washington passed a city ordinance that not only provides for paid sick or "safe" leave, (one hour accrues for every forty hours worked), but also only permits employers to seek certification of that leave after the employee has taken three or more consecutive days of leave.¹²⁸ This reasonable and flexible provision seems fashioned in a way to better address the variety of responses and needs of employee-survivors. When designing a certification requirement for employees, the goal should be to remain inclusive rather than exclusive. Lawmakers should take into consideration the culture of shame that surrounds victims, and the notion that incidents of sexual violence, stalking and IPV are largely underreported.¹²⁹ Understanding that there are a variety of reasons why victims delay or avoid reporting their abuse is a prerequisite for designing any meaningful legal support.¹³⁰

Conclusion

Addressing intimate partner violence as an "employment" issue is necessary in order to reduce the violence in our communities.¹³¹ In 2012, President Obama issued a memorandum requiring federal executive department heads to establish workplace policies regarding do-

126. See HAW. REV. STAT. ANN. § 378-2 (West 2013); N.Y. ADMIN. CODE § 8-107.1 (2013).

127. See SEATTLE, WASH., MUN. CODE §§ 14.16.010–110 (2012).

128. *Id.* Paid "safe leave" is a valiant proposition beyond the scope of this paper. *Id.*

129. CDC SUMMARY REPORT, *supra* note 5, at 91.

130. *Id.*

131. See Widiss, *supra* note 13, at 669.

mestic violence.¹³² He reaffirmed the policy of the federal government to promote the health and safety of its employees, and specifically, to provide support and assistance to federal employees whose working lives are affected by violence.¹³³ Similarly, California's public policy, established by the Act and its amendments, encourages employers to protect the economic independence and safety of employee-survivors.¹³⁴ This year, California continued to make significant advances in protection of survivors of intimate partner violence, sexual assault, and stalking.¹³⁵ In addition, California is one of a few states striving to implement a good-faith, interactive process for providing reasonable accommodations for employee-survivors.¹³⁶ We must continue to push state law forward.

Jan, the employee-survivor from the Introduction, would now be able to sit down with her employer and explain that decreasing her hours is not the solution. However, Jan's workplace addressed her situation slowly, only after her partner John nearly killed her in the employee parking lot. Jan's employer eventually set up an escort system, where an escort accompanied her to and from her car every day and provided her with a walk-talkie for direct communication with building security.¹³⁷ Jan's workplace became her safest haven. While her employer ultimately corrected its grave errors, training and education could have more quickly enhanced Jan's safety, protection, and productivity.

If employers are trained and ready with responses to IPV, and employee-survivors understand the rights afforded to them under the law, survivors and workplaces will benefit.

132. Establishing Policies for Addressing Domestic Violence in the Federal Workforce, 77 Fed. Reg. 24339 (Apr. 18, 2012).

133. *Id.*

134. See S. 400, 2013–2014 Sess. (Cal. 2013).

135. See generally CAL. LAB. CODE §§ 230, 230.1 (West 2014).

136. Other states that provide reasonable accommodations to employee-survivors include: Illinois (820 ILL. COMP. STAT. 180 (2009)); Hawaii (HAW. REV. STAT. ANN. § 378-2 (West 2013)); New York (N.Y.C. ADMIN. CODE § 8-107.1 (2003) and WESTCHESTER CITY. MUN. CODE §§ 700.02(19) (2009), 700.03(6) (2005)); and Oregon (OR. REV. STAT. §§ 659A.270-290, 659A.885 (2013)). None of these include an “interactive process” to determine those accommodations. See *State Law Guide*, *supra* note 60 (providing a list of other recent legislative proposals).

137. *Employee Story: Jan*, *supra* note 1.