



UPDATE

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Employment Protections for Victims of Domestic Violence and Sexual Assault

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The increasing incidents of domestic violence and the toll it takes on society are staggering. Mostly, domestic violence is a problem that remains hidden from general discussion, unless it involves a high profile individual and is splashed all over the news. Still, many women, and the great majority of domestic violence victims are women, suffer silently through what can be a terrifying situation. To compound the problem, all too often working women faced with domestic violence are threatened on another front: the loss of their job because they need time off to attend a court hearing, get an injunction for protection, receive assistance from a victim's advocate, arrange for housing at a battered women's shelter, or receive medical or mental health care. It has been estimated that domestic violence results in 8 million lost work days and \$ 4.1 billion in medical costs a year. Of course, this does not measure the emotional toll violence takes on family, children and friends, and says nothing of lost efficiency and productivity when it seeps into the workplace.

Because for so many losing their jobs has been part and parcel of being a victim of domestic violence, legislatures in an increasing number of states have enacted legislation to provide

protected time off from work, in addition to other protected leaves or paid leaves offered as part of an employee benefits plan. With two new states mandating domestic violence leave for employees this year and other states with laws pending before legislatures, employers need to be aware of this growing trend to provide protection and accommodations for employees who are the victims of domestic violence.

Current legal protections for employees who miss or have to take time away from work due to domestic violence or sexual assault vary widely. Some states simply prohibit discrimination, retaliation, or termination of an individual who needs time off to respond to a subpoena in order to testify or meet with a prosecuting attorney or law enforcement for the prosecution of a perpetrator of domestic violence. But since victims of domestic violence need time away from work beyond the courtroom, a number of states have begun to provide broader protections specifically allowing time off to victims or family members of victims to help address a number of non-judicial issues that result from domestic violence. These include time off to obtain domestic violence injunctions, arrange for alternate housing, seek medical care or mental health counseling, or secure a home to make it safer for the victim and their family. One state, Illinois, classifies domestic violence victims alongside other protected categories, such as sex, race, national origin and disability, to prohibit any discrimination due to the employee having been the victim of domestic violence. In addition to state statutes, certain larger municipalities, like Miami and New York City, have passed laws that provide protections often greater than those provided in the state statutes. It is important, therefore, for employers to become familiar with what is required in a particular jurisdiction when formulating policies and addressing employee requests for leave based on claims of domestic violence.

Most states already have laws that allow employees time off from work to appear in court or provide testimony pursuant to a subpoena, especially when the employee is the victim of the crime. For example, Connecticut law imposes criminal contempt sanctions, with 30 days in jail, for any employer that terminates or interferes with an employee taking time off work to obtain a domestic violence injunction or provide testimony in a criminal proceeding. Such legislation is premised mainly on the concept that businesses should support, not interfere with, the proper functioning of the civil and criminal justice systems. Legislation aside, supporting the judicial system with reasonable leave for employees subpoenaed to testify also makes good business sense. An employer should remember that there may come a day when it is a defendant in a lawsuit and will need former employees or others to provide testimony in support of its position. In such a case, the defendant employer will not want to face a situation where a witness's employer refuses to allow that witness time off to appear in court or at a deposition, leaving the witness with the choice of responding to a subpoena or keeping his or her job.

Currently ten states (California, Colorado, Florida, Hawaii, Illinois, Kansas, Maine, North Carolina, Oregon, Rhode Island) provide victims of domestic violence and sexual assault with protected leave to address the numerous issues that often face victims of such crimes. At the core of this legislation, leave is generally granted to victims of domestic violence or their families to obtain a restraining order or injunction against violence, meet with prosecuting attorneys, attend court hearings, find alternate housing, such as at a women's shelter or at another location, seek medical care or mental health counseling, or other victim's services. The amount of leave that is required varies from as little as three (3) days, to thirty (30) days, to twelve (12) weeks, to a

“reasonable” amount of time off. The criteria for when an employee becomes eligible for such leave also varies from state to state.

For instance, Florida’s newly enacted statute applies to employers with 50 or more employees and requires that the employee be employed for a period of 90 days before being eligible for domestic violence leave. Eligible Florida employees are entitled to three (3) days of unpaid leave during a 12 month period. Miami-Dade County, Florida employees, by comparison, are entitled to thirty (30) days of leave and may use that leave for divorce or child custody proceedings that arise out of an incident of domestic violence. Oregon’s statute applies to employers who have six or more employees, but employees must work at least 25 hours per week for 180 days before becoming eligible for leave. Eligible Oregon employees may take a “reasonable” amount of leave. In Kansas, the statute applies to all employers, regardless of size. Employees in Kansas are entitled to a “reasonable” amount of leave to be used during otherwise paid leave provided by the employer, such as vacation or sick leave, or, if no paid leave is available, then up to eight (8) days of unpaid leave. In Hawaii, employers with 50 or more employees must provide for up to 30 days of leave, while smaller employees must provide up to 5 days of leave.

These four (4) states, Florida, Hawaii, Kansas, and Oregon, also provide by statute for the confidentiality of all records relating to an employee’s request for domestic violence leave. Employers in those states will want to protect the confidentiality of those records and limit who has access to them. In some cases, the records may also be protected from disclosure, so employers will want to consult with an attorney before producing any such records to third parties.

There are also bills currently pending before Congress in both the House of Representatives and the Senate that would provide thirty (30) days of unpaid leave to employees who are victims of domestic violence. Such leave would be administered in a fashion similar to leave under the Family and Medical Leave Act. Should a version of the federal bills become law, employees of employers with 50 or more employees would be protected during leave associated with obtaining an injunction, appearing in court, meeting with a counselor, obtaining medical care or arranging for alternative housing that are related to an incident of domestic violence or sexual assault. As with many state statutes, leave would be available to victim employees and to employees who have a family or household member who has been a victim of domestic violence or sexual assault.

While the vast majority of states that have already enacted statutes provide some form of time off and prohibit termination or interference with employees who seek to take time off related to instances of domestic violence and sexual assault, Illinois has enacted legislation that provides the full ambit of protection by adding victims of domestic violence to the general anti-discrimination in employment categories, such as sex, race, age, disability, national origin, etc. The Illinois statute also provides for twelve (12) weeks of unpaid leave for victims of domestic violence. Illinois also requires employers to make reasonable accommodations for employees, such as reassignment to other positions, working a reduced shift, or other arrangements similar to accommodations made under the Americans with Disabilities Act. A number of other states have considered general anti-discrimination provisions that mirror those of Illinois that would make

victims of domestic violence a protected job category, such as sex and race; thus far none of these initiatives have become law.

The ability of employees to take time off from work so that they can properly and timely address the traumatic effects of domestic violence without fear of losing their jobs lies at the heart of this new wave of legislation. Employers must continue to manage their work force and find the proper balance between accommodations and productivity. States are beginning to mandate that balance with laws that provide what the legislatures believe to be a sufficient amount of time off from work for employees to address the residual effects of domestic violence.

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