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Changing Federal Statutory Proposals to Address Domestic Violence at Work

CREATING A SOCIETAL RESPONSE BY MAKING BUSINESSES A PART OF THE SOLUTION

Marcy L. Karin[†]

INTRODUCTION

Over five million acts of domestic violence are committed every year.¹ The prevalence of these acts makes domestic violence “the leading cause of injury to women.”² Detrimental wherever they occur, these acts are not limited to the privacy of one’s home. Instead, domestic violence regularly and repeatedly spills over to the “public” workplace.

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¹ NAT’L CTR. FOR INJURY PREVENTION & CONTROL, CTRS. FOR DISEASE CONTROL & PREVENTION (CDC), COSTS OF INTIMATE PARTNER VIOLENCE AGAINST WOMEN IN THE UNITED STATES 1 (2003), http://www.cdc.gov/ncipc/pub-res/ipv_cost/IPVBook-Final-Feb18.pdf (reporting on data from the National Violence Against Women Survey, which estimated 5.3 million acts of domestic violence against women who are at least eighteen years old happens annually).

No single act defines domestic violence. In general, domestic violence occurs when one or more persons uses intimidation, physical violence, threats, coercion, emotional, sexual, and/or economic abuse to exert power and control over another person or persons. Thus, a range of activities may constitute domestic violence, including but not limited to name-calling, intimidation, pinching, slapping, hitting, strangling, assault, or homicide (or threatening or attempting any of these activities). It may also include financial manipulation or control such as removing a spouse from joint accounts, or changing a partner’s allowance without notice or cause. Other terms sometimes used synonymously with or describing some aspect of domestic violence include: workplace violence, domestic abuse, intimate violence, intimate partner violence, stalking, physical abuse, sexual abuse, sexual assault, psychological abuse, dating violence, relationship abuse, and family violence. See, e.g., *id.* at 8; Jennifer E. Swanberg et al., *Intimate Partner Violence, Employment, and the Workplace: Consequences and Future Directions*, 6 TRAUMA, VIOLENCE, & ABUSE 286, 289 (2005).

² 118 CONG. REC. S10737-8 (daily ed. Sept. 29, 2005) (statement of Sen. Murray). While domestic violence impacts both men and women, approximately 85% of victims of domestic violence are women. Margaret Graham Tebo, *When Home Comes to Work*, 91 A.B.A. J. 42, 42 (2005). In 2001, women were “subject to approximately 13,000 acts of workplace violence each year that [were] perpetrated by a husband or boyfriend.” Bonnie Campbell & Marcy L. Karin, *Beyond “Going Postal”: Responding to Everyday Violence in the Workplace*, 7 WORKPLACE VIOLENCE PREVENTION REP. 1, 1 (2001). Domestic violence is also prevalent in same-sex relationships. Joanna Bunker Rohrbach, *Domestic Violence in Same-Gender Relationships*, 44 FAM. CT. REV. 287, 287-88 (2006). It also crosses all socioeconomic, racial, ethnic, and religious backgrounds, although some reports conclude that domestic violence disproportionately affects the poor.

For example, Francesca La Rose's former boyfriend called her supervisor and threatened to come to the office to kill La Rose if she was not fired. Her employer responded by warning La Rose to keep her personal problems out of the workplace. The next day, the ex-boyfriend walked into the building where La Rose worked, past the security guard, and shot and killed her. La Rose's family filed a wrongful death case against her employer claiming that the employer failed to adequately protect La Rose after being notified of a specific threat.³ In another example, a perpetrator of abuse began harassing his target's coworkers after the perpetrator was served with a protection order sought by the targeted employee. Neither the employer nor the coworkers had standing to seek a protection order in response to this new harassment.⁴

These stories are not the only ones that can be told. In fact, domestic violence has a significant impact on America's workplaces. Individuals subjected to abuse, their coworkers, and other third parties (like volunteers, contractors, and customers) all suffer consequences as a result of domestic violence that occurs or spills over into the workplace. One out of every five employed adults is a victim of domestic violence,⁵ and 96% of victims have experienced trouble at work related to domestic violence.⁶ Employees experience decreased productivity during and after actual or threatened violence and may require time off from work to address safety concerns, medical needs, and legal issues.

In addition, employers need to address the consequences of domestic violence. America's workplaces are faced with significant economic losses from lost productivity, administrative difficulties when employees take unplanned time off, increased medical costs and insurance premiums, and the threat of liability for firing employees experiencing domestic violence in hopes of maintaining a safe workplace or for failing to adopt and/or enforce appropriate domestic violence

³ *La Rose v. State Mut. Life Assurance Co.*, No. 9322684 (214th Dist. Ct., Harris County, Tex. Dec. 5, 1994). The suit was reportedly settled for \$850,000. Donald F. Burke, *When Employees Are Vulnerable, Employers Are Too*, NAT'L L. J., Jan. 17, 2000, at B11; Jean Hellwege, *Claims for Domestic Violence in the Workplace May Be on the Rise*, TRIAL, May 1, 1995, at 94; see also Sarah M. Buel, *The Impact of Domestic Violence on Children: Recommendations to Improve Interventions 42-43* (2007) (unpublished manuscript), available at <http://www.childscryforhelp.com/domesticvindex.html>.

⁴ *Hearing Before the Nev. S. Comm. on the Judiciary*, 71st Sess. (May 9, 2001) [hereinafter Nevada Senate Hearing] (statement of Debra S. Jacobson, Lobbyist, Southwest Gas Corp.), available at <http://www.leg.state.nv.us/71st/Minutes/Senate/JUD/Final/1332.html>.

⁵ Press Release, Corporate Alliance to End Partner Violence, *Domestic Violence Exerts Significant Impact on America's Workplaces, Benchmark* (Oct. 11, 2005), available at <http://www.caepv.org/about/releasedetail.php?prID=89>. Of course, it is important to remember that a significant amount of domestic violence goes unreported. Nina G. Stillman, *Workplace Violence*, 697 PLI/LIT 39, 54 (2003) (noting a Bureau of Justice Statistic's finding that less than half of incidents of domestic violence are reported to the police on average).

⁶ WOMEN'S BUREAU, DEP'T OF LABOR, *DOMESTIC VIOLENCE: A WORKPLACE ISSUE 1* (1996); Nicole Buonocore Porter, *Victimizing The Abused?: Is Termination the Solution When Domestic Violence Comes to Work?*, 12 MICH. J. GENDER & L. 275, 287 (2006) (internal citation omitted).

prevention policies. Generally speaking, however, the business community has not yet realized the significant burden domestic violence imposes or changed the usual employer response of ignoring a “personal” problem or taking ill-advised actions that result in further negative legal and practical consequences.

Despite these real consequences, the workplace is not the first societal structure that most people think of when they think of changes that are needed to address domestic violence. Instead, when most people think of solutions to the problem of domestic violence, they think of things like increased education on how to prevent the cycle of abuse, changes that need to be made to the prosecution of related crimes, or increasing emergency housing for victims and their children.⁷ In many respects, this represents a significant service that past feminist scholarship on domestic violence has made—it recognizes that domestic violence is not simply a private matter. Rather, it is a public problem that is in need of a societal solution.

However, by not thinking of the workplace in response to this question, a significant area for which change is needed is missed. There is a legitimate basis for proposing a societal solution to domestic violence that is rooted in employment law. There are already various rules that are being used to respond to the effects of domestic violence at work (e.g., tort law, statutory leave laws, occupational safety regulations, etc.). This Article argues that the workplace has a greater affirmative role to play in reducing the impact of domestic violence on the workplace. Moreover, society has an obligation to create a coherent structure and system for this issue to be addressed.

This Article argues that the best way to do that is through a federal approach. The federal government has an affirmative societal role to play in pushing the workplace to confront this issue. Moreover, there is utility for a societal solution to this problem that engages the workplace directly to respond to domestic violence and reduce its impact on the victim and others. Obviously, a federal approach will result in the consideration of complicated legal terrain that involves both constitutional issues and conceptual federalism issues as to the proper role of the federal and state governments. (The latter is necessary because the federal government would need to work *with* the state structures already in existence.) But it is worth trying to figure this out. This Article makes the case that there is a crucial role for the federal

⁷ See, e.g., James Martin Truss, *The Subjection of Women . . . Still: Unfulfilled Promises of Protection for Women Victims of Domestic Violence*, 26 ST. MARY'S L. J. 1149, 1156, 1201 (1995) (emphasizing the importance of educating law enforcement officers, prosecutors, and judges about violent relationships); *Developments in the Law: Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498, 1505-18 (1993) (noting that an integrated solution for fighting domestic violence, which includes at least shelters, protection orders, prosecution, and education, is needed); Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV. 267, 321-27 (1985) (advocating for an improved criminal response to abuse, including stronger prosecution).

government to play and that it can do so both creatively and constitutionally.

Part I of the Article makes the case that domestic violence has significant ramifications in the workplace and analyzes some of the structural problems with the workplace that currently make it difficult to appropriately deal with domestic violence. Part II canvasses the state laws that have been passed or proposed to address domestic violence at work. This analysis provides us with a good sense of the experiences of employees and employers in this area as well as a rich basis of practice to draw on in considering the appropriate federal response. Part III describes two of the current federal proposals to address the problem of domestic violence at work.⁸ These bills attempt to address a real need of employees by providing victims of domestic violence with, among other things, up to thirty days of unpaid job protected leave. But they provide employers little or no assistance in addressing the effects domestic violence has on the employers. Drawing on the lessons from the state laws, as well as from the author's personal experience working at the federal legislative level, this Article suggests several changes to the proposed federal bills that will make it more likely that the protections needed to address the problems caused by domestic violence at work will actually be obtained and that will offer businesses a reason to support—or at least not oppose—these bills.

In essence, this Article proposes three ways to amend these bills to provide a societal response to the problem of domestic violence at work: (1) reframing the bills to reflect the effect on employers and society; (2) providing employers with the ability to go to court to seek a protection order; and (3) creating a refundable tax credit to recoup a percentage of costs related to prevention, education, and safety policies and programs. Together, these changes could have a significant impact on the potential of these bills to transform the normative response to domestic violence at work and address the very real public ramifications of domestic violence on both employees and employers.

The goal throughout this piece is, therefore, to consider how law can be used as a vehicle for transforming the norm of the workplace as it responds to what has often been perceived of as the “private” problem of domestic violence. This Article is part of a small, but growing body of scholarship aimed at exposing the impacts of domestic violence on employees and employers. By suggesting ways that the federal government can more effectively engage in this issue to respond to the needs of all members of the workplace, this Article attempts to move the conversation forward on a theoretical, strategic, and practical level.

⁸ Survivors' Empowerment and Economic Security (SEES) Act, S. 1136, 110th Cong. (2007); Security and Financial Empowerment (SAFE) Act, H.R. 2395, 110th Cong. (2007); *see infra* Section III for information on these bills and the proposals to change them.

I. THE PROBLEM—THE IMPACT OF DOMESTIC VIOLENCE AT WORK AND STRUCTURAL PROBLEMS PREVENTING AN EFFECTIVE WORKPLACE RESPONSE

In 2001, Bonnie Campbell (the first director of the Violence Against Women Office at the Department of Justice) and I co-wrote an article that stated, “Employer-initiated prevention efforts are the front-line in this fight [against domestic and workplace violence], and employers ignore the problem at their own peril.”⁹ It might seem counterintuitive to concentrate efforts to address domestic violence on the workplace or on what employers—as opposed to employees—need to respond to this problem. It is not that other aspects of this fight are not also important. For example, there is a need to increase recognition of a privilege between counselors/advocates and victims of domestic violence¹⁰ and for alleviating policies that systematically remove the children of victims of domestic violence because the victims “failed to protect” the children by “allowing” them to witness the abuse.¹¹

But, focusing only on criminal and family law misses an opportunity to address the bigger picture. The same is true in crafting domestic violence policy for the workplace that only considers the needs of victim employees. An effective national policy on domestic violence must reflect an understanding of the impact that domestic violence has on the workplace, including the problems for both employees and employers, some of which result from the structure of the workplace itself. This section explores that impact, including the effects of domestic violence on the workplace and the tolls imposed on employees and employers. It also examines some of the structural problems within the typical workplace that currently make it difficult to address issues related to domestic violence.

A. *The Significant Toll on Employees*

Acts of domestic violence often occur while a victim is at work because work is the one place where perpetrators know they will be able to find their victims.¹² While precise numbers are difficult to find,¹³

⁹ Campbell & Karin, *supra* note 2, at 7.

¹⁰ See, e.g., Domestic Violence Victim Confidentiality Protection Act of 2005, D.C. CODE § 14-310 (2005).

¹¹ This was the issue in the widely publicized case of *Nicholson v. Scopetta*, 820 N.E.2d 840 (N.Y. 2004). I was part of a team that drafted an amicus brief on behalf of the Pennsylvania Coalition Against Domestic Violence and thirty-three other state domestic violence organizations that supported the position that the removal of a child from his or her non-offending parent is not in the child’s best interest where the sole basis for removal is a finding that the child has witnessed an act of domestic violence against his or her mother.

¹² ALABAMA COALITION AGAINST DOMESTIC VIOLENCE & VERIZON WIRELESS, DOMESTIC VIOLENCE IN THE WORKPLACE: A GUIDE FOR EMPLOYERS 3 (2006), available at <http://www.acadv.org/DVManualPDF2.pdf>.

¹³ Domestic violence is often underreported. See Stillman, *supra* note 5, at 54-55.

studies have documented the negative impact on women's economic stability resulting from domestic violence. For example, a recent Bureau of Labor Statistics Report found that approximately 31% of female employees that died at work did so from "interpersonal assaults."¹⁴ Although it often gets the most media attention, violence at work comes in more forms than just shootings. Domestic violence impacts victim employees' day to day experiences at work.

A significant number of victims report being subjected to adverse employment actions that resulted in part from dealing with domestic violence. Recently, the General Accounting Office reported that 25% to 50% of victims lost a job at least in part due to domestic violence and 55% to 85% took time off as a result of the abuse.¹⁵ In 2002, the National Employment Law Project ("NELP") reported survey results that broke down the "time off" category further. According to NELP, domestic violence caused 56% of victimized employees to be late for work at least five times per month; 28% to leave work early at least five times per month; and 54% to miss at least three days of work per month.¹⁶ The NELP survey also found that 74% of employed victims were harassed at work.¹⁷ Finally, 96% of employed victims reported that domestic violence impacted their ability to perform their jobs.¹⁸

Violence also impacts coworkers' work experiences. Among other things, other employees may have to cover for distracted or absent coworkers, guard targeted employees from harassing calls or visitors, resent time off or accommodations given to targeted employees, or fear

¹⁴ BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, CENSUS OF FATAL OCCUPATIONAL INJURIES (2001) (also reporting that 14% of men that died at work did so from these types of assaults).

¹⁵ U.S. GEN. ACCOUNTING OFFICE, DOMESTIC VIOLENCE: PREVALENCE AND IMPLICATIONS FOR EMPLOYMENT AMONG WELFARE RECIPIENTS 7-9, 18-19 (1998); *see also* NAT'L EMP. L. PROJECT (NELP), UNEMP. INS. FOR SURVIVORS OF DOMESTIC VIOLENCE 1 (2003) ("One-quarter of battered women say they had to quit work at least partly due to domestic violence. One-half of women who survive sexual assaults say they had to quit work due to the assault."). A Senate report included information from another survey with similar results that found approximately half of sexual assault survivors lost their jobs after the assault. S. REP. No. 103-138, at 54 n.69 (1993) (citing E. Ellis et al., *An Assessment of Long-Term Reaction to Rape*, 90 J. ABNORMAL PSYCHOL. 264 (1981)). Additionally, domestic violence has been reported as the direct cause of job loss by 5% to 27% of victims in cross-sectional studies. Swanberg et al., *supra* note 1, at 296; *see also* Jennifer E. Swanberg & Caroline Macke, *Intimate Partner Violence and the Workplace: Consequences and Disclosure*, 21 AFFILIA: J. WOMEN & SOC. WORK, 391, 394 (2006) (explaining that "studies have found that employers sometimes respond to . . . incidents [of domestic violence] that are perpetrated on the job by firing the victims"). Studies also demonstrate that domestic violence victims have trouble with long-term employment security. Jennifer E. Swanberg & T.K. Logan, *Domestic Violence and Employment: A Qualitative Study*, 10 J. OCCUPATIONAL HEALTH PSYCH. 3, 3 (2005).

¹⁶ NELP, *supra* note 15.

¹⁷ *Id.*; *see also* Unborn Victims of Violence Act of 2004, 150 CONG. REC. S3124-02, S3152 (2004) (statement of Sen. Patty Murray) (estimating "that 75 percent of victims of domestic violence are harassed at work by their abuser"); *but see* U.S. GEN. ACCOUNTING OFFICE, *supra* note 15, at 19 (reporting that 35% to 56% of employed victims were harassed at work by their abusers).

¹⁸ NELP, *supra* note 15; MAINE DEP'T OF LABOR & FAMILY CRISIS SERVS., DOMESTIC VIOLENCE SURVIVORS AT WORK: HOW PERPETRATORS IMPACT EMPLOYMENT 4 (2005), *available at* http://www.maine.gov/labor/labor_stats/publications/dvreports/survivorstudy.pdf.

that their own safety could be in danger.¹⁹ In response to a question about workplace safety in a 2005 study, 30% of employees responded that perpetrators of violence visited the workplace and 38% feared for their own safety as a result.²⁰

These studies make one thing clear: domestic violence causes employees to walk a tightrope in balancing their work and private lives. Acts of domestic violence cause victims to arrive late, leave early, and otherwise miss work to care for their injuries.²¹ Employees utilize employers' resources such as phone, email, and security personnel to seek refuge from acts of violence.²² And a steady paycheck is often the key to a victim's economic independence and safety from abuse.²³ Employees "should not have to choose between their safety and their jobs."²⁴ Unfortunately, a number of employees are faced with this choice.

B. *The Business Case—Why Employers Need to Care*

Given the impact of domestic violence on employees at work, it is not hard to imagine that there will be significant adverse impacts on employers as well.²⁵ The impact of domestic violence on employers' bottom lines has been documented.²⁶ According to the Centers for

¹⁹ The federal government encourages targeted employees to rely on coworkers to "help . . . by screening phone calls and keeping an eye out for" the alleged perpetrator. OFFICE OF PERSONNEL MGMT., FEDERAL GOVERNMENT RESPONDING TO DOMESTIC VIOLENCE: WHERE FEDERAL EMPLOYEES CAN FIND HELP, at http://www.opm.gov/employment_and_benefits/worklife/officialdocuments/handbooksguides/domesticviolence_help/index.asp (last visited Sept. 22, 2008).

²⁰ Press Release, Corporate Alliance to End Partner Violence, *supra* note 5 (results from a national survey asking employees about the impact of domestic violence in the workplace); *see also* Jennifer Swanberg et al., *Working Women Making it Work*, J. INTERPERSONAL VIOLENCE 292, 302 tbl.3 (2007) (describing the interference tactics related to work that victims in a study reported experiencing, ranging from being physically restrained from getting to work to being stalked at work).

²¹ Ralph Henry, *Domestic Violence and the Failures of Welfare Reform: The Role for Work Leave Legislation*, 20 WIS. WOMEN'S L.J. 67, 83 (2005); Swanberg & Logan, *Domestic Violence and Employment*, *supra* note 15, at 6-8 (classifying job interference tactics as "actions taken before work, actions taken during work, and actions taken after work," all of which impacted job performance).

²² Henry, *supra* note 21, at 83.

²³ Tebo, *supra* note 2, at 42 ("[A]busers often retain control over victims by forcing them to be economically dependent."); *see also* Press Release, Senator Patty Murray, Murray Holds Hearing and Introduces Bill on Domestic Violence in the Workplace (Apr. 17, 2007) (on file with author) ("[E]conomic security and independence is the most accurate indicator of whether a victim will be able to stay away from an abuser.").

²⁴ Campbell & Karin, *supra* note 2, at 7.

²⁵ There is much less scholarship discussing the effect of violence on employers. *See, e.g.*, Deborah A. Widiss, *Domestic Violence and the Workplace: An Analysis of Emerging State Legislation*, 35 FLA. ST. U. L. REV. (forthcoming 2008) (manuscript at 2 n.3, on file with author) (noting the relative absence of scholarship in this field and describing the articles that do exist). Those articles that do exist spend a significant time laying out an employer's potential legal liability. Surprisingly few talk about what should be done about the problem.

²⁶ *See generally* AMY FARMER & JILL TIEFENTHALER, DOMESTIC VIOLENCE AND ITS IMPACT ON WOMEN'S ECONOMIC STATUS, EMPLOYERS, AND THE WORKPLACE, available at <http://www.caepv.org/getinfo/docdetail.php?docID=259&catID=1> (last visited Oct. 29, 2008).

Disease Control, almost eight million days of paid work (the equivalent of 32,114 full-time jobs) are lost as a result of domestic violence every year.²⁷ Lost productivity alone has been calculated to cost employers between three and five billion dollars every year.²⁸ This does not include the administrative difficulties and costs of covering people who take unplanned time off and training replacement workers,²⁹ property damage, increased medical costs and insurance premiums for employers,³⁰ or public relation problems that result when an incident of violence gets in the news.³¹

In addition, employers experience lost productivity and other costs as a result of employing a perpetrator of domestic violence. According to Laura A. Fortman, Head of the Maine Department of Labor, a recent survey of perpetrators found that 78% regularly used their employer's resources to further their crime;³² 85% contacted their victim from work;³³ 48% had trouble focusing on work;³⁴ 42% were late

(evaluating the studies demonstrating the impact of domestic violence on employers and the workplace).

²⁷ CDC, *supra* note 1, at 19. The CDC has calculated the value of this lost employment productivity to be \$727.8 million. *Id.* at 31.

²⁸ Press Release, Senator Patty Murray, Murray Introduces "SAFE Act" to Help Domestic Violence Victims (Sept. 29, 2005); *see also* Security and Financial Empowerment (SAFE) Act, H.R. 2395, 110th Cong. § 2(3) (2007) (citing this Bureau of National Affairs' estimate and further noting that "other reports have estimated the cost at between [\$5.8 and \$13 million] annually").

²⁹ *Too Much, Too Long? Domestic Violence in the Workplace: Hearing Before the Subcomm. on Employment and Workplace Safety of the S. Comm. on Health, Education, Labor and Pensions*, 110th Cong. 5 (2007) [hereinafter Senate Hearing] (statement of Kathy Rodgers, President, Legal Momentum) ("Losing loyal and experienced employees generates substantial hiring and training costs, which would be largely avoided by addressing the impact of domestic and sexual violence in the workplace."); Swanberg et al., *supra* note 1, at 299-300.

³⁰ H.R. 2395, § 2(4) (notes an estimate of \$31 billion per year for medical costs related to domestic violence; with each incident ranging from \$387 to \$948). Employers absorb "nearly \$4.1 billion . . . [in] direct medical and mental health care services." CDC, *supra* note 1, at 2; *see also* 150 CONG. REC. S3152 (2004) (statement of Sen. Patty Murray) ("Businesses are paying \$3 billion to \$5 billion a year in health care for victims of domestic violence.").

³¹ Kyle Riley, *Employer TROs Are All the Rage: A New Approach to Workplace Violence*, 4 NEV. L.J. 1, 3 (2003) ("[N]egative publicity drives customers away, valued employees leave the company and new hires are harder to attract.") (internal quotations omitted); Swanberg et al., *supra* note 1, at 301 (noting the stigma attached to workplace violence that impacts employer decisions).

³² Senate Hearing, *supra* note 29, at 4 (statement of Laura A. Fortman, Commissioner, Maine Department of Labor) (citing ELLEN RIDLEY, MAINE DEP'T OF LABOR & FAMILY CRISIS SERVS., IMPACT OF DOMESTIC VIOLENCE OFFENDERS ON OCCUPATIONAL SAFETY & HEALTH: A PILOT STUDY 1 (2004), available at http://www.maine.gov/labor/labor_stats/publications/dvreports/domesticoffendersreport.pdf); *see also* Legal Momentum, Domestic Violence and Economic Insecurity (Jul. 14, 2005), <http://www.stopfamilyviolence.org/ocean/host.php?folder=52>; EMPLOYERS AGAINST DOMESTIC VIOLENCE, HOW DOES DOMESTIC VIOLENCE AFFECT THE WORKPLACE?, <http://www.employersagainstdomesticviolence.org/effects.html> (last visited Nov. 22, 2007) ("[Perpetrators] use workplace resources . . . to express remorse or anger to, check up on, or threaten the victim."); H.R. 2395, § 2(17) (same).

³³ Senate Hearing, *supra* note 29, at 4 (statement of Laura A. Fortman, Commissioner, Maine Department of Labor) (further noting that 75% used the company phone).

³⁴ This problem is called presenteeism. It is defined as "lost productivity that occurs when employees come to work but perform below par due to any kind of illness." JODIE LEVIN-EPSTEIN, CTR. FOR LAW & SOCIAL POLICY, PRESENTEEISM AND PAID SICK DAYS (Feb. 28, 2005),

to work;³⁵ and nearly one in five had or almost had an accident at work.³⁶ Thus, employed perpetrators cause their employers to suffer economic repercussions as a result of their crimes.

These economic costs are only one part of the challenge, however.³⁷ In addition to lost economic costs, employers are increasingly faced with lawsuits seeking to impose liability on employers that fail to adopt and/or enforce appropriate violence prevention policies or otherwise hold employers responsible for actions a company took or failed to take in response to domestic violence at work.

Injured employees, customers, perpetrators, and the government have obtained relief and imposed liability on employers based on: (1) federal and state statutes, and (2) judicially-imposed requirements from common law.³⁸ Cases have been brought under a variety of federal and state laws including the Americans with Disabilities Act,³⁹ the Family and Medical Leave Act,⁴⁰ and Title VII of the Civil Rights Act.⁴¹

<http://www.clasp.org/publications/presenteeism.pdf>. "Presenteeism results in lost productivity that could be recovered." *Id.*

³⁵ RIDLEY, *supra* note 32; Legal Momentum, *supra* note 32.

³⁶ Senate Hearing, *supra* note 29, at 5 (statement of Laura A. Fortman, Commissioner, Maine Department of Labor); *see also* Widiss, *supra* note 25, manuscript at 9 (describing other studies that show "perpetrators of domestic violence place significant costs on their own employers").

³⁷ There is also an argument to be made that businesses need to care about domestic violence to be good corporate citizens. "Corporate citizenship is [defined as] the business strategy that shapes the values underpinning a company's mission and the choices made each day by its executives, managers and employees as they engage with society." Boston College Center for Corporate Citizenship, What is Corporate Citizenship, *available at* <http://www.bccc.net/index.cfm?pageId=2007> (last visited Jan. 14, 2009). A good corporate social responsibility policy ("CSR") could address the impact of domestic violence on a variety of company stakeholders, which in turn can help with retention, morale, risk management and any number of other positive associations. *See, e.g.*, Boston College Center for Corporate Citizenship, Company Example: Allstate (Feb. 2007), *available at* <http://www.bccc.net/index.cfm?fuseaction=page.viewPage&pageID=1583&nodeID=1>; Allstate Foundation, Responsibility at Allstate, *available at* <http://www.allstate.com/social-responsibility/responsibility/main.aspx> (last visited Jan. 24, 2009) (describing Allstate Foundation's domestic violence program as an example CSR signature program, and including the following targeted stakeholders: "customers, associates[,] shareholders and communities at large").

³⁸ *See* Porter, *supra* note 6, at 289-319 (describing potential liability for terminating the victim-employee and/or failing to protect other employees or persons on business property); Phillip B. Russell, *Workplace Violence: What Can Employers Do?*, THE ACSNET Q. (2007), <http://www.ascnetquarterly.org/NewArticle.asp?id=185> (noting an employer's duty to maintain a safe workplace and the potential theories of liability).

³⁹ Domestic violence may cause an impairment that "substantially limits one or more . . . major life activities," 42 U.S.C. § 12102(2) (2000), such that the victim employee qualifies as someone with a disability for which an employer may have an obligation to provide a "reasonable accommodation[]" unless doing so would be an "undue hardship" for the employer. 42 U.S.C. § 12112(b)(5) (2000). One such accommodation may include leave or changing an employee's work location or hours. The failure to provide this accommodation could serve as the basis for a lawsuit. *But see* Pettis v. House of Ruth Md., Inc., 144 Fed. Appx. 313, 316-17 (4th Cir. 2005) (plaintiff did not have a disability under the ADA; her month long illness related to a sexual assault and medications taken after the assault was temporary); Nina W. Tarr, *Employment and Economic Security For Victims of Domestic Abuse*, 16 S. CAL. REV. L. & SOC. JUST. 371, 392 (2007) ("There have been no reported cases of a victim . . . successfully arguing that she had a disability . . . solely because of her status as a victim of domestic violence.").

⁴⁰ The FMLA provides employees with up to twelve weeks of unpaid, job-protected time off to care for one's own serious health condition or the serious health condition of a covered family

But state law has clearly been the leader in this arena. In addition to state laws that may be more protective than their equivalent federal laws, the most frequent claims are state tort law claims.⁴² The most common tort claim is wrongful termination. Usually in these cases, an employer decides to fire a victim employee. This may be because the employee has missed work to ensure her safety from a feared attack or because the employer fears that the employee's presence at the workplace will bring violence to the worksite.⁴³

The general rule is that employers in every state except Montana may fire an employee for any or no reason under the at-will employment doctrine unless otherwise barred by law.⁴⁴ This means that an employer may legally fire someone who is late to or absent from work to deal with domestic violence unless an exception to the at-will rule exists. Two exceptions may apply in this situation. The first comes in the form of an anti-discrimination law that prohibits termination on the basis of a protected class.⁴⁵ The second stems from case law that has expanded exceptions to the at-will employment rule to allow a fired victimized employee to bring a claim for wrongful termination in violation of public policy. At least twenty-five states have cases finding an employer liable for firing an employee as a result of "factors arising out of domestic violence."⁴⁶

One such case is *Apessos v. Memorial Press Group*.⁴⁷ In 2002, the Massachusetts Superior Court ruled in favor of a newspaper reporter

member. 29 U.S.C. §§ 2601-2654 (2006). Domestic violence may result in a serious health condition for an employee or a covered family member such that employers may be required to provide the employee with time off under the FMLA. The failure to provide this leave may serve as the basis for a lawsuit. *See, e.g., Municipality of Anchorage v. Gregg*, 101 P.3d 181 (Alaska 2004).

⁴¹ Potential claims under Title VII include disparate treatment, disparate impact, hostile work environment, and retaliation. *See, e.g., Fuller v. City of Oakland*, 47 F.3d 1522 (9th Cir. 1995) (female police officer harassed by ex-boyfriend who was also a cop brought successful hostile work environment claim under Title VII against the City of Oakland).

⁴² Claims also may be brought under state workers compensation laws. These laws make employers responsible for all injuries that arise out of one's employment and may cover acts of violence that occur at work. Usually the state workers compensation law provides the exclusive remedy for injuries that occur at work. However, an injury that is intentionally caused may serve as the basis for other claims. *See, e.g., Gantt v. Security, USA*, 356 F.3d 547, 563-64 (4th Cir. 2004).

⁴³ Widiss, *supra* note 25, manuscript at 4 (noting the alternative where employees quit out of fear of disclosing the violence).

⁴⁴ PETER O. HUGHES, 10-259 LABOR AND EMPLOYMENT LAW § 259.02 (Release 130, 2008) (explaining the general principle and history of at-will employment); Wrongful Discharge from Employment Act, MONT. CODE ANN. §§ 39-2-901 to 915 (eliminating the presumption of at-will employment and requiring "good cause" to terminate an employee after a probationary period).

⁴⁵ As noted above, a few cases have brought claims under Title VII, but some jurisdictions provide actual or perceived victims of domestic violence protection as a protected class under the local anti-discrimination law such that an employer's decision to fire a victim employee who is a member of this protected class may be challenged in court or administrative action pursuant to statute. *See infra* Section II (discussing some of the laws that may serve as the basis for a statutory exception to the at-will doctrine).

⁴⁶ Tebo, *supra* note 2, at 44. Factors such as court appearances, medical appointments, and counseling sessions contribute to the absences that may lead to an employee's termination. *Id.* (citing Stacey P. Dougan, member, ABA Domestic Violence Commission).

⁴⁷ 15 Mass. L. Rptr. 322, 2002 WL 31324115 (Mass. Super. 2002).

who obtained a temporary protection order over a weekend against her husband who had assaulted her. Because the order was temporary, Apessos had to appear in court on Monday to apply for an extension. She left a message for her employer over the weekend informing her supervisor of the Monday court appearance. On Monday, when she was still dealing with tasks associated with ensuring her safety, she called her supervisor in the afternoon to report that she would not be in that day but would be back at work the next morning. When she reported to work the next morning, she was fired. In denying the employer's motion to dismiss, the Court held that, even though she was an at-will employee, Apessos could have a claim for wrongful discharge in violation of public policy because she missed work to seek a protection order. In so holding, the court declared that "[a] victim should not have to seek physical safety at the cost of her employment."⁴⁸

The next most frequent fact pattern occurs when employers fail to provide a safe workplace by failing to adequately respond to or prevent violence. Negligence claims are the most common in this fact pattern, although the type of negligence claim that is brought varies.⁴⁹

⁴⁸ *Id.* at *3. The case ultimately settled out of court but demonstrates the potential for plaintiffs to use this theory to obtain relief for an employer's response to the effects of violence at work. *See also* Danny v. Laidlaw Transit Servs. Inc., 193 P.3d 128, 130 (Wash. 2008) (state has "a clear [public policy] mandate . . . of protecting domestic violence survivors and their families and holding their abusers accountable[.]" which may be the basis for the narrow wrongful termination tort); Dunwoody v. Handskill Corp., 60 P.3d 1135 (Or. Ct. App. 2003) (employee could sue for wrongful discharge in violation of public policy when she was fired after she missed work to testify in a criminal proceeding pursuant to subpoena); Vance v. Dispatch Mgmt. Serv., 122 F. Supp. 2d 910 (N.D. Ill. 2000) (employee who was fired after she sought a protection order against her supervisor who was a former boyfriend and battered her at work may continue on the claim for retaliatory discharge in violation of public policy). *But see* Imes v. City of Asheville, 594 S.E.2d 397 (N.C. Ct. App. 2004), *aff'd*, 606 S.E.2d 117 (N.C. 2004) (No wrongful discharge claim exists when an at-will employee cannot specify the precise public policy violated. The state legislature "is free" to treat victims of domestic violence as a protected class, however, a general notion that the law protects victims of domestic violence is not enough to create a public policy exemption "where none exist[s].").

Other courts have held in favor of a fired employee in wrongful termination against public policy cases involving a different type of workplace violence. *See, e.g.*, Daoust v. Abbott Labs., No. 05 C 6018, 2007 WL 118414 (N.D. Ill. Jan. 11, 2007) (allowing Daoust's claim for wrongful termination in violation of public policy based on his belief that he was fired in response to complaining about a subordinate employee's abusive behavior). The *Daoust* court held that "[a]llowing employers to discharge their employees because they reported an incident of workplace violence would directly contravene Illinois' efforts at promoting and protecting violence-free work environments, to the detriment of Illinois' working citizenry." *Id.* at *4; *see also* Franklin v. Monadnock Co., 59 Cal. Rptr. 3d 692 (Cal. Ct. App. 2007). In *Franklin*, an employee was fired after he reported allegations that a coworker threatened to have him and three other employees killed. The employer did nothing in response to the reported threat. The coworker later stabbed him with a screwdriver, and the employee was fired after he reported the assault to police. *Id.* at 694. The court held that a claim for wrongful termination in violation of public policy may be based on an employer's action in violation of policies encouraging the reporting of workplace violence threats and requiring employers to "take reasonable steps to address credible threats of violence in the workplace." *Id.* at 696-700. Plaintiffs' could rely on these cases to analogize to a situation involving domestic violence.

⁴⁹ *See, e.g.*, Panpat v. Owens-Brockway Glass Container, Inc., 71 P.3d 553, 554 (Or. Ct. App. 2003) (holding that a negligence claim may proceed to the jury). The court held that it was improper to grant summary judgment to the employer on the issue of whether it was foreseeable that

Some examples include: wrongful death; negligent hiring if an employer fails to investigate an applicant's character and criminal history before hiring; negligent supervision if an employer fails to train or supervise an employee that perpetrates domestic violence against a coworker or third party; negligent retention if an employer knows of an employee's propensity for violence and fails to fire the employee who later commits an act of violence at work; and defamation.⁵⁰ The average out-of-court settlement for a failure to foresee or adequately respond to violence case is about \$500,000.⁵¹ In 2001, the average jury award was \$3 million,⁵² and at least one reached \$7.9 million.⁵³

When you add an employer's duty under section 5(a)(1) of the Occupational Safety and Health Act ("OSH Act"), which requires employers⁵⁴ to "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,"⁵⁵

Panpat would be at risk of harm when the employer allowed another employee with whom she had recently broken off a relationship and "who was on a psychiatric medical leave [as a result of the break-up,] and who was not authorized to be in the workplace to approach" her. *Id.* at 558. *But see* *Midgett v. Wal-Mart Stores, Inc.*, 317 F. Supp. 2d 550 (E.D. Pa. 2004) (Wal-Mart not liable on negligence claims for failing to protect or negligent entrustment). In *Midgett*, Wal-Mart was not found liable even though it had knowledge that the employee's husband of 26 years was barred from coming near her and that he was stopping by the store, it sold him ammunition for a 22-caliber firearm on the evening the employee was shot, and it told the employee to "keep [her marital difficulties] out of the store." *Id.* at 560.

Intentional tort claims have also been brought against employers. *See, e.g.*, *Gantt v. Security, USA*, 356 F.3d 547 (4th Cir. 2004) (lower court erred in granting the employer summary judgment on an intentional infliction of emotional distress claim after an ex-boyfriend kidnapped her from work, assaulted, and raped her). In *Gantt*, the employee's supervisor assigned her to work at an unsecured location with the intent of letting her ex-boyfriend approach her, despite knowledge that the employee had a protection order against her ex-boyfriend—someone with whom the supervisor "had a friendly relationship" and worked with in a "weapon qualified" position at another security company. *Id.* at 549, 556 (internal quotation marks omitted).

⁵⁰ *See* Campbell & Karin, *supra* note 2 (providing a detailed discussion of these potential tort theories).

⁵¹ *Id.* at 6; Nat'l Ctr. for Victims of Crime, *Workplace Violence: Employer Information*, available at <http://www.ncvc.org/ncvc/main.aspx?dbName=DocumentViewer&DocumentAction=ViewProperties&DocumentID=32374&UrlToReturn=http%3a%2f%2fwww.ncvc.org%2fncvc%2fmain.aspx%3fdbName%3dAdvancedSearch> (last visited Sept. 28, 2008) (referencing a National Safe Workplace Institute estimate that a single episode of violence at work costs employers an average of \$250,000 in lost time and potential legal costs/liability).

⁵² Campbell & Karin, *supra* note 2, at 6.

⁵³ *Preventing Violence in the Workplace*, LAB. & EMP. NEWSL. (Semmes, Attorneys at Law, Balt., Md.), 2003, available at http://www.semmes.com/publications_archive/labor_employment/preventing-violence-in-the-workplace.asp (last visited Nov. 9, 2008) (describing a \$7.9 million verdict in a negligence case for an employer's failure to protect employees against a violence-prone coworker); *see also* Burke, *supra* note 3 (observing that "juries tend to be generous with their awards" when it comes to workplace violence); Chelsea Lettieri et al., Sloan Work & Fam. Res. Network, *Supporting Workers Experiencing Domestic Violence*, 2007 POL'Y LEADERSHIP SERIES: WORK-FAM. INFO. FOR ST. LEGISLATORS (Sloan Work & Fam. Res. Network, Chestnut Hill, Mass.), 2007, available at http://wfnetwork.bc.edu/pdfs/policy_makers11.pdf (stating that the price-tag for a wrongful death case has risen to upwards of \$850,000).

⁵⁴ All private employers are subject to the OSH Act. 29 U.S.C. § 652(5) (2000).

⁵⁵ 29 U.S.C. § 654(a)(1). Section 5(a)(1) of the OSH Act is known as the general duty clause. Employers may violate the general duty clause if they fail to adequately address credible threats to an employee's safety or if they allow an abuser to use work to perpetrate or further a

into the mix, employers have conflicting obligations with no clear instructions on what to do to maintain a safe workplace or limit or eliminate their potential liability. Employers have to balance the privacy, safety, and health interests of the victim employee with the rights of all employees to a safe environment.⁵⁶ In essence, employers are faced with a Hobbsian choice in deciding how to deal with the impact of domestic violence at work: face liability for failing to provide a safe workplace or face liability for wrongful termination. This “catch-22” requires employers “to look down the line and say, ‘If I don’t do this, which legal case would I rather be defending.’”⁵⁷ The question is not if an employer will be sued; the question is under which theory that suit will come. This threat of litigation is a real concern for employers.⁵⁸

C. Structural Problems with the “Normal” Workplace Set-up

The structure of the “normal” American workplace presents additional obstacles to crafting a cultural response geared towards mitigating the effects of domestic violence at work. The National Institute for Occupational Safety and Health (“NIOSH”)—the only federal agency required to research techniques to prevent injuries at work⁵⁹—has studied these structural deficits. In 2006, NIOSH published findings from the first government-sponsored national conference on violence at work, entitled *Partnering in Workplace Violence Prevention: Translating Research to Practice*. At the conference, participants

crime. However, while OSHA has issued guidance describing “best practices” and promoting the voluntary development of “violence prevention programs,” the agency has stated that it will not issue citations under the general duty clause for a failure to institute a “violence protection program[.]” Letter from Joseph A. Dear, Assistant Sec’y, Dep’t of Labor, to Congressman Cass Ballenger, Guidelines for Workplace Violence Prevention Programs for Night Retail Establishments (Oct. 23, 1996), available at http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=22281. OSHA’s current position on workplace violence is available at <http://www.osha.gov/SLTC/workplaceviolence/index.html> (last visited Jan. 24, 2009).

⁵⁶ Senate Hearing, *supra* note 29 (statement of Sue K. Willman, on behalf of the Society for Human Resource Management (SHRM)) (articulating this concern); *see also* Tarr, *supra* note 39, at 373 (noting the “almost inevitable tension between the employer’s desire to help and protect employees who are victims of domestic violence and the need to respect employee autonomy creates uncertainty for both victims of domestic violence and their employers”).

⁵⁷ *Workplace Violence: Interest in Violence Prevention Grows, but Few Companies Have Established Plans*, 37 OSHA Rep. (BNA) 403 (May 3, 2007) [hereinafter *Workplace Violence*] (internal citations omitted) (quoting Mark Braverman and further quoting employment lawyer Rebecca Speer, who commented that “[employers] have to be educated on countervailing rights—employer obligations to provide a safe workplace but also respecting rights of privacy”).

⁵⁸ *See* Mary J. Pitzer, *Work & Careers Human Resources*, L.A. TIMES, Mar. 23, 1997, at 5 (Employers fear lawsuits, and “[i]t’s not just the violence they fear. It’s the lawsuits as well. [Because employees] have a legal right to a safe workplace . . .”).

⁵⁹ Nat’l Inst. for Occupational Safety & Health, Ctrs. for Disease Control & Prevention, Women’s Safety and Health Issues at Work, <http://www.cdc.gov/niosh/topics/women/> (last visited Sept. 28, 2008).

discussed obstacles to successful workplace violence prevention.⁶⁰ Gaps identified at the conference include: (1) communication problems; (2) the appropriate role for employers in preventing and responding to workplace violence; and (3) “too few incentives for companies to implement [a workplace violence] prevention program.”⁶¹ Other gaps that hinder violence prevention include the inconsistent and sometimes conflicting obligations under federal and state law described above.

There is not one universal communication problem that prevents an effective response to workplace violence. Instead, there is an amalgamation of problems involving communication. There may be a breakdown in established communication systems when domestic violence is involved.⁶² Supervisors and employees may experience a “disconnect[]” that prevents fears, concerns, and effective collaboration on this issue.⁶³ There also may be a wall of silence that prevents employees from informing the employer about a dangerous situation.

Employees may remain silent for any number of reasons. Victims and witnesses of violence may not report threats or acts of violence if they do not believe their employers will do anything with the information or be willing to get involved in such a personal situation.⁶⁴ Alternatively, employees might believe that mentioning it would be a waste of company time and energy.⁶⁵ Embarrassment and fear of termination or other retribution often prevent victim employees from talking to their employers about their situations.⁶⁶ Some employees may

⁶⁰ NAT'L INST. FOR OCCUPATIONAL SAFETY & HEALTH, CTRS. FOR DISEASE CONTROL & PREVENTION, PUBL'N NO. 2006-144, WORKPLACE VIOLENCE PREVENTION STRATEGIES AND RESEARCH NEEDS § 2 (2006) [hereinafter NIOSH], available at <http://www.cdc.gov/niosh/docs/2006-144/pdfs/2006-144.pdf>.

⁶¹ *Id.* at §§ 2.1.1-2.1.4.

⁶² *Id.* at § 2.1.9 (“Lack of reporting is also a fundamental barrier to effective . . . prevention.”).

⁶³ *Id.* at § 2.1.3; see also Stephanie L. Perin, *Employers May Have to Pay When Domestic Violence Goes To Work*, 18 REV. LITIG. 365, 396-98 (1999) (discussing how to train supervisors and coworkers to identify domestic violence victims).

⁶⁴ Conference participants noted that employers are wary against “assuming responsibility for workers’ private lives.” NIOSH, *supra* note 60, § 2.1.1; see also *Violence is Top Security Concern in 2000*, BRAUN CONSULTING NEWS (Braun Consulting Group, Seattle, Wash.), Fall 2000, available at <http://www.braunconsulting.com/bcg/newsletters/fall0005.html> (“The number one message that [e]mployers must get out to employees is: ‘It is OK to contact management if any employee believes there is a reason to be concerned[.]’ . . . [Companies need to take control over] exposure to violence by encouraging employees to tell management about their concerns.”); Swanberg & Macke, *supra* note 15, at 399 (One reason victims do not disclose violence at work is the “thought that [domestic violence] was a personal issue and should not be brought into the workplace.”).

⁶⁵ Employees may not report violence if they “feel that nothing will be done if they do report.” NIOSH, *supra* note 60, § 2.1.9.

⁶⁶ See Tebo, *supra* note 2, at 44; see also Jennifer Swanberg & T.K. Logan, *Intimate Partner Violence, Employment and the Workplaces: An Interdisciplinary Perspective*, 22 J. INTERPERSONAL VIOLENCE 263, 263-66 (2007); Ilann Margalit Maazel & O. Andrew F. Wilson, *Outside Counsel: Protecting the Rights of Domestic Violence Victims in the Workplace*, N.Y.L.J., Aug. 1, 2006, at 4 (explaining the evidence heard at four hearings of the New York City Council, including “a growing body of evidence suggesting that domestic violence victims justifiably fear negative employment actions such as demotion, suspension, loss of pay or benefits or termination”);

think an employer has no ability to improve the situation, might make it into a bigger deal than it is, or reject or discredit the employee's circumstances by taking the perpetrator's side.⁶⁷ Others may have confidence in their ability to independently deal with the violence and its effects.⁶⁸ Further, employees that have obtained a protection order are under no legal duty to inform an employer that they have obtained one or that coworkers or customers may be endangered.⁶⁹

Communication issues are particularly difficult for small employers whose employees typically lack a voice in management decisions.⁷⁰ Of course, an employer may always create violence prevention policies as well as educate and train supervisors and other employees about domestic violence and how to deal with the effects it has on work. But an employer cannot address a specific risk without knowledge that the risk exists. Even companies with appropriate workplace policies come across a problem when employees are not aware of the policy's existence or how to use it.⁷¹

In addition, the tools that exist for employers and employees tend to be "incident-focused" reactive responses to domestic violence.⁷² For example, employees seek a remedy under tort law only after violence occurs, which does nothing to help with prevention.⁷³ And the "prevailing corporate attitude" is one that denies the need for employers to address domestic violence "until a tragic, violent event occurs."⁷⁴

Abby Ellin, *Agony of Domestic Violence at the Office*, N.Y. TIMES, Mar. 1, 2000, at G1 (describing one victim's fear to inform her boss).

⁶⁷ See Richard D. Sem, *Workplace Violence: Prevention and Response*, SEC. TECH. & DESIGN, Sept. 1, 2007, at 84, 88, available at <http://www.allbusiness.com/medicine-health/diseases-disorders-mental-illness/10587534-1.html> ("It is especially dangerous, and all too common, for supervisors and managers to brush off concerns that are raised to them or even to penalize the person reporting."); Swanberg & Macke, *supra* note 15, at 400 (noting that victims did not disclose violence at work out a failure to trust their colleagues or employers).

⁶⁸ Swanberg & Logan, *Domestic Violence and Employment*, *supra* note 15, at 12 (Some "women mentioned that they could balance the demands of work with the victimization and therefore deemed it 'unnecessary to tell anyone at work, as [they] could handle the abuse on [their] own.'").

⁶⁹ Many advocacy organizations recommend keeping a certified copy of the order at hand and providing a copy of the order to anyone who needs to know about it, including employers. See, e.g., IDAHO COUNCIL ON DOMESTIC VIOLENCE & VICTIM ASSISTANCE, FILING PROTECTION ORDERS, available at <http://www2.state.id.us/crimevictim/victims/ProtectionOrders.cfm> (last visited Sept. 28, 2008); N. H. Coal. Against Domestic Violence & Sexual Violence, DV in the Workplace, http://www.nhcadsv.org/dv_workplace.cfm (last visited Sept. 28, 2008).

⁷⁰ NIOSH, *supra* note 60, § 2.1.3; see also Perin, *supra* note 63, at 401 ("Despite the growing number of businesses that have made domestic violence a company issue, many employers remain unconvinced that domestic violence is a problem in the workplace.").

⁷¹ Press Release, Corporate Alliance to End Partner Violence, *supra* note 5 (Two thirds of surveyed employees "did not know if their employer has a domestic violence policy or program in place.").

⁷² Widiss, *supra* note 25, manuscript at 44 ("By approaching the situation from the individual 'business' perspective or 'victim' perspective, many advocates and legislatures have failed to recognize the benefits of addressing the issue more comprehensively.").

⁷³ Riley, *supra* note 31, at 25 (These are "post-incident remedies.").

⁷⁴ NIOSH, *supra* note 60, § 2.1.1.

This approach is not working. The rules under which victims and perpetrators operate and the conflicting obligations imposed on employers have primarily been established on a state level (e.g., criminal law, tort law, etc.).⁷⁵ The time has come to change this normative response to domestic violence to recognize the impact it has at work. Society can no longer afford to view domestic violence as an issue to be dealt with solely through the criminal or family law systems. Instead, society has an obligation to create a coherent structure and system to respond to the totality of the problem.

The remaining sections explain proposals to change the law to address the problem of domestic violence in a more holistic fashion on a national level. After reviewing recent changes to state law and existing federal proposals, this Article argues that the best way to achieve effective results is through a federal approach that recognizes and works with the states to provide additional, appropriately tailored tools to all workplace actors.

II. NEW STATE LAWS RESPOND TO THE NEEDS OF EMPLOYEES

Before a comprehensive federal approach to combat the effects of domestic violence at work can be developed, we need to examine the systems already in place in the states and local jurisdictions. Looking at what states have already done to shape their laws to respond to the impact of domestic violence at the workplace gives a sense of the needs that employees and employers have been experiencing as well as a basis of practice on which to draw.

In recent years, states have been granting additional job-protected time off and other employment-related protections to employees in an effort to address the effects of violence at work. Three relevant trends emerge from a review of the state laws. Employees have been granted additional: (1) access to leave from work; (2) access to unemployment compensation; and (3) protection from adverse employment actions via anti-discrimination laws.

The first trend involves states creating new or expanding existing leave mandates in an effort to support victims' economic self-sufficiency.⁷⁶ Under these mandates, employers are required to provide access to some form of job-protected time off to be used in responding to violence. According to a 2005 survey of state laws conducted by Legal

⁷⁵ See, e.g., Deborah M. Weissman, *Gender-Based Violence as Judicial Anomaly: Between "The Truly National and the Truly Local"*, 42 B.C. L. REV. 1081, 1133-37, 1141 (2001) (noting the need of state courts to "serve as the principal vehicle" and observing that criminal remedies have been the primary "legal response to domestic violence").

⁷⁶ See Edward H. Trent & Richard N. Margulies, *Employment Protections for Victims of Domestic Violence and Sexual Assault*, METROPOLITAN CORP. COUNS. 38 (Nov. 2007) ("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 . . .").

Momentum,⁷⁷ thirty-two states grant crime victims some form of time off to participate in court proceedings.⁷⁸ Most of these leave laws are narrowly defined and enumerate the specific activities for which leave may be taken. For example, some require employers to provide leave only if the employee is responding to a subpoena or in response to a prosecutor's request to serve as a witness in a criminal case.⁷⁹ Others allow leave for a much broader range of activities. Nine states provide leave to victims of domestic violence to take actions to obtain a civil protection order, receive medical treatment including psychological care, relocate or obtain shelter or other safe housing, or participate in safety planning.⁸⁰ Two provide leave to seek protection orders only.⁸¹ Some states require employees to use all other available leave before they may take leave pursuant to the domestic violence work leave statute.⁸² These laws also vary as to the length of leave for which job protection is afforded.⁸³ Most states provide for between three and thirty days.⁸⁴ A few permit leave for a "reasonable and necessary" length of time.⁸⁵ Most of these laws provide for unpaid leave.⁸⁶

⁷⁷ Legal Momentum is a leader in the effort to obtain additional protections, organize support for, and analyze local, state, and national employment protections for victims of violence. See Legal Momentum, About Us, http://www.legalmomentum.org/site/PageServer?pagename=aboutus_1 (last visited Nov. 3, 2008). For more information on Legal Momentum's efforts to secure employment rights for victims of domestic violence, see Legal Momentum, Employment and Housing Rights for Victims of Domestic Violence, http://www.legalmomentum.org/site/PageServer?pagename=erhdv_16 (last visited Nov. 3, 2008).

⁷⁸ See LEGAL MOMENTUM, KNOW YOUR RIGHTS: TIME OFF TO PARTICIPATE IN CRIMINAL PROCEEDINGS 1 (2005), available at <http://www.legalmomentum.org/site/DocServer/criminal%20proceedings.pdf?docID=295>. In addition, federal employees are granted paid leave to serve as a witness in a case in which the government is a party. 5 U.S.C. §§ 5515, 5537, 6322 (2000).

⁷⁹ See, e.g., D.C. CODE § 1-612.03 (2001) (certain city employees have access to paid leave to serve as a witness in a case in which the city is a party); ORE. REV. STAT. § 659A.190 (2007) (granting certain employees the right to take unpaid leave to attend criminal proceedings). As explained below, most protection orders are civil in nature and therefore, employees' jobs are not protected in these states if they seek protection orders during normal business hours, although five states explicitly allow leave to go to court to request a civil protection order. See LEGAL MOMENTUM, *supra* note 78, at 2.

⁸⁰ LEGAL MOMENTUM, 50-STATE OVERVIEW: EMPLOYMENT PROTECTIONS FOR VICTIMS OF DOMESTIC AND SEXUAL VIOLENCE 1 (2006), available at <http://www.legalmomentum.org/assets/pdfs/employment50stateoverview.pdf> (listing nine state statutes that provide "Domestic violence-specific leave laws [that] provide time off to victims to take a range of steps to address the violence . . .") (internal quotation marks omitted).

⁸¹ LEGAL MOMENTUM, *supra* note 78, at 2.

⁸² See, e.g., HAW. REV. STAT. § 378-73 (2007) (employees "shall exhaust [any] other paid and unpaid leave" before taking domestic violence leave).

⁸³ Illinois's Victims' Economic Security and Safety Act (VESSA), which was modeled on an earlier version of the federal SEES and SAFE Act, provides the most expansive protection: up to twelve weeks of leave per year for victims or family members of victims to take time off from work to seek medical care, counseling, services from victim's groups, safety training, and/or legal assistance. 820 ILL. COMP. STAT. ANN. 180/20(a) (West 2003).

⁸⁴ See, e.g., COLO. REV. STAT. § 24-34-402.7 (2007) (three days of leave is available after all other leave is exhausted or waived by the employer).

⁸⁵ See, e.g., ME. REV. STAT. ANN. tit. 26, § 850 (2007).

⁸⁶ LEGAL MOMENTUM, *supra* note 78, at 2. *But see* D.C. CODE § 32-131.02(b) (2008) (provides for paid time off to seek a protection order, counseling, or other legal and social services

The second trend in state laws granting additional protection to victimized employees involves the provision of unemployment benefits. Usually unemployment compensation is available only to employees who have been fired from their jobs.⁸⁷ Most states deem employees ineligible for benefits if they voluntarily left employment without “good cause” or if they were discharged for “misconduct.”⁸⁸ A growing trend among state laws is to define “good cause” to include protection of one’s self or children from domestic violence. “Good cause” provisions entitle employees “to benefits if they quit [work] because their health, safety or comfort has been endangered.”⁸⁹ Currently, twenty-eight states and the District of Columbia provide unemployment benefits to victims of domestic violence; however, the extent of and circumstances under which victims may obtain these benefits vary.⁹⁰ No federal law requires states to provide unemployment compensation to victims of domestic violence at this time.

based on a sliding scale determined by the employer’s size); MILWAUKEE CODE OF ORDINANCES, ch. 112 (2008) (providing for up to seventy-two hours of paid sick leave per year, or up to forty hours of work if the business has less than ten employees, for an “[a]bsence necessary due to domestic” violence); Mass. Exec. Order No. 491 § 8 (2007), available at http://www.mass.gov/Agov3/docs/Executive%20Orders/executive_order_491.pdf (provides for up fifteen days of paid leave “for purposes of victim counseling, obtaining medical treatment, attending legal proceedings, or carrying out other necessary activities, where such activities result from domestic violence or stalking and the employee is not the abuser, or where such activities result from sexual assault inflicted upon the employee or upon the employee’s children where the employee is not the abuser”).

In addition, a number of states are currently considering paid leave bills that would provide time off from work that would cover one or more circumstances under which an employee may need time off to address the effects of violence. For example, California Assembly Bill 2716 would provide up to nine days of paid time off to recover from illness, care for another, or recover from related to domestic violence or sexual assault. Legis. Assem. 2716, 2007-08 Reg. Sess. (Cal. 2007-08). More information on state efforts to enact paid leave is available at Multi-State Working Families Consortium, <http://www.valuefamiliesatwork.org/> (last visited Feb. 7, 2009).

⁸⁷ See Katherine Elizabeth Ulrich, *Insuring Family Risks: Suggestions for a National Family Policy and Wage Replacement*, 14 YALE J.L. & FEMINISM 1, 33-34 (2002) (explaining that state agencies use a three-part test to evaluate a claimant’s eligibility for unemployment compensation: (1) has the claimant worked for a covered employer and demonstrated an attachment to the labor force; (2) is the claimant able and available to work; and (3) was the claimant separated from employment involuntarily); CORNELL UNIV. LAW SCHOOL, LEGAL INFO. INST., *Unemployment Compensation*, in WEX, http://topics.law.cornell.edu/wex/unemployment_compensation (last visited Nov. 1, 2008) (stating that unemployment compensation provides monetary payments for a period of time if the worker has been terminated “through no fault of [his] own”).

⁸⁸ See, e.g., Ohio Department of Job and Family Services, Unemployment Compensation FAQ’s, http://jfs.ohio.gov/unemp_comp_faq/faq_elig_reason.stm#laid_off (last visited Nov. 1, 2008) (explaining that an employee must show “just cause” for leaving employment, while the employer must show “just cause” for discharging the employee).

⁸⁹ Campbell & Karin, *supra* note 2, at 7.

⁹⁰ See LEGAL MOMENTUM, STATE LAW GUIDE: UNEMPLOYMENT INSURANCE BENEFITS 1 (2007), available at <http://www.legalmomentum.org/site/DocServer/ui.pdf?docID=574>. For example, California, Maine, and New Hampshire allow a victim to receive benefits only if she made “all reasonable efforts to preserve the employment.” Connecticut applies the exception only to someone who quit work to protect children living with the person. EMPLOYMENT & TRAINING ADMIN., U.S. DEP’T OF LABOR, COMPARISON OF STATE UNEMPLOYMENT INSURANCE LAWS, *Good Cause for Voluntary Leaving* § 430.01, available at <http://www.ows.doleta.gov/unemploy/pdf/2001compeli.pdf> (last visited Sept. 28, 2008).

The third trend relates to protecting victims under local anti-discrimination laws. Three jurisdictions—Illinois, New York City, and Westchester County—specifically prohibit all forms of employment discrimination against employees because they are or are perceived to be victims of domestic violence.⁹¹ These jurisdictions also require employers to provide victims with reasonable accommodations at work. For example, a state court held that the New York Department of Corrections failed to reasonably accommodate an employee who violated her employer's sick leave policy when she refused to give out the address of the domestic violence shelter in which she was living to protect the safety of the shelter's other residents and employees. The court stated that it would not be an undue burden for the employer to modify its sick leave policy to permit domestic violence victims to live away from home while on leave.⁹² In addition, other states prevent employers from taking adverse employment actions against someone based on the fact that the person sought or obtained a protection order,⁹³ sought or obtained counseling or safety planning,⁹⁴ responded to a subpoena,⁹⁵ or otherwise participated in a criminal proceeding or police investigation.⁹⁶

Taken together, these laws offer employees additional protection and tools to deal with violence at work. Despite the promise of these laws to address some aspects of the problem, they are not enough. Victims in a couple of states do not have access to any of these protections.⁹⁷ In addition, few states offer all of these protections or otherwise have a comprehensive approach to deal with violence at work.⁹⁸ Moreover, these state law trends, along with the tort cases described above, demonstrate that employers are increasingly faced with

⁹¹ 820 ILL. COMP. STAT. 180/30 (Supp. 2008) (providing that employees may not be fired because they take leave related to an incident of domestic violence or because the workplace is disrupted due to actual or threatened domestic violence); N.Y. ADMIN. CODE § 8-107 (Supp. 2007); WESTCHESTER COUNTY CODE § 700.03 (1999).

⁹² *Reynolds v. Fraser*, 781 N.Y.S.2d 885, 887-88, 891 (N.Y. Sup. Ct. 2004) (finding it was improper to fire an employee for violating the employer's sick leave policy when she was not at her "report[ed]" residence while on leave as a result of domestic violence).

⁹³ *See, e.g.*, CAL. LAB. CODE § 230(c) (West 2003); CONN. GEN. STAT. § 54-85b (2002); R.I. GEN. LAWS § 12-28-10(a) (2002).

⁹⁴ *See, e.g.*, CAL. LAB. CODE § 230.1(a).

⁹⁵ *See, e.g.*, MO. ANN. STAT. § 595.209(1)(14) (West Supp. 2008) (providing that an employee may not be discharged or disciplined for responding to a subpoena to prepare for or attend a criminal proceeding; nor may an employee be required to use vacation, personal, or sick leave when responding to a subpoena); S.C. CODE ANN. § 16-3-1550(A) (2003).

⁹⁶ *See, e.g.*, CONN. GEN. STAT. § 54-85b(a); 18 PA. CONS. STAT. ANN. § 4957(a) (West Supp. 2008).

⁹⁷ For example, neither West Virginia nor Idaho have laws addressing employment issues for victims of domestic violence. *See* LEGAL MOMENTUM, 50 STATE OVERVIEW: EMPLOYMENT PROTECTIONS FOR VICTIMS OF DOMESTIC AND SEXUAL VIOLENCE 2-3, available at <http://www.legalmomentum.org/assets/pdfs/employment50stateoverview.pdf> (last visited Sept. 29, 2008).

⁹⁸ Illinois and D.C. are two of the exceptions, offering some form of time off, unemployment compensation, and nondiscrimination protections. 820 ILL. COMP. STAT. 180/1-45, 405/601 (Supp. 2008); D.C. CODE §§ 32-131.02(b)(4), 51-131-136 (2001).

additional duties to respond to the impact of violence at work.⁹⁹ And these obligations may impose conflicting duties on employers.¹⁰⁰ As a result, the legal protections available to a victim differ depending on where the victim lives. As a policy matter, therefore, the federal government can and should piggy-back on this momentum building in the states to address the needs of employees and do something to fix the mismatch between what victim employees and employers need and what recourse the law provides. The next section analyzes two bills from the 110th Congress that attempt to address this mismatch as well as proposals to add additional provisions to them to more effectively address the mismatch.

III. THE CURRENT FEDERAL BILLS AND PROPOSALS TO AMEND THE SEES AND SAFE ACT TO CREATE A SOCIETAL RESPONSE TO VIOLENCE AT WORK

In 1994, Congress first helped educate and elevate the national consciousness about the effects of domestic violence against women with the Violence Against Women Act (“VAWA”).¹⁰¹ Federal law should now build on the state laws described above and give employers and employees their own defenses in the front-line to make domestic

⁹⁹ This momentum also exists on the local level, where additional employment protections for victims of domestic violence are also being gained. *See* Maazel & Wilson, *supra* note 66, at 4 (describing the 2001 amendment to the New York City Administrative Code, which became the “forefront of a growing national legal trend protecting the rights of domestic violence victims at work”).

¹⁰⁰ *See* 153 CONG. REC. E2337-02 (2007) (statement of Rep. Lucille Roybal-Allard) (noting that although “many states . . . have taken action to help survivors retain their financial independence, the job protections offered by state laws vary dramatically”); Senate Hearing, *supra* note 29 (statement of Kathy Rogers, President of Legal Momentum) (“[E]xisting state laws have created an uneven patchwork of protection, where a victim’s access to the economic security she needs to separate from an abuser depends on the state in which she happens to live.”).

¹⁰¹ The Violence Against Women Act of 1994, Pub. L. No. 103-322, tit. IV, 108 Stat. 1796. This law—the first comprehensive federal legislation to address violence—prompted changes in public attitudes, policy, law, and the criminal justice system affecting federal, state, and local responses to domestic violence against women and children. *See generally* KRISTEN J. ROE, NATIONAL ALLIANCE TO END SEXUAL VIOLENCE, THE VIOLENCE AGAINST WOMEN ACT AND ITS IMPACT ON SEXUAL VIOLENCE PUBLIC POLICY: LOOKING BACK AND LOOKING FORWARD (Sept. 2004), <http://www.nrcdv.org/docs/Mailings/2004/NRCDVNovVAWA.pdf> (providing a history of VAWA and its impact, as well as an analysis of concerns and gaps that remain a decade after its enactment). VAWA also provided the first federal program to prosecute interstate domestic violence and sexual assault crimes, enforce protection orders across state lines, and highlight the unique needs of certain underserved populations, such as battered immigrants. National Coalition Against Domestic Violence, *Violence Against Women Act (VAWA) Appropriations*, <http://www.ncadv.org/files/2008vawa.pdf>.

The original provisions of VAWA expired in 2000. The law was subsequently reauthorized in 2000 and 2005 to provide resources and protections to additional communities impacted by domestic violence. *See id.*; Pub. L. No. 106-386, 114 Stat. 1464 (2000); Pub. Law 109-162, 119 Stat. 2960 (2005). VAWA 2000 and VAWA 2005 appropriated funding to expand legal assistance, and programs to address prevention, housing, health care, child custody and visitation, and employment issues resulting from domestic violence. *Id.*; *see also* GARRINE P. LANEY, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS, VIOLENCE AGAINST WOMEN ACT: HISTORY AND FEDERAL FUNDING (2005), available at http://assets.opencrs.com/rpts/RL30871_20050318.pdf.

violence a “public” issue once and for all. Federal legislation is the appropriate level at which to address this societal problem. In so doing, federal law would set a national standard to address a national problem.

On April 17, 2007, Senator Patty Murray (D-WA) introduced the Survivors’ Empowerment and Economic Security Act (“SEES Act”).¹⁰² The Security and Financial Empowerment Act (“SAFE Act”),¹⁰³ a companion bill to the SEES Act, was introduced by Congresswoman Lucille Roybal-Allard (D-CA) on May 21, 2007.¹⁰⁴ These bills do a lot to respond to the needs of employees dealing with domestic violence by: (1) providing up to thirty days of unpaid job protected leave per year to deal with the aftermath of domestic violence;¹⁰⁵ (2) adding victims of domestic violence as a protected class against which adverse employment actions may not be based unless it would present an undue hardship to the employer;¹⁰⁶ and (3) amending the Internal Revenue Code to require every state to allow victims to access unemployment benefits if they are fired or forced to leave their job as a result of domestic violence.¹⁰⁷

¹⁰² S.1136, 110th Cong. (2007). As of September 12, 2008, the SEES Act had three cosponsors: Sherrod Brown (D-OH); Christopher Dodd (D-CT); and Thomas Harkin (D-IA) and has been referred to the Senate Finance Committee. Govtrack.us, S.1136: Survivors’ Empowerment and Economic Security Act, <http://www.govtrack.us/congress/bill.xpd?bill=s110-1136> (last visited Nov. 21, 2008).

The employment related provisions of these bills have been introduced in one form or another since the 104th Congress, including: SAFE Act, S. 1796, 109th Cong. (2005); SAFE Act, H.R. 3185, 109th Cong. (2005); VAWA Reauthorization Act of 2005, H.R. 3171, 109th Cong. (2005); Title VII Providing Economic Security for Victims of Violence, VAWA Reauthorization Act of 2005, S. 1197, 109th Cong. § 701 (2005); SAFE Act, S. 1801, 108th Cong. (2003); SAFE Act, H.R. 3420, 108th Cong. (2003); Victims’ Economic Security and Safety Act (VESSA), S. 1249, 107th Cong. (2001); VESSA, H.R. 2670, 107th Cong. (2001); Battered Women’s Employment Protection Act, H.R. 5262, 106th Cong. (2000); Title II, Violence Against Women and the Workplace of the Battered Women’s Economic Security and Safety Act, S. 1069, 106th Cong. (1999); Title II, Violence Against Women and the Workplace of the Battered Women’s Economic Security Act, S. 2558, 105th Cong. (1998); Title VII, Violence Against Women and the Workplace of the Violence Against Women Act of 1998, H.R. 3514, 105th Cong. (1998); Battered Women’s Employment Protection Act, S. 367, 105th Cong. (1997); Battered Women’s Employment Protection Act, H.R. 851, 105th Cong. (1997); and Battered Women’s Employment Protection Act, H.R. 3837, 104th Cong. (1996).

¹⁰³ H.R. 2395, 110th Cong. (2007). As of July 9, 2008, the SAFE Act had bipartisan support from the following co-sponsors: Thomas Allen (D-ME); Brian Baird (D-WA); Shelley Berkley (D-NV); Andre Carson (D-IN); Bob Filner (D-CA); Michael Honda (D-CA); William Jefferson (D-LA); Zoe Lofgren (D-CA); Nita Lowey (D-NY); Thaddeus McCotter (R-MI); James McDermott (D-WA); George Miller (D-CA); Dennis Moore (D-KS); James Moran (D-VA); Ted Poe (R-TX); Hilda Solis (D-CA); and Albert Wynn (D-MD). Govtrack.us, H.R. 2395: Security and Financial Empowerment (SAFE) Act, <http://www.govtrack.us/congress/bill.xpd?bill=h110-2395> (last visited Nov. 3, 2008).

¹⁰⁴ The remainder of the Article includes citations to the SAFE Act only, but each of these citations to the SAFE Act has corollary provisions in the SEES Act. Other than the title provision, the House and Senate bills are identical.

¹⁰⁵ H.R. 2395 § 102(a).

¹⁰⁶ *Id.* § 303.

¹⁰⁷ *Id.* § 202(a). The SAFE Act also contains the Victims of Abuse Insurance Protection Act, which would prevent the denial or restriction of insurance coverage based on the status of an applicant or an insured person as a victim of domestic violence. *Id.* §§ 401-409.

The Employment and Workplace Safety Subcommittee of the Senate Committee on Health, Education, Labor and Pensions convened a hearing to discuss these bills on the same day the SEES Act was introduced. At the hearing, Kathy Rogers, President of Legal Momentum, testified that “federal legislation is needed to ensure all survivors of sexual and domestic violence receive at least basic economic protections.”¹⁰⁸ This is a critical point. And these provisions would have a significant impact on the immediate and long-term safety, economic security, and lives of victims of violence.

But Senator Isakson (R-GA) also made a key point at the hearing when he pointed out that “[t]he presumptive basis of legislation is critical,” and these bills presume that employers are at fault for failing to protect victims.¹⁰⁹ This frame underlies the provisions of the proposed legislation, especially when viewed in the context of the historical opposition businesses have against additional leave mandates. Federal legislation can be crafted in a way that recognizes, respects, and integrates the roles and needs of a variety of stakeholders. In this context, the bills also need to ensure that employers are offered avenues and incentives to address the impact of domestic violence or proactively maintain a safe worksite.

The remainder of this section offers amendments to the SEES and SAFE Act bills to holistically approach the theory and practice of how domestic violence affects the workplace. Before describing these proposals, however, it is worth noting that there are a number of other bills pending in the 110th Congress that attempt to address one or more of the problems associated with domestic violence at work.¹¹⁰ The

¹⁰⁸ Senate Hearing, *supra* note 29, at 5 (statement of Kathy Rogers, President, Legal Momentum).

¹⁰⁹ *Id.* How the bills are framed has important political ramifications. See Widiss, *supra* note 25, manuscript at 29 (correctly noting that framing domestic violence protections in the antidiscrimination context “predisposes businesses to oppose it”).

¹¹⁰ Other bills have been introduced during this Congress to specifically deal with domestic violence. For example, Congresswoman Roybal-Allard (D-CA) and Congressman Ted Poe (R-TX) introduced: (1) the Job Protection for Survivors Act, H.R. 4015, 110th Cong. (2007), which would provide up to fifteen days of time off to employees to deal with the aftermath of violence, “such leave as is necessary” to participate in civil or criminal proceedings related to domestic violence, and protection against adverse employment actions on the basis of one’s actual or perceived status as a victim of violence subject to an undue burden defense for the employer; (2) the Unemployment Insurance for Survivors Act of 2007, H.R. 4016, 110th Cong. (2007), which would require states to provide unemployment compensation to people whose work is terminated because of domestic violence; and (3) the Insurance Non-Discrimination for Survivors Act, H.R. 4014, 110th Cong. (2007), which would prohibit employers and insurance providers from basing coverage decisions on an employee’s history as an abuse victim. In addition, Title III, the Employment Protection for Battered Women of The Family and Medical Leave Expansion Act, would allow employees to take FMLA-protected leave if needed to address problems arising from domestic violence. H.R. 1369, 110th Cong. (2007). The Healthy Families Act, S. 910, 110th Cong. (2007), H.R. 1542, 110th Cong. (2007), would also grant victims access to up to seven days of paid sick leave annually that could be used to address the effects of domestic violence. Section 9 of the Healthy Families Act would also require the GAO to study the annual use of paid sick leave, including “[w]hether employees used paid sick leave to care for illnesses or conditions caused by domestic violence against the employees or their family members.” H.R. 1542, 110th Cong. (2007).

fundamental premise underlying the analysis in this Article, as well as the proposals that follow, can be applied to any one of the pending bills that becomes the moving vehicle with the most promise to offer a comprehensive societal response to the problem of violence at work. This Article posits that the employee protections found in the current bills *combined with* the following proposals to change the SEES and SAFE Act would give both employees *and* employers a reason to want to be a part of the solution and work to actually move these bills toward passage and effectuating change.

A. *Reframing the Bills to Acknowledge a Societal Problem*

The first proposal is to reframe these bills to specifically state that appropriately responding to and combating domestic violence at work is a societal issue. Currently, the purpose section of the bills acknowledges that the goal is “*to minimize the negative impact on interstate commerce from dislocations of employees and harmful effects on productivity, employment, health care costs, and employer costs.*”¹¹¹ It continues by noting that this goal should be accomplished by “(A) entitling employed victims . . . to take leave . . . without penalty from their employers; and (B) prohibiting employers from discriminating against actual or perceived victims . . . *in a manner that accommodates the legitimate interests of employers and protects the safety of all persons in the workplace.*”¹¹²

Specific purpose statements should be added to reflect the need for a social response to the problem of domestic violence at work in a way that recognizes the impact on, role of, and responsibility of the business community. One way to do this would be to add the following subsections to § 101(7): (C) providing employers with an affirmative tool by which they can seek and take preventive action to protect the safety of all persons in the workplace; and (D) creating a societal response to address the effects of domestic violence at work.

This section—and, therefore, the purpose of the legislation—should be about more than just accommodating employers’ legitimate interests as a defense to a discrimination claim. It should also be about more than simply summarily noting that domestic violence imposes costs on employers as part of a laundry list of purposes (especially if the substantive provisions outlined elsewhere in the bills do not necessarily correlate with this stated purpose). Instead, this section should recognize that domestic violence affects everyone—including employers. Making this change would broaden the conversation on this issue beyond the

Finally, the Unemployment Insurance Modernization Act, S. 1871, 110th Cong. (2007) would, among other things, provide states with incentives to extend eligibility for unemployment insurance to individuals who leave work as a result of domestic violence.

¹¹¹ H.R. 2395 § 101 (emphasis added).

¹¹² *Id.* (emphasis added).

current focus on expanding protections for victims, but it would not remove those expansions from the discussion.

Specifically articulating the purpose of the bills in this frame is key. It would reflect an express congressional intent to holistically address this problem. And, when combined with the additional proposals described below, it would be a clear statement recognizing the impact of domestic violence on the workplace as well as a congressional desire to provide additional ways for employees, employers, *and* society as a whole to mitigate that impact.

B. Giving Employers the Ability to Go to Court to Obtain Protection Orders

This proposal would create a new title to the SEES and SAFE Act that would encourage states to give employers the ability to obtain protection orders in response to actual or threatened violence directed at an employee. It would also preempt state and local laws that fail to provide employers with this important tool or fail to provide a litigation defense for the employer against state tort claims brought by victim employees, coworkers, or third parties.

Every state has a statute that authorizes a court to issue protection orders for the protection and safety of one or more parties.¹¹³ The statutes vary in detail about who may seek a protection order,¹¹⁴ how long an order may last, what activities may be proscribed in the protection order, and other relief that may be sought.¹¹⁵ Most statutes provide the flexibility to afford protection and instruct another not to abuse, harass, or contact the petitioner (and sometimes other people) at work, home, or other frequently visited locations.¹¹⁶ Almost every state grants courts the authority to award temporary custody and visitation if children are involved¹¹⁷ and to require perpetrators to relinquish all firearms.¹¹⁸

¹¹³ The majority of these statutes were enacted between 1976 and 1994. Carolyn N. Ko, Note, *Civil Restraining Orders for Domestic Violence: The Unresolved Question of "Efficacy,"* 11 S. CAL. INTERDISC. L.J. 361, 362 (2002).

¹¹⁴ A protection order (sometimes known as a restraining order, a no contact order, a civil protection order, or a civil restraining order) is a court order requiring someone to do or not to do specified acts for the protection of the petitioner, who is typically a victim of domestic violence.

¹¹⁵ See Ko, *supra* note 113, at 364-67 (analyzing the legal framework and procedures related to obtaining protection orders in the various states); *id.* at 363 & n.22 (Protection orders may offer a Petitioner a broad range of relief, including "eviction [of the perpetrator] from the shared residence, child support payments, limitations on child visitation rights, and mandatory counseling attendance.").

¹¹⁶ Brief for the Family Violence Prevention Fund et al. as Amici Curiae Supporting Respondent, *Castle-Rock v. Gonzales*, 545 U.S. 748 (2005) (No. 04-278), at 8-9 [hereinafter *Gonzales Amicus Brief*] ("The relief available through state protection order statutes is as varied as are the safety needs of abused women and their children.").

¹¹⁷ *Id.* at 16.

¹¹⁸ See, e.g., CAL. CIV. PROC. CODE § 527.8(j)(1) (West Supp. 2008).

States issue two kinds of protection orders: (1) a temporary order, which usually can be issued without a hearing and lasts for no more than a few weeks; and (2) a permanent protection order that usually lasts for up to a year (or longer).¹¹⁹ A protection order is enforceable everywhere in the United States pursuant to the Full Faith and Credit provisions of VAWA.¹²⁰

1. State Employer Protection Order Laws

In theory, employers may seek a temporary restraining order through a tort action in almost every state. However, these actions are burdensome, expensive, last for a relatively short period of time, and are difficult to obtain.¹²¹ Consequently, employers have sought a quicker, less-expensive way to obtain a protection order from a court. Although it has yet to be proposed on the federal level, the business lobby has sought such laws on a state-by-state basis.¹²²

In 1994, California became the first state to allow employers to obtain a protection order.¹²³ The California Workplace Violence Safety Act allows an employer to petition for two types of protection orders on behalf of an employee: (1) a temporary protection order that is good for up to fifteen days upon the filing of an affidavit¹²⁴ that demonstrates reasonable proof that an “employee has suffered unlawful violence or a

¹¹⁹ An emergency protection order is also available in some jurisdictions.

¹²⁰ 18 U.S.C. § 2266(5) (2000). This means that a protection order issued in one state must be enforced by any other state, so long as the protection order was “issued for the purpose of preventing violent or threatening acts or harassment against, or contact or communication with or physical proximity to, another person.” *Id.*

¹²¹ Riley, *supra* note 31, at 15, 26 (describing how an employer may obtain a temporary restraining order (TRO) against offenders under a trespass theory). Riley concludes that “[w]ith such limited protection at a great cost, the employer must preserve the existing TRO for the most critical of workplace emergencies.” *Id.* at 15.

¹²² SHRM has proposed a Model Workplace Violence Act toolkit to “promote” and otherwise support state efforts to pass legislation that offers employers this tool. Press Release, Soc’y for Human Res. Mgmt., SHRM Releases New Legislative Proposal, *available at* <http://www.braunconsulting.com/bcg/workplace2.html> (last visited Jan. 14, 2008); Diane Cadrain, . . . *And Stay Out!*, SHRM HR MAGAZINE, Aug. 2002, *available at* <http://www.shrm.org/hrmagazine/articles/0802/0802agn-security.asp>; News Brief, *Model Workplace Violence Safety Act Established*, 10 WORKPLACE VIOLENCE PREVENTION REP. 3 (2004) (summarizing SHRM’s model act). The toolkit includes materials on how to have such a bill introduced in a state and tips for supporting the bill through its legislative process to enactment. It also includes a draft bill, supporting testimony, questions and answers, and a list of potential coalition supporters. Press Release, Soc’y for Human Res. Mgmt., *supra*; SOC’Y FOR HUMAN RES. MGMT., SUCCESS OF HR VOICE, *available at* <http://www.shrm.org/government/hrvoice/HRVoice.pdf> [hereinafter SHRM, SUCCESS OF HR VOICE] (last visited Dec. 29, 2007) (using the SHRM State Affairs tool kit has led to new state violence prevention legislation).

¹²³ Workplace Violence Safety Act, CAL. CIV. PROC. CODE § 527.8 (2007).

¹²⁴ JUDICIAL COUNCIL OF CALIFORNIA, INSTRUCTIONS FOR PETITIONS TO PROHIBIT WORKPLACE VIOLENCE (Jan. 1, 2007), at 1, 3, *available at* <http://www.courtinfo.ca.gov/forms/documents/wv150info.pdf>. The employer files a “Petition of Employer for Injunction Prohibiting Violence or Threats of Violence against Employee.” JUDICIAL COUNCIL OF CALIFORNIA, FORM WV-100: WORKPLACE VIOLENCE AND APPLICATION FOR TEMPORARY RESTRAINING ORDER (Jan. 1, 2007), *available at* <http://www.courtinfo.ca.gov/forms/fillable/wv100.pdf>.

credible threat of violence”¹²⁵ “that can reasonably be construed to be . . . or to have been carried out at the workplace”¹²⁶ and that “irreparable harm would result to an employee[;]”¹²⁷ and (2) a permanent protection order good for up to three years if a hearing is held at which a judge determines by clear and convincing evidence that the targeted employee would be subjected to further unlawful violence or credible threat of violence.¹²⁸

Since California’s law passed, nine additional states have granted employers the right to seek a protection order from a court, and nine other states have considered bills that would allow employers to do so.¹²⁹

As a fundamental matter, protection orders are designed to prevent *future* violence.¹³⁰ They are not meant to address past wrongs but

¹²⁵ CAL. CIV. PROC. CODE § 527.8(e).

¹²⁶ *See id.* § 527.8(a). “Unlawful violence’ . . . shall not include lawful acts of self-defense or defense of others.” *Id.* § 527.8(b)(1). A “[c]redible threat of violence” is defined to include any “knowing and willful statement or course of conduct that would place a reasonable person in fear for his or her safety, or the safety of his or her immediate family, and that serves no legitimate purpose.” *Id.* § 527.8(b)(2). “Course of conduct” is defined as:

[A] pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose, including following or stalking an employee to or from the place of work; entering the workplace; following an employee during hours of employment; making telephone calls to an employee; or sending correspondence to an employee

Id. § 527.8(b)(3).

¹²⁷ *Id.* § 527.8(e).

¹²⁸ *Id.* § 527.8(f). The California statute does not require a filing fee to petition or respond to an employer protection order. *Id.* § 527.8(p).

¹²⁹ The following state statutes also provide some form of employer protection order: ARIZ. REV. STAT. ANN. § 12-1810 (2003); ARK. CODE ANN. § 11-5-115 (LexisNexis 2002); COLO. REV. STAT. § 13-14-102(4)(b) (2007); GA. CODE ANN. § 34-1-7 (LexisNexis 2004); IND. CODE ANN. § 34-26-6 (LexisNexis Supp. 2008); NEV. REV. STAT. ANN. §§ 33.200-33.360 (LexisNexis 2006); N.C. GEN. STAT. §§ 95-260-271 (2007); R.I. GEN. LAWS § 28-52-2 (2003); TENN. CODE ANN. §§ 20-14-101 to -109 (LexisNexis 2007). Most of these state laws use California’s law as a model. *See, e.g.,* RUTH D. REICHARD, SECTION BY SECTION SUMMARY OF HOUSE ENROLLED ACT 1232, at 6 (Mar. 21, 2002), <http://www.in.gov/judiciary/forms/po/docs/summary.pdf> (“[Indiana’s] statute is based upon California’s statute, which is generally considered to be a model in this area of the law.”).

Most of these bills faced little opposition and were supported by a range of groups on all sides of the issue. *See, e.g., Workplace Violence Protective Orders: Hearing on A.B. 429 Before the Cal. S. Comm. on the Judiciary*, 2005-2006 Reg. Sess. 4, 7-8 (2005) (listing support from the California Alliance Against Domestic Violence, Lambda Letters Project, and Family Law Section of the State Bar for a bill to expand employer protection orders); Nevada Senate Hearing, *supra* note 4 (Nevada’s bill was supported by groups ranging from the State Attorney General’s office to the Nevada Domestic Violence Prevention Council).

A list of states that recently considered bills that would provide employers with this tool can be found at LEGAL MOMENTUM, STATE LAW GUIDE: WORKPLACE RESTRAINING ORDERS 3-4 (2008), available at http://www.legalmomentum.org/site/DocServer/Workplace_RO_6.08.08.pdf?docID=3301.

¹³⁰ *See, e.g., Scripps Health v. Marin*, 85 Cal. Rptr. 2d 86, 89, 94 (Ct. App. 1999). Marin successfully appealed an employer order that prevented him from contacting any Scripps employees or coming within 500 yards of their facilities because it was “imposed under factual circumstances which did not establish a threat of future harm.” *Id.* at 88-89, 94 (“[A] plaintiff must establish by clear and convincing evidence . . . that great or irreparable harm would result to an employee if a

rather are used as a preventative tool. While the exact provisions of the state laws and proposed bills differ, the underlying assumption is the same—employers need this preventative tool to proactively seek protection from a court when people are endangered at work or on the worksite.

The state laws on which this proposal is based vary as to whom an employer may seek a protection order on behalf of. In California, employers are only able to seek an order on behalf of a targeted employee.¹³¹ “Employee” is defined broadly to include “volunteer[s and] independent contractor[s] who perform[] services . . . at the employer’s worksite.”¹³² According to a state court, the employee need not be “specifically identified by the harasser.”¹³³ In addition, temporary protection orders may also be sought on behalf of certain household members of the employee.¹³⁴

By contrast, Nevada and Arizona allow employers to seek an order on behalf of anyone in the workplace.¹³⁵ They do not limit their protection to employees. An order may be sought in Arkansas if an employer, employee, or someone invited onto the employer’s property has suffered or “[r]eceived a threat of violence . . . [that] can reasonably be construed as a threat which may be carried out at the work site.”¹³⁶ In Colorado, a protection order may be issued “in the name of the business for the protection of the employees” if “imminent danger exists to the employees.”¹³⁷

Thus, even though the state laws use different language, they almost universally cover a broad range of people present in the workplace—from known, targeted employees to invitees. Accordingly, my proposal would follow the majority state trend and create a basic

prohibitory injunction were not issued due to the reasonable probability unlawful violence will occur in the future.”).

¹³¹ See CAL. CIV. PROC. CODE § 527.8(a).

¹³² *Id.* § 527.8(d).

¹³³ *USS-POSCO Indus. v. Edwards*, 4 Cal. Rptr. 3d 54, 56 (Ct. App. 2003). Even though the statute only permits an employer to seek an order on behalf of an employee, the courts have interpreted this provision to allow an employer to get an injunction if there have been “generalized threats of workplace violence . . . on behalf of an employee who is a logical target of the threats.” *Id.*

¹³⁴ See CAL. CIV. PROC. CODE § 527.8(e) (stating that an employer who obtains a temporary protection order “may include other named family or household members who reside with the employee, or other persons employed at his or her workplace or workplaces” if good cause is shown).

¹³⁵ See ARIZ. REV. STAT. ANN. § 12-1810E, F.2 (2003) (stating that courts may grant “other relief necessary for the protection of the employer, the workplace, the employer’s employees or any other person who is on or at the employer’s property or place of business or who is performing official work duties”); NEV. REV. STAT. ANN. § 33.240(2) (LexisNexis 2006). Nevada’s legislators also noted that employers must “show concern about all employees in the workplace, not just the employee who is the subject of harassment.” Nevada Senate Hearing, *supra* note 4 (statement of Senator Terry Care).

¹³⁶ ARK. CODE ANN. § 11-5-115(a)(2) (LexisNexis 2002).

¹³⁷ COLO. REV. STAT. ANN. § 13-14-102(4)(b) (2007).

federal provision to encourage states to allow employers to utilize this process on behalf of themselves, their employees, or their customers.

The state laws also vary on another key issue: what constitutes an employer's worksite. This is important for two reasons: (1) an order only may be obtained if violence or threat of violence exists at work; and (2) the scope of some available relief may be limited to the worksite.

California, Rhode Island, and Arkansas define workplace to include any location at which the employer's work is performed.¹³⁸ To obtain an order, most of the states require one or more of the threatened or prior acts of violence to "reasonably be construed to be carried out [or to have been carried out] at the employee's place of work."¹³⁹ If there is a threat of violence at work an order may be issued, but the protections granted under the order are not limited to the workplace.¹⁴⁰

All of the state laws allow judges to require perpetrators to stay away from an employer's work or property.¹⁴¹ However, work may include more than the four walls of an employer's main office. For example, in *County of Marin v. Neufeld*,¹⁴² the County obtained an employer protection order to prohibit Neufeld from harassing a County Commissioner, her husband, and her two stepchildren by following them to or from work "and from communicating with the protected persons by any means."¹⁴³ Neufeld claimed that the protection order was invalid because there was no evidence that unlawful acts occurred at the workplace.¹⁴⁴ The California Appellate Court disagreed, holding that "[b]y its plain language, this statute also extends to cases in which a prior threat of violence, wherever that threat was made, can reasonably be construed 'to be carried out . . . at the work place.'"¹⁴⁵ Since the evidence of a threat of violence could reasonably be construed as a threat that would be carried out at the workplace, the order was valid—even though

¹³⁸ ARK. CODE ANN. § 11-5-115(a)(3); R.I. GEN. LAWS § 28-52-2(a) (2007) (orders available to prevent "further unlawful acts" from happening at work, "which shall include any place at which work is being performed on behalf of the employer"); S.F. AIDS Found. v. Best, No. A095039, 2002 WL 31677132, at *6 (Cal. Ct. App. Nov. 27, 2002) (citing Pulaski v. Occupational Safety & Health Stud. Bd., 90 Cal. Rptr. 2d 54 (Ct. App. 1999)).

¹³⁹ See, e.g., IND. CODE ANN. § 34-26-6-6(2) (LexisNexis 2008). But see Eskanos & Adler v. Lutge, No. A116279, 2007 WL 4139186, at *3 (Cal. Ct. App. Nov. 21, 2007) (upholding a permanent employer protection order on appeal even though the targeted employee was no longer an employee of the employer at the time of the hearing).

¹⁴⁰ See, e.g., ARK. CODE ANN. § 11-5-115(b)(2)(F); N.C. GEN. STAT. § 95-264(b)(6).

¹⁴¹ See, e.g., ARK. CODE ANN. § 11-5-115(b)(2)(A)-(E); N.C. GEN. STAT. § 95-264(b)(1)-(5).

¹⁴² No. A095538, 2002 WL 1375999 (Cal. Ct. App. June 25, 2002).

¹⁴³ *Id.* at *1. The County also petitioned to keep Neufeld at least 100 yards from the employee's residence and stepchildren's school. *Id.* The decision does not note whether this request was granted.

¹⁴⁴ *Id.* at *5. He argued that the statute "only protects employees who have either suffered unlawful violence at the workplace or have been threatened with violence while at their workplace." *Id.*

¹⁴⁵ *Id.* at *6-7 (quoting CAL. CIV. PROC. CODE § 527.8(a) (West 2007)).

it extended protection to the Commissioner and her family outside of the office.¹⁴⁶

Although the relief granted in an employer protection order focuses on the worksite, judges are able to offer a wide range of relief under the “other appropriate relief as necessary” clause.¹⁴⁷ This clause has been used to justify including protections that are typically granted under other civil protection order statutes. For example, the *Neufeld* court noted its authority “to preclude the defendant from coming within a specified number of yards of the employee, her residence and her family members.”¹⁴⁸ Thus, a protection order may prevent access to an employee’s home, or access to children, or provide access to any other relief typically granted in a protection order.¹⁴⁹

2. Situations for Which an Employer Might Seek an Order

There are almost always warning signs present before violence occurs at work or when violent acts occur outside of the workplace but have an impact on an employee’s work.¹⁵⁰ For any number of reasons,

¹⁴⁶ *Id.* at *6 (reasoning that § 527.8 protects the employee at work, even outside his or her office, when the employee leaves the workplace, and also protects the employee’s family).

¹⁴⁷ *See, e.g.*, ARK. STAT. ANN. § 11-5-115(b)(2)(F) (LexisNexis 2002). Employers who respond to violence that stems from a labor dispute are not usually able to use the employer protection order statute to seek an injunction. *See, e.g., id.* § 11-5-115(h)(1); *Nordman v. N. Manchester Foundry, Inc.*, 810 N.E.2d 1071, 1073 (Ind. App. 2004) (reversing trial court’s injunction under the employer protection order statute because the underlying threats related to a labor dispute and were therefore governed by the Anti-Injunction Act).

¹⁴⁸ County of Marin, 2002 WL 1375999, at *7. This would not be the first time the federal government has regulated workplace safety issues in someone’s home. For example, OSHA previously declared that employers were responsible for the safety of employees who telecommute or work from home. Letter from Richard E. Fairfax, Directorate of Compliance Programs, OSHA, to T. Trahan, CSC Credit Servs. (Nov. 15, 1999), available at http://www.osha.gov/as/opa/foia/hot_4.html. On January 6, 2000, the letter was rescinded after it was the subject of an attack from the business community. *See* Letter from Richard E. Fairfax, Directorate of Compliance Programs, OSHA, to T. Trahan, CSC Credit Servs. (Jan. 6, 2000), available at http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONp_id=22933 (withdrawing the earlier letter, which “caused widespread confusion and unintended consequences”); *Prepared for a Hearing Before the Subcomm. on Emp., Safety, and Training of the S. Comm. on Health, Education, Labor and Pensions*, 106th Cong. (2000) (statement of Charles N. Jeffress, Assistant Secretary For Occupational Safety and Health, U.S. Department of Labor); Kelly Dunn, *Is OSHA Leaving Home?*, 79 PERSONNEL J. 26 (Feb. 1, 2000) (“Public outcry immediately followed.”); Kelli L. Dutrow, *Working at Home at Your Own Risk: Employer Liability for the Teleworkers Under the Occupational Safety and Health Act of 1970*, 18 GA. ST. U. L. REV. 955, 962 (2001) (observing that the “business community responded with an overwhelming attack on the” original letter); J.C. Howard, *At-Home Work Spurs Risk Mgt. Concerns*, 104 NAT’L UNDERWRITER PROP. & CASUALTY RISK & BENEFITS MGMT. 6 (May 1, 2000) (OSHA’s initial letter “sparked a thunderclap of media coverage and a barrage of criticism from business groups. It also ignited a fierce debate.”). Like the OSH Act, the proposed changes to the SEES and SAFE Act are designed to prevent injury and not to compensate someone for an injury that has already occurred. *See* Dutrow, *supra* at 987 (explaining that the OSH Act is meant to prevent injury; workers compensation and tort cases are designed to compensate an injured victim).

¹⁴⁹ *See supra* notes 114-118 and accompanying text (describing other relief granted in protection orders).

¹⁵⁰ *See Workplace Violence, supra* note 57; Riley, *supra* note 31, at 27 (citing Amy D. Whitten & Deanne M. Mosley, *Caught in the Crossfire: Employers’ Liability for Workplace*

however, a victimized employee may be unwilling to seek a protection order for herself. My proposal would allow an employer to seek an order when a threatened employee does not seek one on her own behalf or to supplement an employee's individual protection order.

The legislative history of some of the state laws is instructive. Situations were described where employees asked employers to seek a protection order out of fear that the perpetrator would take retribution against the employees if they sought an order themselves.¹⁵¹ When an employer seeks an order, some of the pressure is removed from the victim's shoulders. According to the Arizona Coalition Against Domestic Violence, the perpetrator's retribution against the victim may decrease in this situation because the victim did not seek the order herself.¹⁵² Having an employer seek an order may also increase the chance of keeping a victim's current (temporary or permanent) address away from the perpetrator.¹⁵³ Other advocates of employer protection orders have argued that a victim may be encouraged to seek additional help when an employer seeks a protection order.¹⁵⁴ Additionally, a state Senator in Nevada described a different, and presumably rare, situation: an employee elected not to seek a protection order on her own behalf, even after the employer's counsel explained how to get one and despite being asked by her employer to do so. The employee was being harassed by someone who was "incessantly calling the workplace" and parking in the employer's parking lot, but she did not seek a protection order because she did not want her husband to find out she was having an affair.¹⁵⁵ Further, an employer's claim that an employee has been subjected to domestic violence or that a protection order is being violated may be treated more seriously by the police or the courts.¹⁵⁶

Alternatively, an employer might seek an order to supplement a protection order obtained by a victim employee. This situation could exist when other employees or customers do not have jurisdiction to seek an order on their own behalf.¹⁵⁷ For example, the primary target may

Violence, 70 MISS. L.J. 505, 506 (2000)) ("In 99.9% of violent workplace incidents, warning signs are present.").

¹⁵¹ See, e.g., Nevada Senate Hearing, *supra* note 4 (statement of Debra S. Jacobson, Lobbyist, Southwest Gas Corp.).

¹⁵² ARIZONA COALITION AGAINST DOMESTIC VIOLENCE, MANUAL FOR LAY LEGAL ADVOCATES ASSISTING IN CASES OF VIOLENCE AGAINST WOMEN IN ARIZONA 87 (2003), available at http://www.delapointe.net/diannepost/docs/lay_advocate.pdf.

¹⁵³ State laws attempt to block access to this information in other ways to maintain a victim's privacy. See, e.g., ARIZ. REV. STAT. § 13-4434 (West 2008) (absent court order, a victim may not be forced to testify about any new addresses or other information that would make her location known to the perpetrator).

¹⁵⁴ See, e.g., Press Release, Soc'y for Human Res. Mgmt., *supra* note 122.

¹⁵⁵ Nevada Senate Hearing, *supra* note 4 (statement of Senator Care, noting that "the easy way out for the employer is to say, 'I do not need this, you are fired'").

¹⁵⁶ Riley, *supra* note 31, at 27.

¹⁵⁷ *Workplace Violence Protective Orders: Hearing on A.B. 429 Before the Cal. S. Comm. on the Judiciary*, 2005-2006 Reg. Sess. 3-4 (2005) (explaining similar circumstances under

obtain a protection order on her own behalf, but the employer may wish to seek an order on behalf of other employees.¹⁵⁸ In another situation, a perpetrator called a victim employee at work so frequently that the employer's telephone system shut down.¹⁵⁹ As the Society for Human Resource Management ("SHRM") witness correctly noted at the Senate Hearing, "the [current SEES and SAFE Act] legislation . . . ignores the inevitable workplace safety issues that will . . . affect other employees."¹⁶⁰ This proposal complements other existing and proposed approaches by filling in this safety of others gap.¹⁶¹

3. Consultation with the Targeted Employee Required

In an attempt to both recognize the importance of protecting other parties in the workplace and maintain the safety of a targeted employee, the proposal would require an employer to consult with an employee before an employer protection order may be issued.

There is evidence that demonstrates that violence increases immediately after a perpetrator is served with a protection order.¹⁶² As a result, employers could potentially find themselves in another "catch-22" situation: an employer needs a protection order because it is concerned about safety and exposure to civil liability, but the service of an employer's protection order on a perpetrator may escalate a violent situation.¹⁶³ It would not be good public policy to give employers a tool that would protect them but also increase the chance that one or more employees could be hurt.

which an employer may seek an order). An order may also be sought to protect employees from former disgruntled clients or employees. *Id.* at 4.

¹⁵⁸ See, e.g., *Puthukkeril v. Allen*, No. A114069, 2007 WL 3112412, at *3 (Cal. Ct. App. Oct. 25, 2007) (one employee sought and received a protection order on her own behalf; employer sought order on behalf of three other employees who had been threatened).

¹⁵⁹ Nevada Senate Hearing, *supra* note 4 (statement of Nancy E. Hart, Deputy Attorney General, Civil Division).

¹⁶⁰ Senate Hearing, *supra* note 29, at 9 (statement of Sue K. Willman).

¹⁶¹ This Article analyzes only one category of workplace violence—domestic violence. The other major categories of workplace violence are stranger violence, client/customer violence, and coworker violence. This amendment would also allow employers to seek protection orders for other types of violence at work, such as when one employee attacks or harasses another. For example, an employer could seek a protection order when violence has been threatened but no employee has been identified as a target. See *USS-POSCO Indus. v. Edwards*, 4 Cal. Rptr. 3d 436, 443 (Ct. App. 2003) (finding that there is no need for the employer to demonstrate that the threat of violence was specific to a certain employee or employees because "[g]iven the legislative intent to prevent workplace violence, it would indeed be absurd to read the statute [that way]"). Interestingly, a majority of the state laws were enacted after 9/11.

¹⁶² See, e.g., David M. Zlotnick, *Empowering the Battered Woman: The Use of Criminal Contempt Sanctions to Enforce Civil Protection Orders*, 56 OHIO ST. L.J. 1153, 1186 n.155, 1193 n.182 (1995) (citations omitted) (citing a study that suggests the risk of violence increases and newspaper articles that describe examples of violence that occurred "because the victim was attempting to leave the relationship or avail herself of a legal remedy such as a protection order").

¹⁶³ Kari Ricci, *Chapter 476: A Three-Pronged Approach to Addressing Issues of Domestic and Workplace Violence*, 38 MCGEORGE L. REV. 61, 71 (2007).

In an effort to combat this “catch-22” and protect the victim employees, employers should be required to notify or otherwise engage in an interactive process with the targeted employees to ensure they have knowledge of the employer’s efforts to seek a protection order. This interactive process would require employers to engage in a dialogue with the victim about safety planning and other available resources. Ultimately, however, an employer would be able to obtain a protection order with *or without* the support of the victim employee.

This proposal follows the requirements of some of the state laws. Nevada and Arizona require employers to “make a good faith effort” to notify the targeted employee of the employer’s intent to seek an order.¹⁶⁴ North Carolina goes one step further by requiring employers to confer with the targeted employee before seeking an order “to determine whether any safety concerns exist *in relation to the employee’s participation in the process.*”¹⁶⁵ North Carolina does not, however, require employers to engage with the targeted employee about the employer’s decision to seek an order or have it served on the perpetrator.¹⁶⁶ Other state statutes are silent on the issue.¹⁶⁷

One of the other titles of the proposed SEES and SAFE Act would play an important role here. Title III would preclude adverse employment actions from being taken on the basis of someone’s actual or perceived status as a victim of domestic violence.¹⁶⁸ This protection would guarantee that employees would not be disciplined or fired for discussing events related to domestic violence with their employers or taking time off to testify in a court proceeding related to the employer’s petition for a protection order.¹⁶⁹

This anti-discrimination protection means that employees would not be economically disadvantaged at work if they elect not to participate in an employer’s petition. Nonetheless, these orders would be controversial. They remove the choice of whether and/or when to obtain protection from the hands of the victim. To be clear, the proposed amendment would not require an employer to obtain the victim

¹⁶⁴ ARIZ. REV. STAT. ANN. § 12-1810.L (2003); NEV. REV. STAT. ANN. § 33.260 (LexisNexis 2006).

¹⁶⁵ N.C. GEN. STAT. § 95-261 (2007) (emphasis added).

¹⁶⁶ *Id.* The state is concerned with ensuring that the act of testifying or providing information to the employer does not place the employee in danger; it is not meant to combat the potential harm that may result if an order is obtained and served.

¹⁶⁷ *See generally* CAL. CIV. PROC. CODE § 527.8 (West Supp. 2008) (no provision indicating a requirement on employers to notify targeted employee(s) of an intent to seek an order); COLO. REV. STAT. ANN. § 13-14-102 (2007) (same).

¹⁶⁸ SAFE Act, H.R. 2395, 110th Cong. § 303(a)(1)(A) (2007).

¹⁶⁹ *Id.* § 303(a)(1). North Carolina combats this problem in a different way: the state law contains an anti-retaliation provision preventing employers from disciplining targeted employees that “are unwilling to participate in the process.” N.C. GEN. STAT. § 95-261. Deborah Widiss notes that victims may be voluntarily more helpful in employer’s efforts to obtain injunctive relief if they do not fear that they will be fired for discussing actual or threatened violence with their employers. Widiss, *supra* note 25, manuscript at 4.

employee's consent as a prerequisite to seeking an order. But it would require an employer to consult with the employee. Consultation is necessary to ensure the employee understands what actions are being taken and has the opportunity to take appropriate safety precautions,¹⁷⁰ but consent (although preferable) cannot be required because it does not take into account the potential these orders have to protect other members of the workplace community.

Historically, protection order statutes were created to allow the victim to have a self-initiated process by which she could seek safety and be given a voice in her situation.¹⁷¹ This proposal does not eliminate an employee's ability to seek her own protection order. Moreover, although the ultimate decision to seek an employer protection order remains with the employer, the proposal attempts to ensure that the victim is given a role in the employer protection order process if she wants it.

In some respects, this provision is similar to mandatory arrest and no-drop prosecution policies.¹⁷² In mandatory arrest jurisdictions,¹⁷³ police officers must arrest a suspect if probable cause exists that an act of domestic violence has been committed, regardless of whether the victim desires an arrest to occur or the police officer has obtained a warrant.¹⁷⁴ A primary purpose of mandatory arrest statutes is to remove police discretion and victim and witness hindsight from the arrest process.¹⁷⁵ Before mandatory arrest policies became popular, and in jurisdictions without them, police officers had *discretion* over this decision and had the ability to take the victim's preference into account.¹⁷⁶

No-drop prosecution eliminates a prosecutor's discretion to bring a criminal charge against an alleged perpetrator and removes the prosecutor's ability to consider the victim's wishes in deciding whether

¹⁷⁰ See, e.g., Nevada Senate Hearing, *supra* note 4 (statement of Mark S. Sertic, counsel for the Nevada Human Resources Association) (one purpose of this notification provision is to allow an employee to make safety arrangements that do not involve the workplace).

¹⁷¹ See Jane Aiken & Kathy Goldwasser, *The Perils of Empowerment*, manuscript at 11-12 (on file with author).

¹⁷² Mandatory arrest and no-drop prosecution laws are not universally approved of and have a significant number of detractors. See, e.g., ELIZABETH M. SCHNEIDER, *BATTERED WOMEN & FEMINIST LAWMAKING* 186 (2000) (describing mandatory arrest provisions as "paternalistic" and noting that they re-victimize victims as a result of "coercion at the hands of the state" and by removing a woman's autonomy); Erin L. Han, *Mandatory Arrest And No-Drop Policies: Victim Empowerment In Domestic Violence Cases*, 23 B.C. THIRD WORLD L.J. 159, 162 (2003) ("call[ing] the appropriateness of these policies into question" because they "intrude upon the autonomy of victims").

¹⁷³ Twenty-one states and the District of Columbia have mandatory arrest provisions. Vi T. Vu, *Town of Castle Rock v. Gonzales: A Hindrance in Domestic Violence Policy Reform and Victory for the Institution of Male Dominance*, 9 SCHOLAR 87, 97 (2006).

¹⁷⁴ See, e.g., COLO. REV. STAT. §§ 18-6-803.5(3)(b) to 803.6 (2008); see also Han, *supra* note 172, at 174-81 (summarizing mandatory arrest policies).

¹⁷⁵ See Gonzales Amicus Brief, *supra* note 116, at 6 (Mandatory arrest provisions "promote the safety of women and children, especially in light of the considerable research and data that demonstrate the dangers to women and children of attempting to separate from their abuser.").

¹⁷⁶ See Han, *supra* note 172, at 161, 174 (discussing mandatory arrest laws which remove police discretion).

to proceed.¹⁷⁷ Under no-drop prosecution policies, the victim is often required to participate in the prosecution, even if she affirmatively does not want to participate or does not want the prosecution to occur.¹⁷⁸ In essence, the victim becomes a witness like any other witness in the criminal case.

As noted above, the proposed employer protection order provision would take the ultimate choice of whether to seek a protection order out of the hands of the targeted employee. But that is where the comparison to mandatory arrest and/or no-drop prosecution provisions must end. Unlike these policies, the proposal to amend the SEES and SAFE Act would essentially place employers in a position similar to the one police officers were in before mandatory arrest provisions existed in that employers are not required to seek a protection order. Instead, after consulting with the targeted employee, they may elect not to seek an order.¹⁷⁹ However, just like police officers were required to consider the safety of others in determining whether or not to arrest someone for a crime involving domestic violence, so too are employers required to consider their duty to maintain a safe workplace for others. Moreover, if after consultation with the employee, an employer elects to seek an order, they may be in a similar situation as a prosecutor in a no-drop prosecution jurisdiction. In seeking an order, employers do not need to use testimony from the victims or force a victim to participate. Employers can use evidence gathered from other employees, third parties, or their own business records (such as computer, phone, and visitor logs). In sum, an employer may obtain a protection order without testimony from the targeted employee.¹⁸⁰

4. Employers Still Have a Duty to Provide a Safe Workplace, Even with Immunity Against Negligence Claims

Allowing an employer to seek a protection order does not have to eliminate or expand an employer's duty to maintain a safe workplace. States could be required to include a provision that explicitly states that

¹⁷⁷ See *id.* at 181 (summarizing no-drop prosecution policies).

¹⁷⁸ *Id.* at 161-62 (“No-drop policies require prosecution of a domestic violence perpetrator, regardless of the victim’s wishes, and often force the victim to participate in the prosecutorial process.”).

¹⁷⁹ For example, CAL CIV. PROC. CODE § 527.8 (West Supp. 2008) was “intended to provide *optional* remedies which supplement rather than replace existing remedies against workplace violence, and does not obligate an employer to seek those optional remedies.” *Franklin v. Monadnock Co.*, 59 Cal. Rptr. 3d 696-97 (Ct. App. 2007) (internal quotation marks and citation omitted) (emphasis added).

¹⁸⁰ For example, an employer sought a protection order on behalf of twenty-two employees, but submitted affidavits from only six in *San Francisco Aids Foundation v. Best*, No. A095039, 2002 WL 31677132 (Cal. Ct. App. Nov. 27, 2002). The lack of testimony from every employee was immaterial. *Id.* at *4. The court noted “the obvious fact that testimony from each employee is not required if there is other substantial evidence to support the finding that they suffered an act of violence or credible threat of violence.” *Id.*

the employer protection order statute does not “[e]xpand, diminish, alter or modify the duty of an employer to provide a safe workplace for its employees and other persons.”¹⁸¹ The purpose of this proposal is to provide a tool for employers to address violence at work, not to change their duty to provide a safe workplace.

Employers need to be able to seek a protection order without expanding their liability under other laws. Assuming actions are taken in good faith, employers should be granted civil immunity for any action taken to seek a protection order. This immunity would serve as an affirmative defense against tort claims brought by victim employees, coworkers, or third parties for acting or failing to act pursuant to this law.

Some state laws already do this.¹⁸² For example, Arizona, Arkansas, Rhode Island, and Nevada provide immunity to employers for actions taken in good faith under the employer protection order law. These states create a rebuttable presumption that employers act in good faith unless a “lack of good faith” is demonstrated.¹⁸³ Colorado provides a more limited immunity that applies only to an employer’s decision not to seek a protection order.¹⁸⁴ Unlike the other states, Nevada also specifically grants immunity to employers who fail to seek an order regardless of whether the decision not to seek an order was made in good faith.¹⁸⁵ In addition, Arkansas’s immunity provision also protects employees and invitees from negligence claims arising out of a decision not to use the protections granted in the act.¹⁸⁶

¹⁸¹ ARIZ. REV. STAT. ANN. § 12-1810(K)(1) (2003); *see also* GA. CODE ANN. § 34-1-7(h) (2004) (“[This law shall not be] construed as expanding, diminishing, altering, or modifying the duty, if any, of an employer to provide a safe workplace for employees and other persons.”); IND. CODE ANN. § 34-26-6-15 (LexisNexis 2008) (“[The law] may not be construed to . . . expand, diminish, alter, or modify the duty, if any, of an employer to provide a safe workplace for an employee or another person.”); NEV. REV. STAT. ANN. § 33.360(1) (LexisNexis 2006) (stating that the law does not change an employer’s duty to provide a safe workplace); N.C. GEN. STAT. § 95-271 (2007) (same); TENN. CODE ANN. § 20-14-108 (LexisNexis 2007) (same). Some of these states clarify that the employer protection order laws do not prevent employers or employees from “pursu[ing] any other civil or criminal remedy provided by law.” *See, e.g.*, N.C. GEN. STAT. § 95-271; TENN. CODE ANN. § 20-14-108. This is just another way of saying that utilizing the provisions of the law are optional and do not alter one’s duties under current law.

¹⁸² Some states have also granted civil liability to employers in a related area—reference checks. These laws immunize employers who are asked about a current or former employee by a prospective employer. For example, Florida grants immunity for any information provided in a reference unless clear and convincing evidence exists that false information was knowingly given. FLA. STAT. ANN. § 768.095 (2005). SHRM has also taken a position and created a legislative toolkit for reference-check legislation. *See* SHRM, SUCCESS OF HR VOICE, *supra* note 122, at 3.

¹⁸³ ARIZ. REV. STAT. ANN. § 12-1810(P); ARK. CODE ANN. § 11-5-115(f) (2002); NEV. REV. STAT. ANN. § 33.340(1) (LexisNexis 2006); R.I. GEN. LAWS § 28-52-2(e) (2003). Except in Nevada, the “lack of good faith” must be “shown by clear and convincing evidence.” ARIZ. REV. STAT. ANN. § 12-1810(P); ARK. CODE ANN. § 11-5-115(f); R.I. GEN. LAWS § 28-52-2(e).

¹⁸⁴ COLO. REV. STAT. § 13-14-102(4)(b) (2007) (“An employer shall not be liable for failing to obtain a civil protection order in the name of the business for the protection of the employees and patrons.”).

¹⁸⁵ *See* NEV. REV. STAT. ANN. § 33.340(1).

¹⁸⁶ ARK. CODE ANN. § 11-5-115(g).

Even in states that do not explicitly provide employers with immunity, few cases have challenged an employer for “using, misusing, or failing to use” the employer protection order statute.¹⁸⁷ Moreover, a limited provision for employers has been created by case law in some of the states without specific statutory immunity. For example, a California state appellate court held that a malicious prosecution action could not be brought against an employer who filed for an employer protection order in *Robinzine v. Vicory*.¹⁸⁸ The employer had obtained a temporary protection order against an employee’s spouse.¹⁸⁹ During the hearing for a permanent protection order, however, the employer was not able to prove unlawful violence against any employee and the court dissolved the temporary order and denied the petition for a permanent order.¹⁹⁰ The employee’s spouse brought a malicious prosecution action on the basis of “phony allegations of workplace violence” that were not enough to sustain a protection order and were “a pretext for further harassment and retaliation.”¹⁹¹ The state court of appeals held that employers are immune from any such claim.¹⁹²

In addition to immunizing actions taken while deciding to seek a protection order, the proposal would prevent evidence of this decision from being admitted as evidence in a negligence case. This provision—based on state laws—would prevent any act or statement made while seeking a protection order from being introduced as evidence.¹⁹³ For example, Nevada prevents any such statement from being “deemed an admission by the employer of any fact.”¹⁹⁴ Under the proposal, this evidence would still be admissible in intentional tort claims.

An alternative would be to allow this evidence to be introduced for impeachment purposes only. A number of states do this. For example, in Arizona and Nevada, any act or statement of an employer used to obtain an injunction may not be deemed an admission of any fact but may be used for the purposes of impeachment.¹⁹⁵ But the potential prejudicial nature of this evidence dictates that it not be introduced at all (as opposed to having it introduced for the limited purpose of impeaching a witness).

¹⁸⁷ Riley, *supra* note 31, at 20-21 (reporting that no cases were brought in California from 1994 to 2002).

¹⁸⁸ 50 Cal. Rptr. 3d 65, 66 (Ct. App. 2006).

¹⁸⁹ *Id.* at 67.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* (internal quotation marks omitted).

¹⁹² *Id.* at 66, 71.

¹⁹³ See, e.g., R.I. GEN. LAWS § 28-52-2(f) (2003).

¹⁹⁴ NEV. REV. STAT. ANN. § 33.340(2) (LexisNexis 2006).

¹⁹⁵ ARIZ. REV. STAT. ANN. § 12-1810(P) (2003); NEV. REV. STAT. ANN. § 33.340(2).

5. Properly Enforced Protection Orders Combat Future Violence

The liability provision discussed above demonstrates that this proposal would limit an employer's liability for utilizing this tool to address domestic violence at work. But the question remains whether a protection order actually deters violence and helps to create a safer workplace. Recently, protection orders have been called into question for two reasons: (1) there is notoriously bad enforcement of protection order violations; and (2) some people believe that there is little evidence that protection orders are effective in protecting the petitioner or preventing further violence.¹⁹⁶

With respect to the first concern about the effectiveness of protection orders, there is substantial evidence of poor efforts to enforce protection orders, even in states with "mandatory" arrest policies.¹⁹⁷ In some respects, "[p]rotection orders . . . are only as effective as their enforcement[, and a]n order without enforcement can create a false sense of security for victims of domestic violence."¹⁹⁸ This safety rationale is one of the driving forces behind calls for mandatory enforcement of protection orders.¹⁹⁹ But the Supreme Court has hampered these calls.

In 2005, *Castle Rock v. Gonzales* presented the Supreme Court with the issue of whether an abused wife and her now-deceased children had the right to sue the city for its failure to enforce a temporary restraining and child custody order pursuant to the mandatory enforcement language present in Colorado's domestic violence statute.²⁰⁰ The Court held that the state could be immune from liability for failing to comply with a mandatory arrest law.²⁰¹ In essence, the court held that the word "mandatory" meant something else.²⁰²

¹⁹⁶ See, e.g., Michelle R. Waul, *Civil Protection Orders: An Opportunity for Intervention with Domestic Violence Victims*, 6 GEO. PUB. POL'Y REV. 51, 54 (2000) (mentioning studies from the 1980s—and later studies clarifying those findings—that "reported that having a protection order did not reduce the likelihood of subsequent violence").

¹⁹⁷ See Ko, *supra* note 113, at 380-81 & nn.160-67.

¹⁹⁸ Gonzales Amicus Brief, *supra* note 116, at 9; see also Ko, *supra* note 113, at 379-80 (describing studies that conclude that poor enforcement by prosecutors and judges of protection orders has hampered their value).

¹⁹⁹ See, e.g., Gonzales Amicus Brief, *supra* note 116, at 2-3 (All thirteen organizations that signed the brief "believe that mandatory protection order enforcement is required to ensure the safety of abused women and children.").

²⁰⁰ 545 U.S. 748, 751-54 (2005). This author was part of the team that drafted an amicus brief in this case on behalf of the Family Violence Prevention Fund, the National Center on Domestic and Sexual Violence, and eleven other organizations. See Gonzales Amicus Brief, *supra* note 116. The brief argued for the recognition and protection of separate procedural due process rights and rights to protection under the order for the three Gonzales children (allegedly protected parties under the order). *Id.* at 18-19. The brief also addressed how the police's failure to grant the children even minimal due process undermined both the order and well-established judicial and legislative efforts to protect victims of domestic violence. *Id.* at 25-26.

²⁰¹ *Castle Rock*, 545 U.S. at 760-63.

²⁰² See also Tarr, *supra* note 39, at 401 (noting that *Castle Rock* "undercuts the notion that a nationwide commitment to protecting victims of domestic violence exists [creating] the potential

With respect to the second critique, there is conflicting evidence.²⁰³ But there is anecdotal evidence that individual victims and employers are seeking protection orders in hopes that they are effective.²⁰⁴ For example, the California State Attorney General's Office reports that there were 1518 active employer protection orders in the California Domestic Violence Restraining Order System ("DVROS") on February 23, 2005.²⁰⁵ Moreover, there is something powerful about having a court issued document that states a protective right. It empowers employers to call the police or take action. While it is true that the police could be called if an unwanted trespasser enters the employer's property regardless of whether an employer has obtained a valid order against the person, violating a protection order in and of itself is a crime.

Protection orders state as much on the face of the document themselves. For example, the Indiana Workplace Harassment Order states, "Violation of this order is punishable by confinement in jail, prison, and/or a fine."²⁰⁶ And while an order is merely a piece of paper that may or may not be enforced, there is something powerful about putting a perpetrator on notice that someone else is watching and that violating the order has consequences in and of itself.

You can never stop violence completely, but early intervention—including the ability to rely on a protection order—should help make the workplace safer.

for employers to use the holding to support their argument that there is no public policy on which to hang an exception to the at-will employment doctrine").

²⁰³ Judith A. Smith, *Battered Non-Wives and Unequal Protection-Order Coverage: A Call For Reform*, 23 YALE L. & POL'Y REV. 93, 123 (2005) (contrasting early studies that concluded that protection orders failed to prevent additional violence with more recent studies finding that protection orders do reduce future harm); Larry Zalin, *Protection Orders Curb Partner Violence, but Few Seek Them*, U. OF WASH. NEWS, Jan. 2, 2003, <http://uwnews.washington.edu/ni/article.asp?articleID=2031> (protection orders kept women "safer than those without them in the five-month period after they were initially threatened or abused," and the protection grew stronger after another four months); REPORT FROM THE ATTORNEY GENERAL'S TASK FORCE ON LOCAL CRIMINAL JUSTICE RESPONSE TO DOMESTIC VIOLENCE, KEEPING THE PROMISE: VICTIM SAFETY AND BATTERER ACCOUNTABILITY 16 (2005) [hereinafter REPORT FROM THE ATTORNEY GENERAL'S TASK FORCE], available at http://www.safestate.org/documents/DV_Report_AG.pdf (citing studies demonstrating that protection orders "are associated with decreased likelihood of subsequent physical and non-physical domestic violence").

²⁰⁴ See Gonzales Amicus Brief, *supra* note 116, at 9 (noting that protection orders are one of the most utilized forms of legal recourse for victims of domestic violence).

²⁰⁵ *Workplace Violence Protective Orders: Hearing on A.B. 429 Before the Cal. S. Comm. on the Judiciary*, 2005-2006 Reg. Sess. 2 (2005) (noting information given by the Attorney General's office). DVROS is the system in which all enforceable orders are recorded. *Id.* at 1.

²⁰⁶ Order After Hearing on Petition of Employer for Injunction Prohibiting Violence or Threats of Violence Against Employee, Form WV-0106 (Jul. 1, 2008), available at <http://www.in.gov/judiciary/forms/po/wvro/wv-0106.pdf>; see also CAL. CIV. PROC. CODE § 527.8(k) (West 2008) and CAL. PENAL CODE § 273.6 (West 2008) (intentional violation of a protection order is a crime). "The threat of punishment is intended to deter abusers, both those subject to an order and batterers in general, from engaging in prohibited contact, thereby decreasing the risk of new domestic violence." REPORT FROM THE ATTORNEY GENERAL'S TASK FORCE, *supra* note 203, at 16.

6. Congressional Action Is Appropriate

In 2000, the Supreme Court's decision in *United States v. Morrison* held that Congress could not create a federal civil cause of action for a claim of gender-motivated violence because it was not sufficiently related to interstate commerce.²⁰⁷ The Court held that the new claim went beyond Congress's power, despite evidence in the legislative history showing a substantial impact on interstate commerce.²⁰⁸ After *Morrison*, it is unclear whether a proposal that created a new federal cause of action could withstand a constitutional challenge, but this is a question for which it is worth grappling.²⁰⁹

Nonetheless, it is a question that need not be answered here because Congress can *encourage* states to provide the tools described in this section. While Congress has no authority to force states to enact this proposal, it can condition certain federal funds on a state's decision to do so. Pursuant to the Spending Clause,²¹⁰ Congress may attach conditions on a state's receipt of federal funds to advance policy, provided any such requirements are unambiguous and clearly stated, made in the pursuit of the "general welfare," and voluntarily and knowingly accepted by the state.²¹¹ Thus, Congress could encourage states to enact the proposal

²⁰⁷ 529 U.S. 598, 617 (2000). For a more detailed discussion of *Morrison*, see Tarr, *supra* note 39, at 391-92; see also Jennifer R. Hagan, *Can We Lose the Battle and Still Win the War?: The Fight Against Domestic Violence After the Death of Title III of the Violence Against Women Act*, 50 DEPAUL L. REV. 919, 925 (2001) (proposing the use of the Thirteenth Amendment for this type of claim).

²⁰⁸ *Morrison*, 529 U.S. at 614.

²⁰⁹ The proposed employer protection order provisions are different than the invalidated federal claim contained in 42 U.S.C. § 13981 (2000). Unlike the cause of action in *Morrison*, an employer protection order has a more direct economic link to and effect on interstate commerce. *Morrison* involved a freshman woman who was allegedly assaulted and raped by two members of the football team at Virginia Polytechnic Institute. *Morrison*, 529 U.S. at 602. Tragic as these alleged events were, the factual situation is very different from the ones that the proposal under discussion here attempts to address. *Morrison* was not an employee or independent contractor of the school. As a result, the proposal here contains a much more direct link to employment and would offer employers a way to get involved when there have been acts or threats of action at or impacting work. The proposal is not to make domestic violence itself a federal crime or to provide a federal cause of action that would involve the potential for compensatory or punitive damages. Instead, it is offering a civil protection order response to domestic violence *at work*. In essence, it would regulate the workplace just like the FMLA, OSH Act and any number of other laws. Of course, an employer protection order issued under a current state law that allows them would be enforceable in every other state under the Full Faith and Credit Clause. 18 U.S.C. § 2266(5) (2000).

²¹⁰ U.S. CONST. art. I, § 8, cl. 1 ("Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States. . . .").

²¹¹ *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) (citations omitted); see also Ann Carey Juliano, *The More You Spend, The More You Save: Can the Spending Clause Save Federal Anti-Discrimination Laws?*, 46 VILL. L. REV. 1111, 1155-56 (2001); W. Paul Koenig, *Does Congress Abuse Its Spending Clause Power by Attaching Conditions on the Receipt of Federal Law Enforcement Funds to a State's Compliance With "Megan's Law"?*, 88 J. CRIM. L. & CRIMINOLOGY 721, 722-23 (1998) (detailing the authority for and analyzing the legality and appropriateness of Congress's decision to condition federal law enforcement funds on the state's establishment of certain sex offender registry requirements).

described in this section by tying them to the provision of appropriate federal funds.

A *significantly* weaker second alternative also exists: the SEES and SAFE Act could be amended to include a new title that expresses a sense of Congress that states should provide the provisions of this proposal.²¹²

C. *Creating a Refundable Tax Credit for Employers That Take Safety Precautions*

The current text of the SEES and SAFE Act would impose a number of mandates on employers requiring them to take affirmative steps to address domestic violence.²¹³ Another way to tackle the societal goal of reducing violence at work is through a tax credit or other financial incentive.²¹⁴ The third proposal utilizes this concept of using the tax system to encourage employers to proactively take steps to address violence at work by providing a refundable business tax credit to employers to recoup certain costs associated with addressing domestic violence.²¹⁵ It also would earmark money to the Internal Revenue Service (“IRS”) to publicize this new credit and contain language granting

²¹² See, e.g., H.R. 3514, 105th Cong. § 761 (1998). This section contains a Sense of Congress statement regarding ways in which state workers compensation laws could address this problem by expressing the sense of the Congress that “State workers’ compensation laws should provide benefits to [eligible female] victims of workplace violence[,] . . . including full compensation for physical and nonphysical injuries;” and “permit the employee to pursue an action at law . . . other than statutory workers’ compensation benefits, based on an employer’s role in the act of workplace violence.” *Id.* § 761(b)(1)-(2).

²¹³ For example, Title I would mandate the provision of time off to employees who are victims of domestic violence. SAFE Act, H.R. 2395, 110th Cong. tit. 1, §§ 101-108 (2007).

²¹⁴ While this section focuses on tax credits, there are a number of other financial incentives that could be utilized to incentivize employers to take measures to address the impact of domestic violence at work. Government sponsored grant programs are one commonly discussed alternative to tax credits. One benefit of utilizing a grant program is that the cost to the government of the grant would be known in advance and before any such program was implemented. For example, the Women in Apprenticeship and Nontraditional Occupations Act gives the Department of Labor authority to offer grants to community based organizations to deliver technical assistance to employers and labor organizations to help them recruit, train, employ, and retain women in “apprenticeable . . . and nontraditional occupations.” 29 U.S.C. §§ 2501-2509 (1992). By statute, only one million dollars was designated to administer this grant program. *Id.* § 2509.

²¹⁵ This proposal also responds to a direct request from the business community that, “[i]nstead of burdening small employers, Congress might consider incentives for employers to provide additional resources or benefits to [victim employees].” Senate Hearing, *supra* note 29, at 14 (statement of Sue K. Willman).

The government imposes a tax on businesses every year at a rate that varies depending on the amount of “taxable income” generated. 26 U.S.C. § 11(a)-(b) (2006). A business’s tax liability consists of its gross income minus any authorized deductions. JOINT COMM. ON TAXATION, OVERVIEW OF THE FEDERAL TAX SYSTEM AS IN EFFECT FOR 2008 8 (2008), available at <http://www.house.gov/jct/x-32-08.pdf>. Business “tax liability [may also be reduced] by any applicable tax credits.” *Id.* at 9. A tax credit reduces the taxpayer’s tax amount dollar for dollar. Kimberly Lankford, *Tax Credit vs. Deduction*, KIPLINGER.COM, Mar. 19, 2007, <http://www.kiplinger.com/columns/ask/archive/2007/q0319.htm>. It is more valuable than an equivalent tax deduction, which allows the incurred expense to be subtracted from the taxpayer’s gross income and lowers the overall taxable income. See *id.*

employers civil immunity from liability in negligence actions taken while seeking or failing to seek the credit. In so doing, this proposal recognizes that the government has a role to play in helping employers reduce violence in the workplace. The government, through the refundable tax credit,²¹⁶ can incentivize action and educate employers on how to appropriately deal with the effects of violence at work.

Under the first element of this proposal, employers could recoup some percentage of costs related to addressing domestic violence through a refundable tax credit for acts or programs such as: training employees to recognize warning signs for potential violence and educating them on available options if violence occurs; purchasing new identification systems or lighting or security equipment; hiring new security personnel; organizing escorts to walk people to their cars; establishing an employee assistance program that provides services related to domestic violence (such as counseling or referral services); retaining counsel to help employees seek protection orders; hiring a financial counselor to aid employees trying to leave a violent situation; relocating an employee to another facility; implementing time off or flexible work policies; or creating or following personal policies to protect or support victimized employees.

An employer that performs these acts needs to be aware that some of them may potentially be considered taxable income for an employee under section 61 of the Internal Revenue Code.²¹⁷ As a result,

²¹⁶ Generally, refundable tax credits are only for individual tax liability. The primary federal refundable tax credit programs are the Earned Income Tax Credit, 26 U.S.C. § 32 (2000), the Child Tax Credit, 26 U.S.C. § 24 (2000), and a health insurance tax credit, 26 U.S.C. § 35 (2000). A few states, however, have established refundable tax credits for business. For example, the Nebraska Advantage Microenterprise Tax Credit Act allows companies with five or less employees to qualify for a 20% refundable tax credit for up to \$10,000 of a new investment in a struggling community. NEB. REV. STAT. ANN. § 77-5906 (LexisNexis 2007); *see also* Michelle Janowitz, *Nebraska's New Advantage*, BUS. FACILITIES ONLINE, Oct. 2005, http://www.businessfacilities.com/bf_05_10_analysis2.php (describing this program as part of "a new set of incentives designed to grow").

A refundable credit is recommended here to ensure that an employer would receive money back even if the employer had no tax liability. If this were a non-refundable tax credit, an employer that does not have any tax liability would not get any money back. 360 Degrees of Financial Literacy, *Refundable Versus Non-Refundable Tax Credits*, <http://www.valueyourmoney.org/military-and-reserves/taxcredit.asp> (last visited Sept. 12, 2008).

²¹⁷ 26 U.S.C. § 61 (2000). Some of these are already excluded from income. For example, help provided under qualified employee assistance and education programs is not considered income to employees. *See* EMPLOYEE BENEFIT RESEARCH INST., TAX EXPENDITURE AND EMPLOYEE BENEFITS: AN UPDATE FROM THE FY 2005 BUDGET 1-2 (2004), *available at* <http://www.ebri.org/pdf/publications/facts/0204fact.pdf> (listing examples of tax exempt employee benefits).

Some of the costs associated with these activities may be considered "ordinary and necessary" business expenses. Under the Internal Revenue Code, ordinary and necessary business expenses may reduce an employer's overall tax liability. 26 U.S.C. § 162(a) (2000). The Code does not define the terms "ordinary" or "necessary". Agency guidance, however, has defined an "ordinary" business expense to be one that is "common and accepted" in a trade or business. IRS, Business Expenses, <http://www.irs.gov/businesses/small/article/0,,id=109807,00.html> (last visited Sept. 19, 2008). A "necessary" expense must be "helpful and appropriate" in a trade or business; it need not be indispensable. *Id.* In addition, these costs must not be deemed personal expenses. *See* Paul Caron, *What is an "Ordinary" Business Expense Under § 162?*, Dec. 5, 2006,

the proposal would require employers to notify an employee of any possibility that a service they are willing to give the employee would count as income under the Code. In addition, the Secretary of Treasury would be given the authority to certify costs that may be included in the calculation of the tax credit. Employers would then submit a certification containing all eligible costs to the IRS with their regular tax filing.²¹⁸

The proposed tax credit would be available to all private employers.²¹⁹ Rather than limiting the credit to employers with only a certain number of employees, the tax credit would be tiered, with the greatest percentage of credit going to small employers.²²⁰ In essence, this would stagger the credit based on the number of employees that an employer has (much like the Earned Income Tax Credit staggers the amount depending on the number of dependent children in a family²²¹).

This tiered approach is suggested to allow the largest incentive to go to smaller employers who have the hardest time adapting their workplace to address or otherwise assist victims dealing with the aftermath of domestic violence. Indeed, small employers are frequently faced with limited resources and conflicting legal and moral obligations.²²² These employers “often have neither the resources nor the staffs” to appropriately address domestic violence.²²³ They may see “prevention . . . as an unwarranted expenditure rather than an investment with a return.”²²⁴ This tiered approach attempts to combat that philosophy by targeting the most support and greatest monetary incentive towards prevention efforts at small business.

http://taxprof.typepad.com/taxprof_blog/2006/12/what_is_an_ordi.html (for example, courts have denied the deduction of expenses for hiring a minister for a business’s employees because the services provided are of an inherently personal nature).

To the extent these costs qualify for the ordinary and necessary business deduction, a legislative fix would not be needed to allow businesses to claim them. The IRS could do a great service by issuing guidance and/or other technical assistance that explicitly states whether these expenses may be claimed as such.

²¹⁸ As with all self-reported aspects of the tax system, an underreporting issue may result. However, one goal of the earmark is to have it be large enough to provide additional staff for enforcement related activities to attempt to limit the scope of this problem.

²¹⁹ Certain employers would be exempt from this proposal because they are not subject to federal tax liability. See 26 U.S.C. § 501(a), (c) (listing organizations that are exempt from paying federal income tax). A grant program or some other financial incentive—perhaps the budget process for government employers—may incentivize these employers to act.

²²⁰ The majority of Americans work for small businesses. U.S. CENSUS BUREAU, STATISTICS ABOUT BUSINESS SIZE (INCLUDING SMALL BUSINESS) FROM THE U.S. CENSUS BUREAU, <http://www.census.gov/epcd/www/smallbus.html> (last visited Jan. 14, 2008) (listing statistics for 2002).

²²¹ 26 U.S.C. § 32(b) (2000).

²²² Michael A. Mayo, *Ethical Problems Encountered by U.S. Small Businesses in International Marketing*, 29 J. OF SMALL BUS. MGMT. 51-59 (1991), available at <http://www.allbusiness.com/human-resources/employee-development-employee-ethics/163877-1.html> (last visited Sept. 29, 2008) (stating that small businesses have limited resources, such as no legal specialists, to deal with issues and ethical dilemmas); see also NIOSH, *supra* note 60, § 2.1.8.

²²³ NIOSH, *supra* note 60, § 2.1.8.

²²⁴ *Id.* (also noting small employers “fac[e] high risks” of violence at work).

The second element of this proposal posits that Congress should earmark money to the IRS for activities related to education and enforcement of this new tax credit.²²⁵ This earmark could fund education efforts about the tax credit through programs such as staffing a 1-800 number that employers could call to have questions answered or putting on a road show or Internet road show to educate a broader range of businesses and locations.²²⁶ It also could provide technical assistance about which costs are eligible for inclusion in the tax credit.

In addition, the staff could refer callers to other entities with the capability to provide technical assistance on steps employers can take to address domestic violence at work. For example, the National Workplace Resource Center would be an ideal referral partner for the IRS on this issue. The National Workplace Resource Center was created as part of the reauthorization of the Violence Against Women Act of 2005 (“VAWA 2005”).²²⁷ VAWA 2005 authorized a grant to a private non-profit entity to operate a national clearinghouse to help businesses develop and implement policies, guidelines, and plans to make their workplaces safer and more productive while supporting domestic violence victims.²²⁸ Taken together, this earmark has the potential to fund activities related to education about both the existence and requirements of the tax credit, as well as referrals and information from subject matter experts on how to prepare an effective safety plan.

The third element of this proposal contains civil liability language that mirrors the employer protection order proposal described above.²²⁹ In sum, it would note that an employer’s duty to provide a safe workplace does not change because the employer obtained a tax credit (or other monetary incentive) under the SEES and SAFE Act. Nor would an employer be able to escape liability under other laws simply because it sought or obtained this credit. Of course, this proposal would not immunize employers against charges of tax evasion or any IRS enforcement action related to statements or acts made or not made while applying for, utilizing, or justifying or clarifying an employer’s eligibility for or calculation of this tax credit.

²²⁵ James M. Buchanan, *The Economics of Earmarked Taxes*, 71 J. POL. ECON. 457, 457-58 (1963) (“‘Earmarking’ is defined as the practice of designating or dedicating specific revenues to the financing of specific public services.”).

²²⁶ For example, the current efforts of the Employee Benefits Security Administration to educate employers about fiduciary liability can be found at <http://www.dol.gov/ebsa/> (last visited Jan. 24, 2009).

²²⁷ Violence Against Women and Department of Justice Reauthorization Act of 2005, 42 U.S.C. § 14043f (2006). This center was first introduced in an earlier version of the SAFE Act. *See* Battered Women’s Economic Security Act, S.2558, 105th Cong. § 211 (1998) (proposing a National Clearinghouse on Domestic Violence and Sexual Assault in the Workplace Grant).

²²⁸ 42 U.S.C. § 14043f(a) (2006). VAWA 2005 appropriates \$1 million annually for five years starting in fiscal year 2007 for this purpose. *Id.* § 14043(e).

²²⁹ *See supra* Section III.B for a discussion of the proposed civil liability provision.

Parts of this proposal are based on a tax provision included in earlier versions of the SEES and SAFE Act that would have amended the Code to provide a tax credit equal to 40% of the costs an employer paid for violence prevention, safety, and education programs.²³⁰ Similar tax credits have also been proposed on the state level. A California bill would have authorized a tax credit for employers who establish and maintain “resources or educational programs to raise awareness of domestic violence in the workplace.”²³¹ Section 1 (c) stated, “In order to encourage businesses to develop workplace domestic violence programs that educate, support, and protect their employees, this act provides a 75-percent tax credit for businesses that offer a domestic violence program. This tax credit is intended to reduce the cost of providing these programs.”²³² Illinois and Hawaii also entertained proposals that would have entitled employers to a tax credit equal to 40% of the domestic violence safety and education costs paid or incurred by the employer during the taxable year.²³³ The states would have certified the costs eligible for the credit or otherwise created appropriate forms.²³⁴ Missouri’s bills would have authorized a tax credit for an employer’s expenses in developing domestic violence prevention programs.²³⁵ Finally, North Carolina’s bill would have provided a tax credit equal to the amount expended on a workplace safety program.²³⁶ None of these bills became law or are up for consideration at this time.

Since a tax credit provides employers with an incentive to address violence at work without *requiring* employers to do anything, it involves a more incremental change than some of the other provisions of the SEES and SAFE Act.²³⁷ For example, in contrast, the anti-discrimination provisions of Title III would require an immediate change in the way some employers do business.²³⁸ Nonetheless, it would still be a change, and with the right outreach and education, a significant one whose importance would only be expanded when combined with the other protections of the proposed SEES and SAFE Act.²³⁹

²³⁰ See, e.g., Battered Women’s Economic Security Act, S. 2558, 105th Cong. 2d Sess. § 45D (1998). However, the federal bills introduced since 2005 have not contained such a provision.

²³¹ S. 1691 § 3, 1999-2000 Reg. Sess. (Cal. 2000).

²³² *Id.*

²³³ H. 3428, 93d Gen. Assem., Reg. Sess. (Ill. 2003); H. 2123, 21st Leg., Reg. Sess. (Haw. 2001); S. 2438, 21st Leg., Reg. Sess. (Haw. 2001).

²³⁴ H. 3428 (Ill. 2003); H. 2123 (Haw. 2001); S. 2438 (Haw. 2001).

²³⁵ H.B. 428, 93rd Gen. Assem. (Mo. 2005); H.B. 429, 93rd Gen. Assem. (Mo. 2005).

²³⁶ Workplace Safety Tax Credits, S.B. 680, 2003-2004 Gen. Assem. (N.C. 2003).

²³⁷ See Anne L. Alstott, *Tax Policy and Feminism: Competing Goals and Institutional Choices*, 96 COLUM. L. REV. 2001, 2080 (1996) (noting “the inherent difficulty of using incremental changes in financial incentives and entitlements to influence patterns of behavior that reflect deep-seated attitudes about gender roles”).

²³⁸ SAFE Act, H.R. 2395, § 303(a) (2007).

²³⁹ Alstott, *supra* note 237, at 2005 (noting “the limited capacity of legal rules governing financial entitlements to change deeply entrenched social norms about gender roles” and concluding

This proposal is also consistent with the shift in recent years to have more social policies enacted through the Code rather than government requirements or direct services.²⁴⁰ Providing a tax credit would represent a paradigmatic shift in the state of the current law, which has focused on dealing with domestic violence through the criminal justice system and violence prevention through protection orders.²⁴¹ By contrast, offering a tax credit does not involve a criminal or civil court to respond to domestic violence. Rather, it presents the government with a way to involve employers and invite them to be a part of the solution when domestic violence impacts their workplaces without going to court.²⁴² More than a reactive legal response is needed to combat the multiple ways in which violence has infiltrated the workplace. In this respect, a tax credit is an important part of a coordinated effort to address the problem from multiple angles.²⁴³

Indeed, encouraging or assisting women's workforce participation through tax credits is not a new concept. The most discussed example is the Earned Income Tax Credit ("EITC").²⁴⁴ It provides a refundable tax credit that reduces or eliminates taxes on low-income married or single working people.²⁴⁵ The EITC is phased out as income rises to ensure the credit is taken by only those with low income.²⁴⁶ It does not provide a specific dollar amount, but rather contains a range depending on the recipients' marital status and number of dependent children present in the immediate family.²⁴⁷

"that coordination between tax rules and other legal rules could draw on the diverse strengths of different legal regimes to expand the institutional options for feminist legal reform").

²⁴⁰ See, e.g., Tax Policy Center, Working Families, <http://www.taxpolicycenter.org/taxtopics/Working-Families.cfm> (last visited Jan. 14, 2008) ("Over the past 15 years, federal tax policy has come to play a central role in the well-being of these families.").

²⁴¹ See generally Ann E. Freedman, *Fact-Finding in Civil Domestic Violence Cases: Secondary Traumatic Distress and the Need for Compassionate Witnesses*, 11 AM. U. J. GENDER SOC. POL'Y & L. 567, 587-92 (2003) (discussing the current "emphasis on criminal law remedies [that] dominates much of our public discourse on domestic violence"); see also SCHNEIDER, *supra* note 172, at 197 (noting that tax credits would be "an important antidote to the criminalization emphasis . . . and represent a different form of state involvement and assistance").

²⁴² Yoram Margalioth, *The Many Faces of Mandates: Beyond Traditional Accommodation Mandates and Other Classic Cases*, 40 SAN DIEGO L. REV. 645, 692 (2003) ("Tax advantages are given to taxpayers as a means of inducing certain behaviors perceived by the policymaker to be desirable.").

²⁴³ Alstott, *supra* note 237, at 2066 ("[C]oordination between tax policy and other legal regimes can expand the available menu of policy options by drawing on the diverse strengths of different legal regimes.").

²⁴⁴ 26 U.S.C. § 32 (2000). The EITC began in 1975 and has been expanded over the years. See generally STEVE HOLT, THE BROOKINGS INSTITUTION, RESEARCH BRIEF: THE EARNED INCOME TAX CREDIT AT 30: WHAT WE KNOW (2006); Alstott, *supra* note 237, at 2038-39 (articulating a feminist view of the EITC).

²⁴⁵ Jonathan Barry Forman, *Earned Income Credit*, in THE ENCYCLOPEDIA OF TAXATION AND TAX POLICY 99-100 (Joseph J. Cordes et al. eds., 1999), available at <http://www.taxpolicycenter.org/publications/url.cfm?ID=1000524>.

²⁴⁶ See 26 U.S.C. § 32 (2000).

²⁴⁷ *Id.* § 32(b).

In addition to the EITC, tax credits have been proposed for any number of social policies in an effort to incentivize employers to do something that is good for society. For example, Illinois created a financial incentive for employers to hire more veterans with a state tax credit of up to \$600 per veteran hired.²⁴⁸ Missouri established a tax credit for employer contributions to domestic violence shelters that may be used to offset the state income tax, corporate franchise tax, financial institutions tax, or the tax on the gross receipts of express companies by up to 50% of qualified contributions of up to \$2 million annually.²⁴⁹ These are just two of many examples of this policy-making-through-tax-credit function.

This proposal also avoids some of the usual criticisms of tax credits. The most common criticism is that tax credits reward businesses that would otherwise be taking the same actions without the credit (mostly large employers).²⁵⁰ But that would not be the case here. The reality is that the majority of employers are not doing anything to prevent or address domestic violence in the workplace. Even though a recent survey found that 94% of corporate security personnel at Fortune 100 companies believe domestic violence is a major security concern,²⁵¹ “[o]ver 70 percent of United States workplaces have no formal program or policy that addresses workplace violence,” and only 44% of those that do have a program or policy address domestic violence.²⁵² As Verizon’s Public Affairs Manager recently put it, “[t]he employer’s job is to provide access to resources and to be able to ‘recognize, respond, and

²⁴⁸ 35 ILL. COMP. STAT. 5/217(a) (2000); *see also* Business and Legal Reports, Inc., *Illinois: State Institutes Tax Credit for Hiring Veterans*, available at http://www.blr.com/display_shrm.cfm?topic/178/state/117 (last visited Dec. 23, 2007).

Illinois also created a program to promote the Veteran’s Tax Credit in an effort to make the credit useful. *See* Press Release, Office of the Governor, Gov. Blagojevich Encourages Employers to Hire Veterans During “Hire a Vet” Month in Illinois, Nov. 1, 2007, <http://www.revenue.state.il.us/AboutIdor/PressReleases/PR-11-01-2007.pdf>; Business and Legal Reports, Inc., *supra*.

²⁴⁹ MO. ANN. STAT. § 135.550 (West 2000); *see also* *Missouri Grants Tax Credits*, NAT’L BULL. ON DOMESTIC VIOLENCE PREVENTION (West), Sept. 1999 (noting the new Missouri tax credit that allows taxpayers to receive a credit of up to 50% of the amount they donate to a domestic violence shelter); S.B. 1471, 208th Leg. (N.J. 1998) (employers may reduce their gross income tax by 50% of contributions to domestic violence shelters of at least \$100).

²⁵⁰ *See, e.g., Tax Incentives and the Cal. Economy: Joint Hearing Before the S. and Assemb. Comms. on Revenue and Taxation*, 1993 Leg., 1993-1994 Sess. (Cal. 1993), available at <http://www.nathanneman.org/EDIN/econ/cch/cch-golddb.html> (statement of Lenny Goldberg, Executive Director, California Tax Reform Association) (“Tax incentives reward activity which would otherwise take place.”).

²⁵¹ Charlene Marmer Solomon, *Talking Frankly About Domestic Violence*, 74 PERSONNEL J. 62, 64 (1995); *see also* ALABAMA COALITION AGAINST DOMESTIC VIOLENCE & VERIZON WIRELESS, *supra* note 12, at 1, 4; EMPLOYERS AGAINST DOMESTIC VIOLENCE, *supra* note 32 (citing this statistic from the National Safe Workplace Institute).

²⁵² *Half of Large Employers Had Workplace Violence Incident in Last Year*, BUS. & LEGAL REP., Oct. 30, 2006, <http://hr.blr.com/news.aspx?id=19318> (citing a survey conducted by Bureau of Labor Statistics for NIOSH); *see also* SAFE Act, H.R. 2395, 110th Cong. § 2(11) (2007) (further noting that “only 4 percent of employers provided training on domestic violence”).

refer” to domestic violence at work.²⁵³ Unfortunately, not enough employers know how to or are doing this.

Violence at work is often predictable and preventable. “The most important function of a workplace violence prevention program is to make sure it includes ‘an early detection mechanism and a well-coordinated response’”²⁵⁴ Employers may (and some do) voluntarily perform this function.²⁵⁵ Increased publicity of particular incidents of and costs associated with domestic violence and the real risk of employer liability have caused a number of organizations to start working to create workplaces that truly respond to employees’ safety needs.²⁵⁶ These efforts—along with the National Workplace Resource Center when it becomes operational—could provide the important steps of offering model employers and best practices. This could go a long way to educate employers and provide them with the information they need to “recognize, respond, and refer” to domestic violence. As noted above, it also could be a vital resource and potential referral partner for the IRS personnel funded under this proposal. But some employers with successful prevention programs may be unwilling to share their strategies with others in response to privacy and proprietary concerns.²⁵⁷ And neither the existence of these model policies nor a national resource center that captures them is sufficient by itself to encourage others to follow these examples or use the center.²⁵⁸ This proposal, however, goes one step further in encouraging employers to develop a plan *before*

²⁵³ *When Domestic Violence Comes to Work, Verizon Wireless, Gap Have Response Plans*, OSHA Rep. (BNA), Apr. 26, 2007, at 370.

²⁵⁴ *Workplace Violence*, *supra* note 57 (quoting Mark Braverman, a workplace violence consultant from Bethesda, MD).

²⁵⁵ Corporate Alliance to End Partner Violence, Best Practices, <http://www.caepv.org/getinfo/bestprac.php> (last visited Jan. 14, 2008) (providing a list of some member businesses that voluntarily perform these functions; examples of the practices found at each company can be located by clicking on the name of the company); LISA A. GOODMAN & DEBORAH EPSTEIN, LISTENING TO BATTERED WOMEN: A SURVIVOR-CENTERED APPROACH TO ADVOCACY, MENTAL HEALTH, AND JUSTICE 129-30 (2008).

²⁵⁶ Swanberg et al., *supra* note 1, at 299, 300-01 (noting that “some” organizations have acted to combat the impact of violence at work as a result of awareness of the “problem and its associated economic and social costs and consequences” and further “suggest[ing] that a concern to ‘keep talent, reduce absenteeism, and avoid liability’ has been moving organizations to take action” (quoting J. Pereira, *Employers Confront Domestic Abuse*, WALL ST. J., Mar. 2, 1995, at B1); FARMER & TIEFENTHALER, *supra* note 26, at 31.

²⁵⁷ NIOSH, *supra* note 60, § 2.1.6.

²⁵⁸ It also fails to address some of the problems that exist when the government elects to outsource a public good like this. For examples of problems outsourcing may cause, see Jessica Holzer, *Pay-go Could Stymie Efforts to End Private Tax Program*, THEHILL.COM, May 14, 2007 (discussing congressional efforts to block an outsourcing plan through the appropriation process); David Cay Johnston, *I.R.S. Enlists Help in Collecting Delinquent Taxes*, N.Y. TIMES, Aug. 20, 2006 (discussing the IRS’s plan to outsource the collection of past-due taxes from those who owe \$25,000 or less); Bill Leonard, *EEOC Kills Call Center Contract, Warns of Slow Service*, SHRM HR NEWS, Nov. 14, 2007, http://www.shrm.org/hrnews_published/articles/CMS_023662.asp (discussing problems with the outsourcing of the EEOC’s call center).

violence occurs and have an appropriate and prompt response ready if violence happens.²⁵⁹

A permutation of this critique is that it is not good public policy to reward bad actors. Certain employers may create a violence prevention and education program or policy only in response to a citation or lawsuit. The question becomes whether these “bad” entities should be offered a financial reward for actions they would take anyway in responding to the incident underlying an existing or prior citation or lawsuit. One state bill attempted to deal with this concern by allowing only employers that could demonstrate that they had not been cited recently under the OSH Act to be considered an eligible employer such that they could receive the proposed tax credit.²⁶⁰ The underlying premise of this exclusion was that these employers would not need additional incentive because the occurrence of a violent incident or actual or threatened lawsuit would be incentive enough.²⁶¹ However, there is still a need to encourage these employers not to merely react to the case at hand, but rather to create a comprehensive approach that would address a variety of situations and consider the needs of other and future employees.

Some people have argued that tax credits do not provide enough “bang for the buck.”²⁶² Essentially, this posits that the amount of money that would need to be used to properly incentivize employers and administer the tax credit is too large. The positive outcomes that would result from the tax credit are not worth it when weighed against the financial and other costs that might be saved by employers and their employees who benefit from the employers’ actions. Without having additional information, it is difficult to estimate precisely how much the proposed tax credit would cost or the exact amount of economic utility the proposal has in terms of how much and which costs utilizing the

²⁵⁹ Campbell & Karin, *supra* note 2, at 7 (describing the elements of a “well-written anti-violence policy”).

²⁶⁰ H.B. 919, Gen. Assem., 2003 Sess. § 105-129.16(b)(1) (N.C. 2003) (defining an eligible employer as one “that certifies that, as of the time the employer first claims the credit, at the business location with respect to which the credit is claimed, the employer has no citations under the [OSH] Act that have become a final order within the past three years for willful serious violations or for failing to abate serious violations”); S.B. 680, Gen. Assem., 2003 Sess. § 105-129.16(b)(1) (N.C. 2003) (same).

²⁶¹ Michele Abbott, *North Carolina Labor Commissioner Touts Safety Reform Initiative*, HIGH POINT ENTERPRISE, June 1, 2003 (describing bi-partisan support for the bill because it offers a “carrot” to encourage voluntary efforts for increased workplace safety rather than a “stick” in the usual form of a citation).

²⁶² See, e.g., Sheldon S. Cohen, *The Erwin N. Griswold Lecture*, 14 AM. J. TAX POL’Y 113, 121 (1997) (criticizing a tax credit proposed by President Clinton for educational expenses in part because scholarship or student loans would have provided “a bigger bang for the bucks”); see also Katherine Pratt, *Deficits and the Dividend Tax Cut: Tax Policy as the Handmaiden of Budget Policy*, 41 GA. L. REV. 503, 565 (2007) (providing a formula to measure how much “bang for the buck” a “stimulative effect of a tax cut or spending increase” has by determining “the ratio of the stimulative effect of the tax cut (or spending program) divided by the revenue loss (or budget costs”).

credit would save. In part, this is because every dollar that the government would spend on this tax credit is a dollar it cannot spend on something else. This limitation, however, would apply to almost anything the government does. The government is always forced to make choices in determining resource allocation. At least until the costs and benefits of the proposal can be measured,²⁶³ the proposed credit is a choice worth pursuing. The costs of continued inaction are too great.

Of course, Congress could impose any number of limitations on the proposal to tailor the targeted population and limit the amount of money spent for this purpose. For example, specific requirements that limit the amount of money spent on this tax credit or further limit the scope of employers eligible to utilize it ultimately could range from including a monetary limit above which expenses would not be eligible for the credit to imposing a “reasonableness requirement” on eligible expenses to removing the “refundable” aspect of the tax credit.²⁶⁴

A related criticism of tax credits focuses on the amount of money it costs to properly administer and enforce a tax credit. The U.S. tax system is based on voluntary reporting and payment.²⁶⁵ There is little direct enforcement and “minimal interaction with the government.”²⁶⁶ As a result, this system has “both unintentional taxpayer errors and intentional taxpayer evasion.”²⁶⁷ When combined with other factors, a tax gap—“the difference between the amount of tax that taxpayers should

²⁶³ Federal legislation regularly includes some form of study requirement, often paired with a reevaluation period. *See, e.g.*, 29 U.S.C. §§ 2631-2636 (1993) (creating a Commission on Leave with a mandate to report back to Congress with findings from a comprehensive study of the costs, benefits, policies, and programs related to a variety of time off issues and the impact of some of the new law’s provisions).

²⁶⁴ *See, e.g.*, Employer-Provided Child Care Credit, 26 U.S.C. § 45F(b) (2006) (creating a cap of \$150,000 per taxable year for this credit); Disabled Access Tax Credit, 26 U.S.C. § 44(a) (2006) (providing small businesses with a 50% credit on the first \$10,000 (excluding the first \$250 spent)); Disabled Access Tax Credit, 26 U.S.C. § 44(c)(3) (2006) (allowing small businesses to include “only expenditures which are reasonable and . . . not include expenditures which are unnecessary to accomplish” compliance with the ADA). Any of these could be used to limit the amount of money the government spends on this tax credit in lieu of or in combination with a cap on the tier-system based on the size of employer (or income generated per year) proposed above.

²⁶⁵ “The vast majority of Americans pay their taxes accurately” IRS, IRS Updates Tax Gap Estimates, Feb. 14, 2006, <http://www.irs.gov/newsroom/article/0,,id=154496,00.html> (quoting former IRS Commissioner Mark W. Everson) (internal quotation marks omitted); IRS, REDUCING THE FEDERAL TAX GAP: A REPORT ON IMPROVING VOLUNTARY COMPLIANCE I (2007).

²⁶⁶ For example, the IRS audited 59,516 businesses in FY 2007, even though over nine million filed returns. IRS, Fiscal Year 2007 Enforcement and Services Results, <http://www.irs.gov/newsroom/article/0,,id=177701,00.html> (last visited Jan. 14, 2009); IRS, Fiscal Year 2007 IRS Enforcement and Service Statistics, 6, available at http://www.irs.gov/pub/irs-news/irs_enforcement_and_service_tables_fy_2007.pdf.

²⁶⁷ IRS, REDUCING THE FEDERAL TAX GAP, *supra* note 265, at 3. Noncompliance exists “due to tax law complexity that results in errors of ignorance, confusion, and carelessness. . . at this point, the IRS does not have sufficient data to distinguish clearly the amount of noncompliance that arises from willful, as opposed to unintentional, mistakes. Moreover, the line between intentional and unintentional mistakes is often a grey one, particularly in areas such as basis reporting, where a taxpayer may know that his or her reporting is inaccurate but does not have ready access to accurate information.” *Id.* at 6.

pay and the amount that is paid voluntarily and on time”—results.²⁶⁸ Former IRS Commissioner Mark Everson illustrated the importance of this concept when he noted that “the magnitude of the tax gap highlights the critical role of enforcement in keeping our system of tax administration healthy.”²⁶⁹ There is no reason to think that compliance with this tax credit, including the filing, reporting, and payment, would be any greater or less than the compliance associated with other tax credits. But the additional allocation of money for enforcement purposes in the earmark to IRS is intended to combat this problem and ensure that the tax gap related to this credit is kept to a minimum or is at least as small as possible under the circumstances.

An alternative proposal could be proffered that would require employers to create a written domestic violence prevention program. This alternative model exists in a number of state and local jurisdictions that have enacted laws in this vein recently. For example, the New York State Workplace Prevention Act requires public employers to develop a written prevention program and implement annual training on workplace violence.²⁷⁰ This type of requirement has tended to focus on the government as employer and not the government in its role as rule maker for private employers. Thus, while these types of laws may be useful, particularly for the government workforce which would not be incentivized by a tax credit as an entity without tax liability, it is hard to imagine a federal law *requiring* private employers to draft a domestic violence prevention plan at this time.²⁷¹ But even in the unlikely event that such a law was enacted, employers would need to go beyond the pages of a written plan itself and take steps to protect employees and others when the policies are or should be activated. Moreover, employers are more likely to take ownership over safety issues if there is an element

²⁶⁸ IRS, *The Tax Gap*, available at <http://www.irs.gov/newsroom/article/0,,id=158619,00.html> (last visited Mar. 8, 2009) (“The tax gap can also be thought of as the sum of non-compliance with the tax law.”). Only a small percentage (about 10%) of the tax gap comes from underreporting from businesses. The Tax Policy Center, *THE TAX POLICY BRIEFING BOOK, The Tax Gap: What is the tax gap?* (2008), <http://www.taxpolicycenter.org/briefing-book/background/tax-gap/what-is.cfm>.

²⁶⁹ IRS, *IRS Updates Tax Gap Estimates* (Feb. 14, 2006), available at <http://www.irs.gov/newsroom/article/0,,id=154496,00.html>.

²⁷⁰ N.Y. LAB. LAW § 27-b (2007); see also Sharon N. Berlin, *The New York State Workplace Violence Prevention Act*, 32 NYSBA LAB. & EMP. NEWSL. 16 (2007) (explaining the new law). Eliot Spitzer also signed an Executive Order that requires state employers to develop written policies addressing domestic violence in hopes of “fundamentally chang[ing] the way New York State prevents and responds to domestic violence . . . [by] taking a proactive approach toward . . . creating a safer and more productive working environment.” Press Release, N.Y. State Executive Chamber, *New York State Enhances Domestic Violence Prevention Efforts* (Oct. 25, 2007), <http://www.ny.gov/governor/press/1025072.html>; N.Y. Exec. Order No. 19 (Oct. 22, 2007) (noting that the state should serve as a model employer for private businesses).

²⁷¹ Such a requirement could be proposed as an OSHA regulation. See *supra* note 55 (discussing OSHA’s position on workplace violence). The Health Insurance Portability and Accountability Act’s Privacy Rule, which requires covered entities to create a written privacy policy and designate an employee responsible for implementing that policy, is another potential regulatory source for certain employers. 45 C.F.R. § 160.310(a) (2007).

of choice and decide to act themselves—even if they elect to do so based on a monetary incentive provided by the government.²⁷²

CONCLUSION

It is time for society to recognize three facts. First, domestic violence has a significant impact on the workplace. Second, the structure of the workplace has a role to play in reducing the impact of violence on employees and employers. Third, the federal government has a critical role to play in pushing all members of the workplace to accept and embrace their roles.²⁷³

The statutory solution proposed in this Article would help federal law recognize and reflect these facts. States have begun to address some of the structural and legal gaps in the workplace's response to domestic violence.²⁷⁴ These new state protections provide excellent momentum for a response by the federal government. After canvassing the movement that has been made on these issues at the state level, the proposals described in this Article will move the debate away from the employee-focused and/or reactive “incident-focused” criminal response.²⁷⁵ They attempt to change the current structure of the workplace in a way that breaks the wall of silence and allows both employees and employers to effectively prepare for and respond to domestic violence.

This societal approach is the logical and necessary next step to addressing domestic violence. Protecting employers would increase the support these bills receive on the Hill.²⁷⁶ By re-framing the bills to acknowledge the employers' role, giving employers the ability to seek preventive protection orders, and creating tax incentives, the proposals give employers the tools and incentives to address this problem.²⁷⁷

²⁷² Lettieri et al., *supra* note 53, at 2 (“Employers will be more likely to adopt policies that support victims of domestic violence if they are rewarded with incentives and recognition.”); *id.* at 1, 3.

²⁷³ Congress can do more than it is currently doing to “push [employers] to protect victims of domestic violence.” *Domestic Violence Spills Into Workplace, but Senate Witnesses Disagree on Solutions*, 25 Human Res. Rep. (BNA) 439 (Apr. 23, 2007) (internal quotation marks omitted) (noting that several witnesses at the hearing agreed this was needed).

²⁷⁴ See *supra* Part II.

²⁷⁵ Vu, *supra* note 173, at 103 (noting that courts use an “incident-focused” definition of domestic violence).

²⁷⁶ Employer support has helped some of the new state provisions addressing domestic violence at work become law. For example, the Maine Commissioner's testimony at the Senate Hearing demonstrates the good that can be done when employers and employees are brought to the table. She noted that employers were included in the “conversation,” and the state Chamber of Commerce supported a recent expansion to the victim leave law in part because they had received “no complaints or concerns [with the earlier law's] implementation.” Senate Hearing, *supra* note 29 (statement of Laura A. Fortman, citing the 2002 testimony of Peter Gore, Senior Governmental Affairs Specialist, Maine State Chamber of Commerce).

²⁷⁷ For a description of how having a federal law can empower victims of violence, see Widiss, *supra* note 25 (manuscript at 15) (“[B]ecause of the expressive power of legal reform,

Having these proposals in the SEES and SAFE Act bills would not only elevate the level of and validate an employer's right to be involved, but it would do so in a way that would improve employees' chances of obtaining leave that can be used to address medical concerns, safety planning, and court appearances. Importantly, the proposals would still help empower victim employees to maintain their economic self-sufficiency. But the proposals also would encourage employers to take action to protect and make the workplace safer for themselves, their employees, and other third parties.

Moreover, the proposals are geared to help employers rethink their current response to a problem that is causing them significant detriment. The status quo of ignoring the "private" problem of domestic violence or taking actions that have potential negative legal and practical implications (like firing an employee that is the target of domestic violence in hopes of maintaining a safe workplace) cannot continue. This Article challenges employers to consider a smarter course of action given the impact domestic violence has on them and their employees, and encourages the federal government to change—or at least supplement—the existing, inadequate legal tools available to employees and employers to address this problem.

In this regard, these proposals are not about providing a favor to a female employee by stepping into her personal situation. They are about creating a better way for businesses and society to address the problem domestic violence causes in the workplace. In sum, the proposals would transform the current individual-focused response into a legislative vehicle that recognizes and respects the roles and responsibilities of a variety of stakeholders. In so doing, the proposals—and therefore the national conversation on this issue—acknowledge that domestic violence is a societal problem to which the federal government must respond in a way that supports the needs of both employees and employers to be a part of the solution. It is time for society to comprehensively address the effects of domestic violence.²⁷⁸

passing laws that protect victims of domestic violence from losing their jobs has an impact beyond the specific substantive protections they provide.”).

²⁷⁸ After observing that Illinois's VESSA “seems to be a step in the right direction,” Nicole Buonocore Porter concluded her 2006 article by noting, “As to whether [a comprehensive domestic violence] statute should be enacted on a federal level, that question is left for another day.” Porter, *supra* note 6, at 330. My argument in this Article is that the answer to that question is “yes,” and the time to answer it is now.