

# THE DOMESTIC VIOLENCE LEAVE ACT: THE NEED FOR VICTIM WORKPLACE LEAVE ON A FEDERAL LEVEL AND IN NORTH DAKOTA

## ABSTRACT

Domestic violence is a growing problem in the United States, and imposing a federal law would be a start in reducing the negative repercussions survivors face. Many states already have laws that provide some type of time off from the workplace; while this is a step in the right direction, a federal law would guarantee higher safeguards for these individuals. The Domestic Violence Leave Act is one such law that would guarantee additional help for survivors and offer them the protection they need to preserve their employment. The Domestic Violence Leave Act would also be a great help to citizens of North Dakota because there is very little protection currently available to its citizens. Although the Domestic Violence Leave Act did not become law when proposed in a previous session of Congress, North Dakota could benefit by imposing state leave laws that are more accommodating to domestic violence victims.

I.	INTRODUCTION .....	169
II.	BACKGROUND OF DOMESTIC VIOLENCE LEAVE PROTECTIONS .....	170
A.	APPLICABLE FEDERAL LAWS.....	170
	1. <i>Family and Medical Leave Act</i> .....	171
	2. <i>Violence Against Women Act</i> .....	174
	3. <i>Americans with Disabilities Act</i> .....	175
	4. <i>Title VII of the Civil Rights Act</i> .....	176
	5. <i>Other Federal Legislation</i> .....	177
B.	INDIVIDUAL STATE LEGISLATION.....	178
	1. <i>Time Off to Obtain Domestic Violence-Related Services</i> .....	179
	2. <i>Time Off to Attend Criminal Proceedings</i> .....	181
	3. <i>Time Off to Acquire a Restraining Order</i> .....	182
	4. <i>Unemployment Insurance Benefits</i> .....	183
	5. <i>Additional Proposed State Legislation</i> .....	184
III.	THE DOMESTIC VIOLENCE LEAVE ACT.....	185
A.	DEFINITIONS AND APPLICABILITY TO INDIVIDUALS.....	185
B.	OTHER REGULATIONS AND REQUIREMENTS .....	187
IV.	DVLA IMPLICATIONS AND APPLICATION.....	188
A.	FEDERAL IMPLICATIONS .....	189
B.	STATE IMPLICATIONS.....	189
	1. <i>North Dakota Implications Specifically</i> .....	190
	2. <i>Changes Needed in North Dakota</i> .....	191
V.	CONCLUSION.....	193

## I. INTRODUCTION

Domestic violence, as the name suggests, is connected with the home, but it has recently become an increasingly prevalent issue in the workplace.<sup>1</sup> Domestic violence is defined as “the willful intimidation, physical assault, battery, sexual assault, and/or other abusive behavior perpetrated by an intimate partner against another.”<sup>2</sup> Domestic violence is a growing problem in the United States in general, and an estimated 1.3 million women are victims of physical assault by an intimate partner each year.<sup>3</sup>

Domestic violence is a pandemic, touching individuals in every community, regardless of age, economic status, race, religion, nationality, or educational background.<sup>4</sup> As a whole, victims of domestic violence lose approximately eight million days of paid work per year because of the violence committed against them by current or former husbands, boyfriends, and dates.<sup>5</sup> This loss is the equivalent of more than 32,000 full-time jobs and almost 5.6 million days of household productivity.<sup>6</sup> These staggering numbers are an indication of the leave needed for domestic violence victims so they no longer have to suffer economic losses from missed work.<sup>7</sup>

The purpose of this note is to address the current federal and state laws that provide protection to victims of domestic violence. First, relevant federal laws will be analyzed for victim protection.<sup>8</sup> If applied correctly, federal laws can provide protection in some areas to help the victims, but these laws alone are not always enough.<sup>9</sup> Next, state legislation will be discussed for an overview of how individual states provide protection.<sup>10</sup> States have different regulations regarding leave and differ in how they

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1. JULIE GOLDSCHIED & ROBIN RUNGE, AM. BAR ASS’N COMM’N ON DOMESTIC VIOLENCE, EMPLOYMENT LAW AND DOMESTIC VIOLENCE: A PRACTITIONER’S GUIDE 2 (2009), *available at* [http://new.abanet.org/domesticviolence/PublicDocuments/ABA\\_CDV\\_Employ.pdf](http://new.abanet.org/domesticviolence/PublicDocuments/ABA_CDV_Employ.pdf).

2. NAT’L COAL. AGAINST DOMESTIC VIOLENCE, DOMESTIC VIOLENCE FACTS 1 (2007), *available at* [http://www.ncadv.org/files/DomesticViolenceFactSheet\(National\).pdf](http://www.ncadv.org/files/DomesticViolenceFactSheet(National).pdf).

3. NAT’L CTR. FOR INJURY PREVENTION & CONTROL, CTRS. FOR DISEASE CONTROL & PREVENTION, COSTS OF INTIMATE PARTNER VIOLENCE AGAINST WOMEN IN THE UNITED STATES 14 (2003), *available at* <http://www.cdc.gov/violenceprevention/pdf/IPVBook-a.pdf> [hereinafter INTIMATE PARTNER VIOLENCE].

4. *Id.* at 3.

5. *Id.* at 1.

6. *Id.*

7. *Id.*

8. *See* discussion *infra* Part II.A (examining federal laws applicable to domestic violence victims).

9. *See* discussion *infra* Part II.A.

10. *See* discussion *infra* Part II.B (reviewing state laws applicable to domestic violence victims).

execute protection, so individual state laws will be addressed to see which provide the most protection for victims.<sup>11</sup> This note will then address the relevant parts of the Domestic Violence Leave Act (DVLA) and regulations and requirements that must be followed.<sup>12</sup> Lastly, the federal and state implications arising from the passage of a federal law such as the DVLA will be discussed.<sup>13</sup> The last section will also analyze the changes North Dakota should make to address instances of domestic violence and increase safeguards for victims.<sup>14</sup>

## II. BACKGROUND OF DOMESTIC VIOLENCE LEAVE PROTECTIONS

Currently, limited federal laws provide domestic violence leave protection for victims, but some of these laws can provide partial protection if applied correctly.<sup>15</sup> More prevalent is individual states enacting their own legislation to protect victims of domestic violence on many different levels.<sup>16</sup> Examining the federal and state laws illustrates the protections already available for victims and also shows how protections would be increased if federal laws mirrored state regulations.<sup>17</sup> Part A of this section discusses the federal laws that can provide leave for domestic violence victims and Part B describes the state laws that have been implemented.

### A. APPLICABLE FEDERAL LAWS

This section discusses four federal laws that have limited applicability to domestic violence victims and can potentially provide protection to victims. The Family and Medical Leave Act (FMLA) is the most applicable federal law as the FMLA is where the DVLA wording and definitions would be incorporated if passed on a federal level.<sup>18</sup> Additionally, the Violence Against Women Act (VAWA) is influential regarding the rights of domestic violence victims because it recognizes domestic violence as a national crime and that federal laws can help overburden state and local

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11. See discussion *infra* Part II.B.

12. See discussion *infra* Part III (providing important information and regulations pertaining to the DVLA).

13. See discussion *infra* Part IV (discussing how the DVLA would apply and benefit victims).

14. See discussion *infra* Part IV.B.2 (analyzing the changes needed in North Dakota).

15. See discussion *infra* Part II.A (examining applicable federal laws).

16. See discussion *infra* Part II.B (providing examples of individual state laws).

17. See discussion *infra* Parts II.A-B (examining current state laws and how they could change with the implementation of the DVLA).

18. See discussion *infra* Part II.A.1 (applying the FMLA to domestic violence victims).

criminal justice systems.<sup>19</sup> Over the years, the VAWA has been given new authority and continues to expand the rights provided under the Act.<sup>20</sup>

The Americans with Disabilities Act (ADA) also can provide safeguards for victims when they are suffering traumatic side effects of the abuse.<sup>21</sup> Victims often suffer illnesses such as post-traumatic stress disorder (PTSD) and anxiety, which may constitute a disability.<sup>22</sup> Disabilities are hard to establish, however, making the ADA narrowly applicable.<sup>23</sup> Finally, Title VII of the Civil Rights Act can apply in some situations, as well.<sup>24</sup> Title VII provides that discrimination cannot be based on gender, race, religion, or similar classifications, and because a majority of domestic violence victims are women, they cannot be discriminated against under this federal law.<sup>25</sup>

### 1. *Family and Medical Leave Act*

The FMLA of 1993 provides an eligible employee up to twelve weeks of paid and/or unpaid, job-protected leave during a twelve-month period if the employee qualifies for the leave.<sup>26</sup> The reasons for taking leave include: incapacity due to pregnancy, prenatal medical care, or childbirth; caring for the employee's child after birth or adoption; caring for the employee's spouse, minor child, or parent who has a serious health condition; or a serious health condition that makes the employee unable to perform his or her job.<sup>27</sup> The purpose of the FMLA is to create equality between the demands of the workplace and the needs of the family and to improve stability and economic security within the family.<sup>28</sup> The Act was also implemented to help employees find a balance between their work and family by allowing them to take unpaid leave for the reasons stated above.<sup>29</sup>

The goal of the FMLA was to provide stability and security in a way that considers the interests of an employer, while observing the Equal Protection Clause of the Fourteenth Amendment.<sup>30</sup> Following the Equal

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19. See discussion *infra* Part II.A.2 (utilizing the VAWA for domestic violence victims).

20. See discussion *infra* Part II.A.2.

21. See discussion *infra* Part II.A.3 (employing the ADA for domestic violence victims).

22. See discussion *infra* Part II.A.3.

23. See discussion *infra* Part II.A.3.

24. See discussion *infra* Part II.A.4 (applying Title VII to domestic violence victims).

25. See discussion *infra* Part II.A.4.

26. 29 C.F.R. § 825.100(a) (1994).

27. DEP'T OF PERS., FAMILY AND MEDICAL LEAVE ACT (FMLA) OVERVIEW 5 (2011), available at <http://dop.nv.gov/FMLAOverview.pdf>.

28. 29 C.F.R. § 825.101(a).

29. *Id.*

30. *Id.*

Protection Clause minimizes employment discrimination on the basis of sex and instead promotes equal employment opportunities for men and women.<sup>31</sup> The FMLA was founded in response to the fundamental concerns regarding the needs of the American workforce and the development of powerful organizations.<sup>32</sup> When employees have family emergencies and need to take care of seriously-ill children, parents, newborns, or adopted infants, or are sick themselves, they need the guarantee they will not have to choose between continuing their employment and their obligations at home.<sup>33</sup>

Currently, the FMLA can apply to domestic violence victims, but on a much smaller scale than the DVLA.<sup>34</sup> The FMLA is the only federal law that allows employees to take job-guaranteed leave from work, but it does not expressly mention domestic violence.<sup>35</sup> The FMLA provides up to twelve weeks of job-protected, unpaid leave to employees who are suffering from a serious health condition and work for employers with fifty or more employees.<sup>36</sup> Many times, a victim of domestic violence has sustained physical as well as mental injuries as a result of domestic violence, and the injuries may satisfy the definition of “serious health condition” under the FMLA.<sup>37</sup>

The term “serious health condition” is broad and covers treatment for a variety of illnesses.<sup>38</sup> For purposes of the FMLA, a “serious health condition” qualifying an employee to take leave under the Act includes “an illness, injury, impairment, or physical or mental condition” needing inpatient care or continuing treatment by a health care provider.<sup>39</sup> In North Dakota, the State Employee Leave Policies expand the definition of “serious health condition” under the FMLA.<sup>40</sup> “Serious health condition” under the North Dakota Century Code includes a “physical or mental illness, injury, impairment, or condition” needing inpatient care at a licensed hospital, a long-term facility, or a hospice program, or outpatient care requiring continued treatment by a health care provider.<sup>41</sup> Even though

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31. *Id.*

32. *Id.* § 825.101(b).

33. *Id.*

34. *See id.* § 825.100 (discussing an “eligible” employee).

35. GOLDSCHIED & RUNGE, *supra* note 1, at 8.

36. 29 C.F.R. § 825.100.

37. ANYA LAKNER & PATRICIA A. SHIU, DOMESTIC VIOLENCE AND EMPLOYMENT: A SURVEY OF EMPLOYMENT RIGHTS IN THE WORKPLACE 17 (2006).

38. *See* 29 C.F.R. § 825.114.

39. *Id.*

40. N.D. CENT. CODE § 54-52.4-01(8) (2008).

41. *Id.*

the FMLA defines “serious health condition” broadly, it may be hard to prove the condition, which is evidenced by the limited case law allowing leave under the FMLA for domestic violence victims.<sup>42</sup>

As noted, there are very few jurisdictions applying the FMLA to domestic violence cases involving serious health conditions, but *Municipality of Anchorage v. Gregg*<sup>43</sup> is one example of applying the FMLA to a domestic violence victim.<sup>44</sup> In the case, Theresa Gregg, a police officer, was involved in a car accident; as a consequence of the accident and domestic violence in the home, she suffered from severe emotional distress.<sup>45</sup> The Municipality of Anchorage argued Gregg should not receive protection under the FMLA for domestic violence because Gregg’s work releases related only to car accident injuries and pregnancy issues and did not address her psychological stress from domestic violence.<sup>46</sup>

The Alaska Supreme Court, however, did not agree with Anchorage’s reasoning.<sup>47</sup> The court determined Gregg satisfied the factors of a “serious health condition” because of the combined effect of her pregnancy, her car accident injuries, and her severe emotional stress due to domestic violence and, therefore, she qualified for FMLA leave.<sup>48</sup> *Gregg* consequently held a domestic violence victim, who suffers from other injuries and takes leave under the FMLA for a serious health condition, is entitled to the FMLA’s protection.<sup>49</sup> The application of the FMLA in *Gregg* is one of the few ways the Act can help domestic violence victims.<sup>50</sup> Although other jurisdictions apply the FMLA in similar ways, application is not uniform and could be remedied by the implementation of federal regulation.<sup>51</sup>

Because there is very little case law addressing how states have implemented the FMLA to protect the employment rights of domestic violence victims, it is difficult to see the extent of help the FMLA can provide on its own without the expanded wording of the DVLA.<sup>52</sup> As seen from the case law in some jurisdictions, the FMLA is very broad and can provide an

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42. See *Municipality of Anchorage v. Gregg*, 101 P.3d 181, 184 (Alaska 2004).

43. 101 P.3d 181 (Alaska 2004).

44. *Gregg*, 101 P.3d at 187.

45. *Id.* at 184.

46. *Id.* at 186.

47. *Id.* at 190.

48. *Id.*

49. *Id.* at 187.

50. *See id.*

51. See discussion *infra* Part II.B (analyzing differing state applications of domestic violence laws).

52. LAKNER & SHIU, *supra* note 37, at 22.

alternative avenue for survivors of domestic violence to take the leave they need.<sup>53</sup> The FMLA implicitly points to the protections given to domestic violence victims, but because the regulations are not clearly stated as to the application in a domestic violence setting,<sup>54</sup> not all states have applied the FMLA to domestic violence victims. The DVLA would clearly explain how the FMLA should be applied to victims of domestic violence and would guarantee all victims receive the same protection, regardless of the jurisdiction in which they live.<sup>55</sup>

## 2. *Violence Against Women Act*

The VAWA is the second federal law to provide protection to domestic violence victims.<sup>56</sup> In 1994, Congress acknowledged the severity of the crimes related to domestic violence and subsequently passed the VAWA as part of the Violent Crime Control and Law Enforcement Act of 1994.<sup>57</sup> The VAWA consists of widespread legislation intended to end violence against women and has been expanded in 2000 and 2005.<sup>58</sup> The legislative history of the VAWA points to Congress making an effort to rectify past laws and social norms that validated violence against women.<sup>59</sup>

The 1994 and 1996 additions to the VAWA “recognize[d] that domestic violence is a national crime and that federal laws can help an overburdened state and local criminal justice system.”<sup>60</sup> The 1994 VAWA addition also provided federal domestic violence victims with the right to be treated with fairness.<sup>61</sup> The VAWA of 2000 and the Violence Against Women and Department of Justice Reauthorization Act of 2005 reauthorized the programs created by the original VAWA and additional legislation and also implemented new programs.<sup>62</sup> The 2000 reauthorization of the VAWA reinforced the original law by increasing the protections given to sexual assault survivors and victims of dating violence, as well as allowing domestic violence victims the right to obtain custody

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53. *See, e.g., Gregg*, 101 P.3d at 187 (applying FMLA protections to a domestic violence victim).

54. *See* 29 C.F.R. § 825.100-.101 (1994).

55. *See* Domestic Violence Leave Act, H.R. 2515, 111th Cong. (2009).

56. 42 U.S.C. § 13925 (2006).

57. U.S. DEP’T OF JUSTICE OFFICE ON VIOLENCE AGAINST WOMEN, WORKING TOGETHER TO END THE VIOLENCE, *available at* <http://www.ovw.usdoj.gov/docs/vawa.pdf> [hereinafter VIOLENCE AGAINST WOMEN].

58. *Id.*

59. *Id.*

60. U.S. ATTORNEY’S OFFICE, FEDERAL DOMESTIC VIOLENCE LAWS, *available at* <http://www.justice.gov/usao/nd/victimwitness/brochures/domesticviolencelaws.html>.

61. *Id.*

62. VIOLENCE AGAINST WOMEN, *supra* note 57.



orders in a different state if there is potential for danger upon their return.<sup>63</sup> The 2005 reauthorization focused on providing increased access to services for underserved populations and implemented new programs such as the Court Training and Improvements, Child Witness, and Culturally Specific programs.<sup>64</sup>

The language of the VAWA and each new reauthorization indicates how the Act is sympathetic to female victims of domestic violence and how the Act provides protections in many different areas.<sup>65</sup> Although the Act can apply on a federal level to protect victims of domestic violence in the workplace, the VAWA is very broad and would need to be interpreted to include victims of domestic violence.<sup>66</sup> Because the Act does not define or specifically name any standards of fairness, passing a law specifically stating the type of leave to which domestic violence victims are entitled would ensure all individuals are afforded leave in the workplace without fear of repercussions.<sup>67</sup>

### 3. *Americans with Disabilities Act*

The ADA is another federal law applicable to victims of domestic violence.<sup>68</sup> Victims of domestic violence often develop hidden disabilities that can severely affect job performance and that must be addressed in order to help individuals stay employed.<sup>69</sup> Types of disabilities can include PTSD, anxiety disorders, depression, and other mental disabilities that make it difficult for victims to continue working.<sup>70</sup> The ADA has very limited application to domestic violence victims because it only applies to individuals that have been found to have a disability as a result of the violence they experienced, a determination usually made by a doctor.<sup>71</sup>

The definition of disability makes it complicated for individuals to establish they actually have a disability, which makes it difficult for them to find relief under the ADA.<sup>72</sup> The ADA defines “disability” with respect to an individual as a physical or mental impairment substantially limiting any

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63. *Id.*

64. *Id.*; see also Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960 (2006).

65. See VIOLENCE AGAINST WOMEN, *supra* note 57.

66. *See id.*

67. *Id.*

68. See 42 U.S.C. § 12101 (Supp. 2009).

69. LAKNER & SHIU, *supra* note 37, at 13.

70. *Id.*

71. *See id.* at 14.

72. *See id.*; see also 42 U.S.C. § 12102(1).

major life activity of the individual.<sup>73</sup> “Disability” may also be having a record of an impairment or being regarded as having an impairment.<sup>74</sup> The definition further explains what qualifies as a major life activity and when a person is regarded as having the impairment.<sup>75</sup> North Dakota has adopted the ADA definition of disability almost verbatim.<sup>76</sup> Because North Dakota also implements the federal ADA, if the victims of domestic violence can prove the heightened requirements needed to qualify for having a disability, they may find some relief under the ADA on a state or federal level.<sup>77</sup>

#### 4. *Title VII of the Civil Rights Act*

The last federal law that can apply to domestic violence victims is Title VII of the Civil Rights Act of 1964.<sup>78</sup> Title VII prohibits discrimination against individuals in the workplace based on traits such as race, color, religion, sex, or national origin.<sup>79</sup> The Act is applicable to domestic violence victims because eighty-five percent of domestic violence victims are women.<sup>80</sup> Because more women than men are victims of domestic violence, discrimination against women could occur if survivors are fired from jobs due to leave needed to deal with the resulting issues of violence.<sup>81</sup>

Title VII gives some protection with regard to domestic violence leave, but only in the sense that discriminatory practices cannot be used against victims.<sup>82</sup> The Title, therefore, has limited application for domestic violence victims, unless the victim can show a pattern in the workplace that continually disadvantages female victims of domestic violence.<sup>83</sup> Because many cases of domestic violence go unreported or do not become severe enough to miss noticeable time from work, Title VII discrimination claims are very hard to prove in domestic violence situations.<sup>84</sup>

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73. 42 U.S.C. § 12102(1).

74. *Id.*

75. *Id.* § 12102(2)-(3).

76. N.D. CENT. CODE § 14-02.4-02(5) (2009).

77. *See, e.g., id.* § 14-02.4-20.

78. *See* 42 U.S.C. § 2000e-2(a) (2006).

79. *Id.*

80. CALLIE MARIE RENNISON, U.S. DEP'T OF JUSTICE, INTIMATE PARTNER VIOLENCE 1993-2001 1 (2003), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/ipv01.pdf>.

81. *See id.*

82. *See* 42 U.S.C. § 2000e-2 (determining employers cannot discriminate based on sex).

83. *See id.* § 2000e-2(k) (stating the complaining party must prove an employment practice causing disparate impact).

84. *See generally id.* (defining the requirements needed for a Title VII claim).

### 5. *Other Federal Legislation*

Federal legislation similar to the DVLA has been proposed in the past, but it has either failed to pass or is still pending.<sup>85</sup> Introduced in 2007, the Security and Financial Empowerment (SAFE) Act is one example that would provide victims of domestic violence up to thirty days of emergency unpaid leave.<sup>86</sup> The emergency leave could be used for obtaining protection orders, finding safe housing, or seeking medical care, legal advice, or counseling assistance.<sup>87</sup> Under the SAFE Act, victims would also be eligible for unemployment insurance if they had to leave the workplace due to domestic violence.<sup>88</sup> The most recent version of the SAFE Act was last referred to the House Committee on Education and Labor in 2009, but it failed to become law during the applicable session of Congress.<sup>89</sup> Similar bills to the SAFE Act have been introduced in the past but have also failed.<sup>90</sup>

Also introduced in 2007, the Job Protection for Survivors Act is another example of legislation that would address employment issues faced by domestic, dating, and sexual violence and stalking.<sup>91</sup> The Act would protect employees in many ways if they are victims of violence.<sup>92</sup> For example, employees would be allowed leave to attend any proceeding related to the violence, and they could request job modifications to protect their safety in the event the workplace was threatened by the abuser.<sup>93</sup> Like the DVLA, the Job Protection and Survivors Act would be helpful in providing leave to victims of domestic violence.<sup>94</sup> The bill for the Job Protection and Survivors Act was last referred to the House Subcommittee on Health, Employment, Labor, and Pensions in 2008 and did not become law during the proposed congressional session.<sup>95</sup>

Even though there are federal laws that can provide some protection to domestic violence victims, the inconsistency with which courts apply the

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85. See LEGAL MOMENTUM, STATE LAW GUIDE: EMPLOYMENT RIGHTS FOR VICTIMS OF DOMESTIC OR SEXUAL VIOLENCE 10-11 (2010), available at <http://www.legalmomentum.org/assets/pdfs/employment-rights.pdf> [hereinafter EMPLOYMENT RIGHTS].

86. *Id.*; see also H.R. 739, 111th Cong. (2009).

87. EMPLOYMENT RIGHTS, *supra* note 85, at 10.

88. *Id.*

89. See *Bill Summary & Status 111th Congress (2009-2010) H.R. 739*, LIBR. OF CONGRESS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:h.r.00739>; (last visited Aug. 17, 2011).

90. EMPLOYMENT RIGHTS, *supra* note 85, at 10-11.

91. *Id.* at 9-10.

92. *Id.* at 10.

93. *Id.*

94. *Id.*

95. *Id.*; see also *Bill Summary & Status 110th Congress (2007-2008) H.R. 4015*, LIBR. OF CONGRESS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:h.r.04015>; (last visited Aug. 17, 2011).

laws makes it clear the federal laws alone are not enough.<sup>96</sup> The continuous push for additional federal legislation implies individuals recognize the need for further safeguards on a federal level.<sup>97</sup> Because heightened federal regulations have not yet been passed, individual states have recognized the need to protect domestic violence victims in the workplace and have passed their own state laws to implement greater protections.<sup>98</sup>

#### B. INDIVIDUAL STATE LEGISLATION

Some states have already passed their own legislation to provide leave or other safeguards to victims of domestic violence.<sup>99</sup> These states have implemented their own requirements and guidelines and generally include their own definition of domestic violence to determine who is eligible for leave.<sup>100</sup> For example, California has interpreted domestic violence to mean abuse against an adult or a minor committed by a spouse, former spouse, current or former cohabitant, a person the victim has a child with or is expecting a child, or has had a dating relationship.<sup>101</sup> Also defined is the meaning of a cohabitant and the factors to weigh in determining if cohabitation has occurred for purposes of the statute.<sup>102</sup> Washington's definition includes a list of crimes constituting domestic violence when the crimes are committed by a family member against another member.<sup>103</sup> The list is not exhaustive, but includes crimes such as assault, reckless endangerment, coercion, burglary, criminal trespass, malicious mischief, kidnapping, unlawful imprisonment, rape, stalking, and violation of a restraining order.<sup>104</sup>

States have chosen many different ways to afford higher protections to residents who have suffered the effects of domestic violence.<sup>105</sup> Some states have created domestic violence awareness and employee assistance policies while others have chosen to focus on the benefits and leave by providing unemployment benefits, paid and unpaid leave, and even paid sick leave options to victims.<sup>106</sup> The states offering paid and unpaid leave are implementing systems that are similar to what the DVLA would

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96. See discussion *supra* Parts II.A.1-4 (analyzing applicable federal laws).

97. See discussion *supra* Part II.A.5 (analyzing proposed federal laws).

98. See discussion *infra* Part II.B (providing examples of individual state laws).

99. See discussion *infra* Part II.B.

100. See discussion *infra* Part II.B.

101. CAL. PENAL CODE § 13700 (Deering 2008).

102. *Id.*

103. WASH. REV. CODE ANN. § 10.99.020(5) (LexisNexis 2007).

104. *Id.*

105. See EMPLOYMENT RIGHTS, *supra* note 85, at 1-10 (listing state domestic violence laws).

106. *Id.*

provide.<sup>107</sup> The states that have chosen to provide fewer protections have at least recognized the need for protection of domestic violence victims in the workplace,<sup>108</sup> which is a step in the right direction. This section discusses the different ways in which states have chosen to address and implement domestic violence protection for victims.

### 1. *Time Off to Obtain Domestic Violence-Related Services*

Some states currently provide domestic violence victims time off from work to attain services similar to services provided in the DVLA, making these laws important in understanding the potential effect of the DVLA.<sup>109</sup> Each state statute sets its own requirements for how much time off can be taken and the size of the company that must provide these rights.<sup>110</sup> California's law provides that employers with twenty-five or more employees cannot discriminate or discharge any employee who is a victim of domestic violence and takes time off to obtain medical attention for injuries occurring from the violence, to obtain services from a domestic violence program, to obtain psychological counseling, or to gain safety from future attacks of domestic violence.<sup>111</sup> The employee must give advance notice of the absence, but in the case of an unscheduled absence, the employee can provide documentation to the employer.<sup>112</sup> If provided, such documentation precludes any adverse actions against the employee.<sup>113</sup> The employee, however, cannot take more than the unpaid leave allowed under the FMLA; that is, the employee may only take twelve weeks of leave.<sup>114</sup> California's regulation employs some of the leave standards provided under the FMLA and is a good example of how the FMLA, with the additional language of the DVLA, can be directly applied to domestic violence victims.<sup>115</sup>

Illinois has similar statutory regulations to those of California.<sup>116</sup> Twelve weeks of leave, as provided by the FMLA, are guaranteed to employees working at facilities with fifty or more employees.<sup>117</sup> Only eight

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107. See Domestic Violence Leave Act, H.R. 2515, 111th Cong. (2009).

108. See EMPLOYMENT RIGHTS, *supra* note 85, at 1-10.

109. See CAL. LAB. CODE § 230.1 (Deering 2006); COLO. REV. STAT. § 24-34-402.7 (2010); 820 ILL. COMP. STAT. ANN. 180/1-180/45 (West Supp. 2011); H.R. 2515.

110. LAKNER & SHIU, *supra* note 37, at 7.

111. CAL. LAB. CODE § 230.1.

112. *Id.*

113. *Id.*

114. *Id.*; see also 29 U.S.C. § 2612 (2006).

115. See CAL. LAB. CODE § 230.1; see also 29 U.S.C. § 2601.

116. See 820 ILL. COMP. STAT. ANN. 180/1-180/45 (West Supp. 2011).

117. *Id.* 180/20.

weeks of leave are allowed to employees working for employers with fifteen to forty-nine employees.<sup>118</sup> An employee who is the victim of domestic violence, or has a family member who is a victim, may take unpaid leave to seek medical attention or recover from injuries resulting from the violence, to obtain services from a victim services organization, to obtain counseling, to participate in any safety actions, or to seek legal assistance.<sup>119</sup> Again, Illinois's legislation expands the FMLA to include workplace leave protection for domestic violence victims.<sup>120</sup>

Colorado, on the other hand, has fewer protections for domestic violence victims.<sup>121</sup> The state's statute allows leave only for employers with more than fifty employees and for employees holding employment for twelve months or more.<sup>122</sup> The employee is only allowed three days of leave in a twelve-month period, and the leave can only be used to obtain protection in specific ways.<sup>123</sup> The types of protection allowed include seeking protection orders, obtaining medical care or mental health counseling, securing housing, or obtaining legal assistance.<sup>124</sup> Even though Colorado has less leave available to domestic violence victims, the state at least provides some protection as opposed to none at all.<sup>125</sup>

As seen from the examples discussed, states have the power to determine the leave given to employees who are victims of domestic violence and can impose any regulations on the leave as they see fit.<sup>126</sup> Other states, including Florida, Hawaii, Maine, New York, and many more, have implemented their own laws that provide leave to obtain domestic violence-related services.<sup>127</sup> Laws providing leave for domestic violence-related services may be seen as the most far-reaching and beneficial.<sup>128</sup> Victims can suffer in many different ways, and they may need to obtain help and services from many different sources over a long period of time.<sup>129</sup> Job security for overwhelmed victims helps to reduce unnecessary stress in

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118. *Id.*

119. *Id.*

120. *Id.*; *see also* 29 U.S.C. § 2612.

121. *See* COLO. REV. STAT. § 24-34-402.7 (2010).

122. *Id.*

123. *Id.*

124. *Id.*

125. *See id.*

126. *See id.*; *see also* CAL. LAB. CODE § 230.1 (Deering 2006); 820 ILL. COMP. STAT. ANN. 180/1-180/45 (West Supp. 2011).

127. *See* FLA. STAT. § 741.313 (2010); HAW. REV. STAT. § 378-72 (Supp. 2010); ME. REV. STAT. ANN. tit. 26, § 850 (2007); N.Y. PENAL LAW § 215.14 (Consol. 2000); *see also* EMPLOYMENT RIGHTS, *supra* note 85, at 2-5.

128. EMPLOYMENT RIGHTS, *supra* note 85, at 1.

129. *Id.*

difficult times.<sup>130</sup> Many states have not given the broad protections like the states mentioned above, but instead have chosen to give limited protection in various other ways.<sup>131</sup>

## 2. *Time Off to Attend Criminal Proceedings*

Many states have implemented laws allowing victimized employees leave to attend court under certain circumstances.<sup>132</sup> The laws also prohibit employers from punishing these victims for needing time off.<sup>133</sup> While states are taking a step in the right direction, laws providing leave to attend court may not protect all victims because many of the statutes only apply to legal proceedings.<sup>134</sup> Although leave to attend legal proceedings may be beneficial to some victims, not all victims will take legal action and instead may need leave for other issues.<sup>135</sup>

Currently, North Dakota only provides leave to attend legal proceedings and punishes employers who do not provide the leave.<sup>136</sup> In North Dakota, it is a misdemeanor for employers to punish employees for serving as a witness, and a civil remedy is available for employees who are eventually terminated for serving as a witness.<sup>137</sup> North Dakota Century Code section 27-09.1-17 protects victims of domestic violence who need to serve as a witness in a court proceeding, but the statute does not provide time off from work to receive any domestic violence-related services.<sup>138</sup> A majority of the states providing protection under crime victim statutes fail to address the other aspects and areas for which domestic violence victims may need protection.<sup>139</sup>

Many states have non-mandatory laws that encourage employers not to take unfavorable measures against victim employees who miss work to testify in a court proceeding.<sup>140</sup> Because the laws allowing time off to

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130. *Id.*

131. See discussion *infra* Parts II.B.2-5 (analyzing other state laws regarding domestic violence protections).

132. EMPLOYMENT RIGHTS, *supra* note 85, at 7.

133. *Id.*

134. See *id.*

135. See *id.*

136. N.D. CENT. CODE § 27-09.1-17 (2006).

137. *Id.*

138. *Id.*

139. See LEGAL MOMENTUM, STATE LAWS CAN HELP SURVIVORS AT WORK: TIME OFF FROM WORK FOR VICTIMS OF DOMESTIC OR SEXUAL VIOLENCE 3-6 (2004), available at <http://action.legalmomentum.org/site/DocServer/leave.pdf?docID=433> (listing the states providing limited protections).

140. See COLO. REV. STAT. § 24-4.1-302.5 (2010); FLA. STAT. § 960.001(1)(i) (2010); 725 ILL. COMP. STAT. ANN. 120/5(a)(2) (West 2008); KY. REV. STAT. ANN. § 421.500(8) (West Supp. 2010); LA. REV. STAT. ANN. § 46:1844(E) (Supp. 2011); NEB. REV. STAT. § 81-1848(2)(h)

testify in court proceedings are suggestive as opposed to mandatory, the states still have the power to deal with victim leave situations as they see fit.<sup>141</sup> North Dakota is one such state allowing victims to request employer intercession services from the prosecuting attorney.<sup>142</sup> Employer intercession services guarantee employers will adhere to the criminal justice process and minimize the victim's loss of pay and benefits due to court appearances.<sup>143</sup> Approximately eleven states currently have pending legislation that would provide individuals some type of crime victim employment leave.<sup>144</sup>

### 3. *Time Off to Acquire a Restraining Order*

A few states have included provisions in their relevant domestic violence statutes that provide time off to obtain restraining orders.<sup>145</sup> Restraining orders can be important in protecting domestic violence victims from future harm, and occasionally time off from work must be taken to obtain protection orders.<sup>146</sup> Some examples of states allowing time off to obtain court orders include California, which provides leave to domestic violence victims to obtain a restraining order;<sup>147</sup> Colorado, which permits a victim to take time off work to obtain a civil protection order;<sup>148</sup> and Hawaii, which allows victims time off from work to pursue actions that will further their physical safety.<sup>149</sup>

With the protection restraining orders can provide, the need for leave in order to obtain the order could be very beneficial on the federal level.<sup>150</sup> In 2009, North Dakota domestic violence programs provided 753 emergency

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(2008); NEV. REV. STAT. ANN. § 178.5694(1) (LexisNexis 2011); N.J. STAT. ANN. § 52:4B-44(b)(13) (West 2009); N.M. STAT. ANN. § 31-26-4(J) (West 2003); N.C. GEN. STAT. § 15A-825(4) (2009); N.D. CENT. CODE § 12.1-34-02(7) (Supp. 2011); OKLA. STAT. tit. 21, § 142A-2 (Supp. 2010); R.I. GEN. LAWS § 12-28-3(a)(7) (2002); TEX. CODE CRIM. PROC. ANN. art. 56.02(a)(10) (West Supp. 2010); UTAH CODE ANN. § 77-37-3(1)(g) (LexisNexis 2008); VA. CODE ANN. § 19.2-11.01(A)(3)(a) (2008); WASH. REV. CODE ANN. § 7.69.030(8) (LexisNexis 2010); W. VA. CODE ANN. § 61-11A-6(a)(8) (LexisNexis 2005); WIS. STAT. ANN. § 950.04(1v)(bm) (West Supp. 2010) (discussing employer intercession service laws for each state).

141. See EMPLOYMENT RIGHTS, *supra* note 85, at 10.

142. N.D. CENT. CODE § 12.1-34-02(7).

143. *Id.*

144. EMPLOYMENT RIGHTS, *supra* note 85, at 17-19.

145. LAKNER & SHIU, *supra* note 37, at 6.

146. See *id.*

147. CAL. LAB. CODE § 230(c) (Deering 2006).

148. COLO. REV. STAT. § 24-34-402.7(1)(a)(I) (2010).

149. HAW. REV. STAT. § 378-72(a)(5) (Supp. 2010).

150. See N.D. COUNCIL ON ABUSED WOMEN'S SERVS., COAL. AGAINST SEXUAL ASSAULT IN N.D., FACTS ABOUT DOMESTIC VIOLENCE IN NORTH DAKOTA (2009), *available at* [http://www.ndcaws.org/facts/domestic\\_violence/domestic\\_violence\\_stats.html](http://www.ndcaws.org/facts/domestic_violence/domestic_violence_stats.html) [hereinafter DOMESTIC VIOLENCE IN NORTH DAKOTA].



protection orders, a sixteen percent increase from 2008.<sup>151</sup> With the number of protection orders on the rise in North Dakota, a law providing time off to obtain protection orders could be very valuable to domestic violence victims in the state.<sup>152</sup>

#### 4. *Unemployment Insurance Benefits*

Some victims of domestic violence need to take leave from work because of the violence and its aftermath, while others are discharged from their jobs because of the violence and negative situations that are a result.<sup>153</sup> Whatever the reason, individuals may find themselves unemployed as a result of domestic violence.<sup>154</sup> Most states base unemployment benefit eligibility on whether the victim leaves work voluntarily for good cause reasons.<sup>155</sup> If the employee leaves voluntarily without a good cause showing, the individual will be ineligible for unemployment benefits.<sup>156</sup>

A majority of states currently have some type of law expressly providing for unemployment insurance benefits for domestic violence victims in certain circumstances.<sup>157</sup> The requirements of each state law differ, but in most cases, the employee must satisfy the eligibility requirements for unemployment insurance before qualifying under domestic violence protections.<sup>158</sup> However, even if a state has not yet passed a law providing unemployment insurance rights for domestic violence victims, victims who leave their jobs or are discharged may still be eligible for benefits under applicable case law or other state provisions.<sup>159</sup>

Misconduct can be grounds for termination that would disqualify an individual from receiving unemployment benefits.<sup>160</sup> A number of states have enacted statutes that exempt specific conduct which occurs as a result of domestic violence from the definition of misconduct.<sup>161</sup> For example, Minnesota applies the misconduct analysis, but does not classify conduct that has resulted from domestic violence against the employee or his or her

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151. *Id.*

152. *See id.*

153. LEGAL MOMENTUM, STATE LAW GUIDE: UNEMPLOYMENT INSURANCE BENEFITS FOR VICTIMS OF DOMESTIC VIOLENCE 1 (2010), *available at* <http://www.legalmomentum.org/assets/pdfs/unemployment-insurance.pdf> [hereinafter UNEMPLOYMENT INSURANCE].

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*; *see also* LAKNER & SHIU, *supra* note 37, at 10.

158. UNEMPLOYMENT INSURANCE, *supra* note 153, at 1.

159. *Id.*

160. *See* LAKNER & SHIU, *supra* note 37, at 11.

161. *Id.*

child as misconduct.<sup>162</sup> Implementation of laws similar to Minnesota's provides much more protection and benefits to victims of domestic violence who must leave or are forced to leave their job.<sup>163</sup>

North Dakota attempted to pass a bill allowing otherwise ineligible individuals to qualify for unemployment benefits if the individuals left their job due to circumstances directly resulting from domestic violence.<sup>164</sup> The victim must have reasonably feared future violence and believed leaving work was necessary for his or her safety.<sup>165</sup> The bill failed to pass, leaving North Dakota with no unemployment protection for victims of domestic violence.<sup>166</sup>

### 5. *Additional Proposed State Legislation*

Many other states have pending legislation or have tried to pass laws in the past that resemble the state laws discussed above.<sup>167</sup> For example, Minnesota introduced a bill that would allow employees to accrue paid sick leave after thirty hours of work, and the sick leave could be used by victims of domestic violence to obtain medical attention for themselves or a family member.<sup>168</sup> The leave could also be used to obtain services from a victim service provider, to obtain counseling, or to seek relocation.<sup>169</sup> The employer would be allowed to request documentation regarding the domestic violence treatment being received, but could not retaliate or discriminate against the employee for requesting or taking the leave.<sup>170</sup> Unfortunately, the bill failed to pass in the House and Senate, and Minnesota has yet to adopt any other legislation that would give domestic violence victims the protection they would have received under the previously proposed law.<sup>171</sup> With an increasing number of states trying to pass laws providing leave protection to domestic violence victims, it is becoming apparent that federal legislation could benefit all of the states.

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162. MINN. STAT. § 268.095(1)(9) (2007 & Supp. 2011).

163. See LAKNER & SHIU, *supra* note 37, at 11.

164. H.R. 1302, 59th Legis. Assemb. (N.D. 2005).

165. *Id.*

166. UNEMPLOYMENT INSURANCE, *supra* note 153, at 10.

167. EMPLOYMENT RIGHTS, *supra* note 85, at 10-19.

168. *Id.* at 13.

169. *Id.*

170. *Id.*

171. *Id.*

### III. THE DOMESTIC VIOLENCE LEAVE ACT

“Many victims and survivors of domestic violence, sexual assault and stalking must leave work in order to protect themselves, their families and their coworkers.”<sup>172</sup> A federal law guaranteeing victims of domestic violence the leave needed to receive help after such a difficult situation could greatly reduce the staggering number of domestic violence cases. The DVLA is one such proposed federal law and would amend the FMLA to allow leave for these individuals.<sup>173</sup> Included in the DVLA are the definitions of domestic violence and other applicable terms needed to understand the language of the Act and to help determine which individuals qualify for the leave.<sup>174</sup> Also addressed is the possibility of paid leave, if such leave has already been accrued by the employee, as well as the notice requirements employees must follow and the confidentiality regulations the employer must follow.<sup>175</sup>

The DVLA is an amendment to the FMLA of 1993 that would allow leave for victims to attend to domestic violence, sexual assault, or stalking and their effects.<sup>176</sup> The Act allows leave for an employee who is unable to perform aspects of his or her job due to the adverse effects of domestic violence, sexual assault, or stalking, but also allows leave in order to care for a family member who is dealing with these issues.<sup>177</sup> Part A of this section will discuss the definitions set forth by the DVLA to determine who is eligible for leave. Part B will then describe the additional requirements needed to obtain leave under the DVLA, and the additional protection afforded under the Act.

#### A. DEFINITIONS AND APPLICABILITY TO INDIVIDUALS

When proposing new laws, definitions of key words must be provided.<sup>178</sup> The definitions are important in helping to determine which individuals are entitled to leave because of domestic violence.<sup>179</sup> The

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172. NAT’L EMP’T LAW PROJECT, UNEMPLOYMENT INSURANCE FOR SURVIVORS OF DOMESTIC VIOLENCE: EXPANDING UI FOR WOMEN, LOW-WAGE & PART-TIME WORKERS 1 (2003), available at [http://nelp.3cdn.net/8ffcd6de3f649a187f\\_b2m6bn78c.pdf](http://nelp.3cdn.net/8ffcd6de3f649a187f_b2m6bn78c.pdf).

173. Domestic Violence Leave Act, H.R. 2515, 111th Cong. (2009).

174. *Id.* § 2; see also discussion *infra* Part III.A (providing applicable definitions and qualification requirements).

175. H.R. 2515 § 2(d)-(e); see also discussion *infra* Part III.B (discussing when paid leave can be used and what employer requirements must be followed).

176. H.R. 2515. The authority for the leave covered under the Act would be added to the end of 29 U.S.C. § 2612(a)(1). *Id.* at 2.

177. *Id.*

178. *Id.*

179. *Id.*

definition section under the FMLA<sup>180</sup> would add the definitions of “domestic violence,” “sexual assault,” “stalking,” and the exact meaning of “domestic violence, sexual assault, or stalking and their effects.”<sup>181</sup>

The terms “domestic violence,” “sexual assault,” and “stalking” have the same meaning in the DVLA as the definitions given in the VAWA of 1994.<sup>182</sup> The DVLA would define “domestic violence” as any felony or misdemeanor crime of violence committed by a victim’s current or former spouse, by a person who shares a child with the victim, by a person who is cohabitating with or has previously lived with the victim as a spouse, by a person who is similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction, or by any person who is protected from the acts under the domestic or family violence laws of the jurisdiction.<sup>183</sup> “Sexual assault” covers any prohibited conduct, including assaults committed by strangers and assaults committed by offenders who are known or related in some way to the victim.<sup>184</sup> “Stalking” consists of behavior intended for a specific person that would cause a reasonable person to fear for his or her safety or the safety of others, or would cause a person to suffer severe emotional distress.<sup>185</sup> With the categories of conduct already defined, “addressing” the conduct must be explained.

The phrase “addressing domestic violence, sexual assault, or stalking and their effects” has many different meanings in the context of the DVLA.<sup>186</sup> “Addressing” can include seeking medical care for injuries, seeking legal assistance or participating in legal proceedings, attending support groups for victims, or receiving psychological counseling, all of which must be attributed to the domestic violence, sexual assault, or stalking activity.<sup>187</sup> Also included in “addressing” domestic violence is participating in safety planning, such as relocation, to prevent future occurrences, as well as partaking in any other activity that is required as a result of the domestic violence, sexual assault, or stalking and that must be taken care of during employee working hours.<sup>188</sup> The addition of domestic violence terms to the FMLA is just a small part of the impact the DVLA will have on domestic violence victims.<sup>189</sup>

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180. 29 U.S.C. § 2611 (2006).

181. H.R. 2515 § 2(b).

182. *Id.*; see also 42 U.S.C. § 13925(a)(6), (23), (24) (2006).

183. 42 U.S.C. § 13925(a)(6).

184. *Id.* § 13925(a)(23).

185. *Id.* § 13925(a)(24).

186. H.R. 2515 § 2(a)(23).

187. *Id.* § 2(a)(23)(A)-(D).

188. *Id.* § 2(a)(23)(E)-(F).

189. *Id.* § 2(a)(23)(E)-(F).

## B. OTHER REGULATIONS AND REQUIREMENTS

The basic premise of the leave provided under the DVLA is consistent with the unpaid leave allowed under the FMLA because the DVLA is merely an amendment to the FMLA.<sup>190</sup> The DVLA also provides paid leave under certain circumstances if the employee would otherwise be eligible for paid leave.<sup>191</sup> If the employee has accrued any paid vacation, personal time, or sick leave, the employee can substitute the accrued time for any of the twelve weeks of leave allowed under the DVLA.<sup>192</sup> Using earned leave or vacation would not only allow domestic violence victims time off from work, it could potentially allow them to receive pay while they are dealing with the many situations that result from domestic violence.<sup>193</sup> When extended periods of leave must be taken or an individual is already financially unstable, any pay can be very beneficial.<sup>194</sup>

As can be expected of any legislation that would impact paid employment, employees and employers must follow rules and regulations in order to ensure the DVLA is properly enforced.<sup>195</sup> An important component of the successful implementation of the DVLA would consist of employees providing notice and certification to their employer.<sup>196</sup> Notice is required if the leave is anticipated for an appointment or planned activity during the aftermath of domestic violence.<sup>197</sup> Because not all leave can be foreseeable, circumstances do exist where the notice requirement is not reasonable or practicable and, therefore, not required.<sup>198</sup>

Because an employer must determine if an employee is eligible for domestic violence leave, the employer may require documentation to verify the reason for the leave and to help determine if the employee qualifies.<sup>199</sup> The certification requirement can be satisfied by a number of documents including documentation of the domestic violence from a medical professional, attorney, shelter worker, or other individual from whom support was sought; statements from individuals who can corroborate the circumstances upon which the claim was based; physical evidence of the domestic violence, such as pictures or torn or bloody clothing; or a written statement

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190. *Id.* § 2(c).

191. *Id.* § 2(d).

192. *Id.*

193. *See id.*

194. *See id.*

195. *Id.* § 2(e)-(f).

196. *Id.*

197. *Id.* § 2(e)(4).

198. *Id.*

199. *Id.* § 2(f).

describing the domestic violence if no other documentation can be provided.<sup>200</sup> If the employee can provide documentation to the extent needed, the requirement of certification is met and the leave can be granted for the eligible employee.<sup>201</sup>

The employer also plays a part in ensuring the DVLA is correctly implemented.<sup>202</sup> The employer must adhere to the confidentiality guidelines set forth to protect the employee in the workplace unless disclosure is necessary.<sup>203</sup> Disclosure may be deemed necessary if the safety of the employee or an employee's family member is in jeopardy or if the documentation of the domestic violence aids a court or law enforcement agency.<sup>204</sup> Keeping the domestic violence incident and proceedings in confidence provides the victim the privacy that is important in a fragile situation.<sup>205</sup> When all of the requirements and regulations of the DVLA have been satisfied, it is then important to understand how the DVLA will be applied and the resulting implications.<sup>206</sup>

#### IV. DVLA IMPLICATIONS AND APPLICATION

With no current federal law to regulate domestic violence leave, implementation of the DVLA would have an impact on both state and federal levels.<sup>207</sup> Because federal law preempts state law, all states would be required to apply the DVLA unless they choose to implement even higher protections.<sup>208</sup> The DVLA would ensure all victims of domestic violence are provided some type of leave to care for themselves and their families, and with individual states already helping victims, it is possible the victims will receive higher safeguards than the DVLA intended.<sup>209</sup> Part A of this section discusses the federal implications if Congress reintroduces and passes the DVLA in a future session. Part B describes how states would be affected by the DVLA, particularly if domestic violence leave has already been implemented on a state level. The implications for North

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200. *Id.* § 2(g)(1)(A).

201. *Id.* § 2(g).

202. *Id.*

203. *Id.* § 2(g)(2).

204. *Id.* § 2(g)(2)(A)-(B).

205. *Id.* § 2(g).

206. *See* discussion *infra* Part IV.

207. *See* H.R. 2515; *see also* discussion *supra* Part II.B (discussing differing state legislation regarding domestic violence victims).

208. U.S. CONST. art. VI, cl. 2; *see also* *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) (stating it has long been recognized that state laws which conflict with federal law are “without effect”).

209. *See* H.R. 2515; *see also* discussion *supra* Part II.B (discussing differing state legislation regarding domestic violence victims).

Dakota specifically and changes North Dakota should make are also discussed in Part B.

#### A. FEDERAL IMPLICATIONS

As previously discussed, the FMLA, the VAWA, the ADA, and Title VII have possible influences on domestic violence victims.<sup>210</sup> Although federal laws have previously been applied to provide leave to domestic violence victims, application of federal laws to domestic violence victims is very limited, and not all jurisdictions are required to apply federal laws in the same manner.<sup>211</sup> The federal application of the DVLA would expand the protections already given under other federal laws and how they have previously been applied.<sup>212</sup> With the current language, the federal laws must be interpreted and properly applied to protect domestic violence victims to the full potential possible in order to receive their benefits.<sup>213</sup> Creating a federal law explicitly setting forth the requirements and protections for domestic violence victims would allow courts to uniformly provide rights to victims and would guarantee all victims receive the help they need.<sup>214</sup>

Because the DVLA would be federal law, it would be possible for states to afford greater protection to domestic violence victims by allowing victims to take leave under the DVLA and to apply another federal law in the way discussed above.<sup>215</sup> However, very few states have chosen to apply federal laws to the benefit of domestic violence victims; therefore, it is unlikely states will go beyond the scope of the DVLA to provide added protections under other federal laws.<sup>216</sup> With the enactment of the DVLA, it will no longer be a problem when states choose not to apply the federal laws to domestic violence victims because the DVLA specifically provides for the leave needed.<sup>217</sup>

#### B. STATE IMPLICATIONS

Almost every state has some type of legislation to reference in order to provide protection for domestic violence victims, whether it is state or

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210. *See* discussion *supra* Part II.A (examining federal laws applicable to domestic violence victims).

211. *See* discussion *supra* Part II.A.

212. *See* discussion *supra* Part II.A.

213. *See* discussion *supra* Part II.A.

214. *See* discussion *supra* Part II.A.

215. *See* discussion *supra* Part II.A.

216. *See* discussion *supra* Part II.A.

217. *See* Domestic Violence Leave Act, H.R. 2515, 111th Cong. (2009).

federal law.<sup>218</sup> As discussed previously, a minority of states have chosen to pass state legislation providing actual leave to obtain domestic violence-related services.<sup>219</sup> Other states have chosen to allow different types of protection for domestic violence victims on a much smaller scale than what the DVLA would provide.<sup>220</sup>

The states that currently have protections similar to the proposed DVLA would have limited changes to make, but these states could provide higher standards than what is set out in the DVLA.<sup>221</sup> For example, as previously discussed, California and Illinois have very generous protection and leave available to domestic violence victims,<sup>222</sup> so very few changes would be needed to enforce the DVLA. Whether major changes or few changes need to be made, the implementation of the DVLA would require all states to apply the federal law, which would allow for uniform leave regulations.<sup>223</sup>

### 1. *North Dakota Implications Specifically*

North Dakota defines domestic violence as physical harm, bodily injury, forcible sexual activity, assault, or causing fear by any of the above mentioned, not committed in self-defense, on a family or household member.<sup>224</sup> North Dakota currently has no law affording the heightened protections victims of domestic violence need in many situations; with domestic violence on the rise, such laws would be very useful to the citizens of North Dakota.<sup>225</sup> In 2009, “4569 new victims . . . received services from crisis intervention centers in North Dakota,” a seven percent increase from 2008.<sup>226</sup> In the same year, “4874 incidents of domestic violence were reported to crisis intervention centers in North Dakota,” a six percent increase from the previous year.<sup>227</sup>

North Dakota currently has little protection for domestic violence victims regarding leave, but there are laws affording protection on a basic

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218. See discussion *supra* Parts II.A-B (examining federal and state laws that can be applied to domestic violence victims).

219. See discussion *supra* Part II.B.1 (analyzing individual domestic violence state laws).

220. See discussion *supra* Parts II.B.2-5 (discussing the state laws that provide minimum protection to domestic violence victims).

221. See discussion *supra* Part II.B (evaluating applicable state laws).

222. See CAL. LAB. CODE § 230.1 (Deering 2006); 820 ILL. COMP. STAT. ANN. 180/1-180/45 (West Supp. 2011).

223. See U.S. CONST. art. VI, cl. 2 (discussing how federal laws are supreme).

224. N.D. CENT. CODE § 14-07.1-01(2) (2009).

225. See discussion *supra* Part II.B.2 (explaining North Dakota laws applicable to domestic violence victims).

226. DOMESTIC VIOLENCE IN NORTH DAKOTA, *supra* note 150 (emphasis omitted).

227. *Id.* (emphasis omitted).



level.<sup>228</sup> North Dakota only provides leave for witnesses to testify in court proceedings, as well as employer intercession services to ensure witnesses do not lose benefits.<sup>229</sup> Federal laws also apply, but there is little case law in North Dakota interpreting federal laws to provide domestic violence protection to victims, especially with regard to leave from work.<sup>230</sup> North Dakota has also failed to pass any of the proposed bills that would have increased the protection given to domestic violence victims.<sup>231</sup>

With little regulation in North Dakota, a federal law would be beneficial to all residents because domestic violence is currently on the rise in the state.<sup>232</sup> Even if a federal law is not implemented in the future, North Dakota could benefit by following the example of states that employ their own laws and pass state legislation to protect the residents of North Dakota from the detrimental effects of domestic violence.<sup>233</sup>

## 2. *Changes Needed in North Dakota*

The limited protections for domestic violence victims in North Dakota indicate a need for additional domestic violence regulations and standards.<sup>234</sup> With federal laws already available that can be applied to victims, North Dakota should begin interpreting the federal laws on a broader level.<sup>235</sup> If the courts broadly interpret the federal laws and apply them to domestic violence victims in North Dakota, there would be no need to pass state laws providing leave for victims.<sup>236</sup> If, however, the courts are not willing to interpret the federal laws in a broad manner, North Dakota should propose state laws modeled after states currently providing heightened domestic violence protections.<sup>237</sup>

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228. See discussion *supra* Part II.B.2 (explaining North Dakota laws applicable to domestic violence victims).

229. N.D. CENT. CODE § 27-09.1-17 (2006).

230. See discussion *supra* Part II.A (examining federal laws that provide domestic violence protection).

231. See, e.g., H.R. 1302, 59th Legis. Assemb. (N.D. 2005); see also discussion *supra* Part II.B.4.

232. See DOMESTIC VIOLENCE IN NORTH DAKOTA, *supra* note 150 (discussing the rise in domestic violence).

233. See discussion *supra* Part II.B (examining state laws applicable to domestic violence victims).

234. See discussion *supra* Part II.B.2 (discussing current North Dakota domestic violence protection).

235. See discussion *supra* Part II.A (analyzing federal laws applicable to domestic violence victims).

236. See discussion *supra* Part II.A.

237. See discussion *supra* Part II.B (examining state laws applicable to domestic violence victims).

Like other states that have chosen to implement their own domestic violence leave laws, North Dakota should provide state regulations for domestic violence leave.<sup>238</sup> First, North Dakota must expand on the leave currently available, which is leave to attend court proceedings.<sup>239</sup> Implementing increased protection for victims can be done in three main ways, as evidenced by other states.<sup>240</sup> Leave to obtain domestic violence related services, leave to acquire restraining orders, and providing unemployment insurance benefits are three areas where North Dakota should expand.<sup>241</sup> With the large number of restraining orders given and the increasing number of victims utilizing domestic violence-related services,<sup>242</sup> North Dakota should pass laws allowing time off to obtain domestic violence-related services and time off to acquire restraining orders. Domestic violence-related services are becoming more available to victims in North Dakota as the need is being recognized,<sup>243</sup> but victims cannot utilize these services unless efforts are made to allow victims flexible employment. Unemployment insurance should also be available to victims who become unemployed because of domestic violence.<sup>244</sup> If the employee would otherwise be eligible for unemployment benefits, domestic violence should be recognized as good cause for leaving employment and should qualify the victim for unemployment benefits in North Dakota.<sup>245</sup>

While North Dakota currently provides leave to attend court proceedings, additional safeguards of allowing leave to obtain domestic violence-related services or restraining orders and providing unemployment insurance benefits would put North Dakota among the states providing the most victim protection.<sup>246</sup> Applying all the protections together would provide the type of help the DVLA intended to provide.<sup>247</sup> Thus, if the DVLA is not reintroduced in a subsequent session of Congress, North Dakota would already have the increased protections that victims desperately need.<sup>248</sup> With instances of domestic violence becoming more

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238. See discussion *supra* Part II.B.

239. See N.D. CENT. CODE § 27-09.1-17 (2006).

240. See discussion *supra* Parts II.B.1, 3-4 (examining state laws allowing leave for domestic violence related services, restraining orders, and unemployment insurance benefits).

241. See discussion *supra* Parts II.B.1, 3-4.

242. See DOMESTIC VIOLENCE IN NORTH DAKOTA, *supra* note 150.

243. See *id.*

244. See UNEMPLOYMENT INSURANCE, *supra* note 153, at 1 (discussing the different types of unemployment insurance laws for domestic violence victims).

245. See *id.* (following the law of most states).

246. See LAKNER & SHIU, *supra* note 37, at 1-8, 10-11.

247. See Domestic Violence Leave Act, H.R. 2515, 111th Cong. (2009).

248. See DOMESTIC VIOLENCE IN NORTH DAKOTA, *supra* note 150 (discussing the rise in domestic violence).

widespread every year in North Dakota,<sup>249</sup> implementing leave allowances for domestic violence victims would help to remedy some of the resulting problems arising from domestic violence.

## V. CONCLUSION

Domestic violence has a significant impact on the workplace and the ability of victims to work.<sup>250</sup> Federal laws can be interpreted and applied to victims of domestic violence in order to provide leave or necessary protections to deal with the aftermath of the domestic violence.<sup>251</sup> Many states have also started to implement their own leave allowances to victims in some way.<sup>252</sup> Looking to state and federal laws, as well as the limited amount of case law, it is apparent domestic violence leave protections vary significantly by state and jurisdiction.<sup>253</sup>

The growing severity of domestic violence in the United States calls for increased regulation to protect victims in the workplace.<sup>254</sup> The DVLA would be one such way to provide uniformity in applying leave for domestic violence victims and would ensure all victims are given the greatest help possible.<sup>255</sup> The current FMLA does not provide the heightened regulations needed to offer domestic violence victims work-related protection on a national level, but the addition of the DVLA would correct the shortcomings of the current FMLA.<sup>256</sup> Implementation of a federal law would require all states to provide a minimum amount of leave to domestic violence victims.<sup>257</sup> The DVLA would greatly expand the protections in states that have little or no state regulation and could potentially increase the leave requirements of states that have already passed their own legislation.<sup>258</sup>

The states that already have generous leave requirements could possibly implement higher standards than what the DVLA would provide,

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249. *Id.*

250. *See* INTIMATE PARTNER VIOLENCE, *supra* note 3, at 1.

251. *See* discussion *supra* Part II.A (explaining applicability of federal laws to domestic violence victims).

252. *See* discussion *supra* Part II.B (analyzing individual state laws applicable to domestic violence victims).

253. *See* discussion *supra* Parts II.A-B (addressing federal laws and individual state laws applicable to domestic violence victims).

254. *See* INTIMATE PARTNER VIOLENCE, *supra* note 3, at 1.

255. *See* Domestic Violence Leave Act, H.R. 2515, 111th Cong. (2009).

256. *Id.*; *see also* discussion *supra* Part II.A.1 (discussing the applicability of the FMLA to domestic violence victims).

257. *See* H.R. 2515.

258. *See* discussion *supra* Part II.B (addressing individual state laws applicable to domestic violence victims).

which is a desirable outcome.<sup>259</sup> The states could then continue to apply their heightened leave protections.<sup>260</sup> It is advantageous to have minimum standards for all states, but at the same time, states can sometimes benefit from applying their own heightened laws.<sup>261</sup>

The DVLA bill was last referred to the House Subcommittee on Workforce Protections on October 22, 2009.<sup>262</sup> The DVLA failed to become law during the 111th session of Congress,<sup>263</sup> but the DVLA can be reintroduced in a future session for debate. The future of the DVLA or similar legislation is unclear, but after considering the numerous adaptations of domestic violence laws on a state and federal level,<sup>264</sup> it is likely other safeguards will be proposed to offer uniform, increased protections necessary to remedy a growing problem.

*Danielle Krause\**

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259. See discussion *supra* Part II.B.

260. See discussion *supra* Part II.B.

261. See discussion *supra* Part II.B.

262. *Bill Summary & Status 111th Congress (2009-2010) H.R. 2515*, LIBR. OF CONGRESS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:h.r.02515>: (last visited Aug. 19, 2011).

263. *Id.*

264. See discussion *supra* Part II (analyzing federal and individual state laws applicable to domestic violence victims).

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