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## Words Can Cut the Deepest Wounds: Why the Family Medical Leave Act Should Be Amended to Expand Protection for Victims of Domestic Violence

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# WORDS CAN CUT THE DEEPEST WOUNDS: WHY THE FAMILY MEDICAL LEAVE ACT SHOULD BE AMENDED TO EXPAND PROTECTION FOR VICTIMS OF DOMESTIC VIOLENCE

## INTRODUCTION

Approximately 42.4 million women in the United States have experienced rape, physical violence, or stalking by an intimate partner in their lifetime.<sup>1</sup> Specifically, one in every three women is physically abused by an intimate partner.<sup>2</sup> Domestic violence is a widespread problem in our society that affects individuals in communities across the United States.<sup>3</sup> The U.S. Office on Violence Against Women defines domestic violence as “a pattern of abusive behavior in any relationship that is used by one partner to gain or maintain power and control over another intimate partner.”<sup>4</sup> Domestic violence does not discriminate;<sup>5</sup> victims of domestic violence are affected regardless of

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1. MICHELE C. BLACK ET AL., CTNS. FOR DISEASE CONTROL & PREVENTION, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 39 (2011), [http://www.cdc.gov/violenceprevention/pdf/nisvs\\_report2010-a.pdf](http://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf); see RANA SAMPSON, U.S. DEP'T OF JUSTICE, PROBLEM-ORIENTED GUIDES FOR POLICE PROBLEM-SPECIFIC GUIDES SERIES NO. 45, DOMESTIC VIOLENCE 5 (Jan. 2007), [http://www.popcenter.org/problems/pdfs/domestic\\_violence.pdf](http://www.popcenter.org/problems/pdfs/domestic_violence.pdf) (“The [National Crime Victimization Survey] and other studies have found that women are victims in as much as 85 percent of domestic violence incidents.”); see also NAT'L COAL. AGAINST DOMESTIC VIOLENCE, MALE VICTIMS OF VIOLENCE, <http://www.reachofmaconcounty.org/data/documents/Male-Victims-of-Violence-.pdf> (last visited Feb. 21, 2016) (“One out of fourteen men [have] been physically assaulted by a current or former spouse, cohabiting partner, boyfriend/girlfriend or date at some point in their lives.”). In this Comment, I use female pronouns to refer to victims of domestic violence because statistics reflect that the majority of victims are women rather than men. This does not suggest that men are not subjected to domestic abuse. Furthermore, in this Comment, I also use male pronouns to refer to the aggressors or perpetrators of domestic violence because statistics reflect that the majority of them are men.

2. BLACK ET AL., *supra* note 1, at 2.

3. *About Domestic Violence*, REACH, <http://www.reachma.org/what-we-do/about-domestic-violence> (last visited Feb. 12, 2016); *Violence Against Women: Intimate Partner and Sexual Violence Against Women*, WORLD HEALTH ORG., <http://www.who.int/mediacentre/factsheets/fs239/en/> (last updated Jan. 2016) (“Recent global prevalence figures indicate that about 1 in 3 (35%) of women worldwide have experienced either . . . intimate partner violence or non-partner sexual violence in their lifetime.”). References to domestic violence in this Comment refer to both domestic and sexual violence.

4. *Domestic Violence*, U.S. DEP'T JUST., <http://www.justice.gov/ovw/domestic-violence> (last updated Oct. 6, 2015).

5. Cindy Southworth, *Domestic Violence Doesn't Discriminate*, NAT'L NETWORK TO END DOMESTIC VIOLENCE, <http://nnedv.org/getinvolved/dvam/1558-dvam-blog-series-5.html> (last visited Feb. 12, 2016).

their age, economic status, sexual orientation, gender, race, religion, or national origin.<sup>6</sup> Moreover, domestic abuse can result in physical and emotional injury, psychological trauma, and, in some cases, even death.<sup>7</sup>

The Family and Medical Leave Act of 1993 (FMLA)<sup>8</sup> does not currently grant unpaid leave for victims of domestic violence to deal with emotional and psychological abuse. Therefore, women who experience emotional or psychological abuse in the absence of physical abuse are left without recourse. They risk losing their jobs or enduring other adverse employment consequences when attempting to ameliorate their circumstances.

Not only are victims of emotional and psychological abuse denied adequate protection under federal law, but, also, their “[abusers] often seek to sabotage their victims’ attempts at economic success” due to the abusers’ need to be in control.<sup>9</sup> “The reason for this behavior is clear: a person who is employed is more likely to escape control and achieve independence from her abuser.”<sup>10</sup> Consequently, victims of domestic violence are prone to suffer from serious health and mental problems that can affect their current job performance and future promotional opportunities.<sup>11</sup> The victim is not the only one who is impacted by domestic violence; in fact, domestic violence negatively impacts the victim’s workplace. The costs that domestic violence brings to the employment sector is yet another reason to provide more adequate safeguards to victims of domestic violence in hopes that one day these victims will be able to safely leave their abusers.

6. *Id.*; see *Domestic Violence*, *supra* note 4 (“Domestic violence affects people of all socioeconomic backgrounds and education levels. Domestic violence occurs in both opposite-sex and same-sex relationships and can happen to intimate partners who are married, living together, or dating.”); *Domestic Violence: Disturbing Facts About Domestic Violence*, L.A. POLICE DEP’T [hereinafter *Disturbing Facts About Domestic Violence*], [http://www.lapdonline.org/get\\_informed/content\\_basic\\_view/8891](http://www.lapdonline.org/get_informed/content_basic_view/8891) (last visited Feb. 21, 2016) (“Women of all races were about equally vulnerable to attacks by intimates. However, women in families with incomes below \$10,000 per year were more likely than other women to be violently attacked by an intimate.”).

7. *What Is Domestic Violence*, NAT’L COAL. AGAINST DOMESTIC VIOLENCE, <http://www.ncadv.org/need-help/what-is-domestic-violence> (last visited Feb. 12, 2016).

8. Pub. L. No. 103-3, 107 Stat. 6 (codified as amended in scattered sections of 29 U.S.C.).

9. Wendy R. Weiser & Deborah A. Widiss, *Employment Protection for Domestic Violence Victims*, CLEARINGHOUSE REV. J. POVERTY L. & POL’Y, May–June 2004, at 3, 4, [http://www.ncdsv.org/images/crjpp\\_employmentprotectionfordomesticviolencevictims\\_may-june2004.pdf](http://www.ncdsv.org/images/crjpp_employmentprotectionfordomesticviolencevictims_may-june2004.pdf).

10. *Id.*

11. See Roy Maurer, *When Domestic Violence Comes to Work: 65 Percent of Employers Don’t Have a Plan for Domestic Violence*, SOC’Y FOR HUM. RESOURCE MGMT., <http://www.shrm.org/hrdisciplines/safetysecurity/articles/pages/domestic-violence-workplace-nfl-ray-rice.aspx> (last visited Feb. 12, 2016).

Many victims who attempt to escape the devastating cycle of abuse are met with obstacles instead of assistance in the workplace.<sup>12</sup> Victims need an opportunity to process the physical and mental effects of the abuse, obtain court orders, attend court proceedings, or seek out a safe house to reside. However, the current federal legislation does not provide unpaid leave to address these concerns, and, as a result, many victims face adverse employment consequences, including demotion and unemployment.<sup>13</sup> Without the economic security that a job provides, many victims feel that the only option they have is to return to their abusers; thus, the cycle of domestic abuse remains unbroken.<sup>14</sup>

Although the FMLA permits unpaid leave for victims of domestic violence to address serious health conditions,<sup>15</sup> it fails to provide protection for those victims who suffer emotional or psychological abuse in isolation. Emotional and psychological abuse can often be more harmful than physical abuse because it can have a long-lasting impact on the victims' emotional well-being,<sup>16</sup> which is why amending the FMLA is imperative.

Because the FMLA fails to provide unpaid leave for victims of domestic violence to address these specific needs, a number of state legislatures have enacted additional laws to supplement the gaps in the federal act.<sup>17</sup> For example, the Illinois legislature adopted a statute that specifically provides protection for victims of emotional and psychological abuse.<sup>18</sup> The Illinois Victims' Economic Security and

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12. *Id.*

13. *See id.*

14. SAMPSON, *supra* note 1, at 6–7; *see* *Apessos v. Mem'l Press Grp.*, No.01-1474-A, 2002 WL 31324115, at \*3 (Mass. Super. Ct. Sept. 30, 2002) (reasoning that it goes against public policy for victims of domestic abuse to seek safety at the cost of employment).

15. U.S. DEP'T OF LABOR, FREQUENTLY ASKED QUESTIONS AND ANSWERS ABOUT THE REVISIONS TO THE FAMILY AND MEDICAL LEAVE ACT 10 (2009) [hereinafter DOL FREQUENTLY ASKED QUESTIONS], <http://www.dol.gov/whd/fmla/finalrule/NonMilitaryFAQs.pdf>.

16. *Types of Domestic Violence*, DOORWAYS, <http://www.doorwaysva.org/our-work/education-advocacy/the-facts-about-domestic-violence/types-of-domestic-violence/> (last visited Feb. 21, 2016).

17. LEGAL MOMENTUM, STATE LAW GUIDE: EMPLOYMENT RIGHTS FOR VICTIMS OF DOMESTIC OR SEXUAL VIOLENCE 1–10 [hereinafter STATE LAW GUIDE], [http://www.legalmomentum.org/sites/default/files/reports/Employment%20Final%20June%202017%202013%20\(2\).pdf](http://www.legalmomentum.org/sites/default/files/reports/Employment%20Final%20June%202017%202013%20(2).pdf) (last updated July 2013) (outlining the state laws that provide greater protection to victims of domestic violence).

18. *See id.* at 4–5. The Victims' Economic Security and Safety Act (VESSA) permits eligible employees to take up to twelve workweeks of unpaid leave during a twelve-month period. *Id.* at 4. *See generally* 820 ILL. COMP. STAT. 180/20(a)(2) (2014). On the other hand, Colorado and Florida only allow victims of domestic violence to take three days of unpaid leave during a twelve-month period to deal with the aftermath of the abuse. STATE LAW GUIDE, *supra* note 17, at 1–2. *See* COLO. REV. STAT. § 24-34-402.7 (2016); FLA. STAT. § 741.313 (2016) (permitting victims of domestic violence to take unpaid leave to obtain counseling for the emotional and psychological abuse they endure).

Safety Act (VESSA)<sup>19</sup> permits an employee who is a victim of domestic violence to request unpaid leave to address emotional or psychological abuse and to receive legal assistance.<sup>20</sup> Unfortunately, states like Illinois that have enacted comprehensive domestic abuse statutes are among the minority.<sup>21</sup> As a result, most women in the United States are left without adequate safeguards and, instead, face dire consequences (like unemployment) when attempting to ameliorate the effects of the abuse.<sup>22</sup> The existing state of affairs is clearly unacceptable given the prevalence of abuse in this country and the need for women to be active participants in the marketplace; thus, more needs to be done.

This Comment argues that Congress should amend the FMLA to provide broader protection for victims of domestic violence that would incorporate emotional and psychological abuse rather than taking a state-by-state approach. Victims of emotional and psychological abuse are in desperate need of federal legislation that allows them to improve the consequences of this type of abuse without jeopardizing employment opportunities. Therefore, Congress should adopt broader protections, which would model VESSA, for these victims to decrease lost productivity in the workplace and to provide all victims of domestic violence the protection they deserve. Specifically, this legislation should address how victims can go about seeking unpaid leave to allow for time to find safe housing and deal with the legal ramifications of the abuse.<sup>23</sup>

Part II of this Comment provides background information regarding the nationwide problem of domestic violence, the FMLA, and VESSA.<sup>24</sup> Furthermore, Part II also explains the steps required to request leave under the FMLA and VESSA and that the FMLA does not preempt VESSA.<sup>25</sup> Lastly, Part II provides an overview on the different types of lawsuits an employee can bring against her employer for violating the FMLA.<sup>26</sup> Part III of this Comment analyzes the current deficiencies in the FMLA and argues that mirroring VESSA would provide greater protection for victims of domestic vio-

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19. 820 ILL. COMP. STAT. 180.

20. *Id.*; STATE LAW GUIDE, *supra* note 17, at 4.

21. Only sixteen states have enacted supplemental statutes to provide greater protection to victims of domestic violence. STATE LAW GUIDE, *supra* note 17, at 1–10.

22. Weiser & Widiss, *supra* note 9, at 4.

23. SAMPSON, *supra* note 1, at 30–33.

24. *See infra* notes 30–86 and accompanying text.

25. *See infra* notes 87–125 and accompanying text.

26. *See infra* notes 126–53 and accompanying text.

lence under the FMLA.<sup>27</sup> Part IV of this Comment discusses the impact that an amendment to the FMLA would have on victims of domestic violence, the employment sector, and the United States court system.<sup>28</sup> Part V concludes that an amendment to the FMLA providing explicit protection for victims to deal with the effects of emotional and psychological abuse would assist in addressing the widespread problem of domestic violence in the United States.<sup>29</sup>

## II. BACKGROUND

Domestic violence is considered one of the United States' most important public health issues.<sup>30</sup> U.S. citizens are becoming increasingly more aware of the impact that domestic violence has on a victim's mental health.<sup>31</sup> The enactment of federal legislation that provides victims with the opportunity and the means to address the negative impact of domestic violence on the victim's mental health is imperative.

This Part provides an overview of the nationwide problem of domestic violence, the FMLA, and VESSA.<sup>32</sup> This Part also explains the required steps to request leave under both the FMLA and VESSA.<sup>33</sup> Lastly, this Part discusses the various types of lawsuits an employee can bring against her employer for violating the FMLA.<sup>34</sup>

### A. *Domestic Violence: A Nationwide Problem*

Over 3 million incidents of domestic violence are reported every year in the United States.<sup>35</sup> Domestic violence is not always just a one-time incident; rather, it can be a vicious pattern of several different abusive behaviors used by an individual to exert power and control over another individual.<sup>36</sup> The most common abusive behaviors

27. See *infra* notes 154–250 and accompanying text.

28. See *infra* notes 251–308 and accompanying text.

29. See *infra* notes 309–18 and accompanying text.

30. Michele Nealon-Woods, *The Realities of Domestic Violence and Its Impact on Our Society*, HUFFINGTON POST (Oct. 19, 2015), [http://www.huffingtonpost.com/michele-nealonwoods/domestic-violence\\_b\\_8316888.html](http://www.huffingtonpost.com/michele-nealonwoods/domestic-violence_b_8316888.html).

31. *Id.*

32. See *infra* notes 35–111 and accompanying text.

33. See *infra* notes 112–25 and accompanying text.

34. See *infra* notes 126–51 and accompanying text.

35. *Disturbing Facts About Domestic Violence*, *supra* note 6.

36. *Understanding Abuse: What Is Domestic Violence?*, U. MICH., <http://stopabuse.umich.edu/about/understanding.html> (last visited Apr. 3, 2016); see also Melinda Smith & Jeanne Segal, *Domestic Violence and Abuse: Signs of Abuse and Abusive Relationships*, HELPGUIDE.ORG, <http://www.helpguide.org/articles/abuse/domestic-violence-and-abuse.htm> (last updated Oct. 2015) (providing an example of how domestic violence can lead to a cycle of abuse).

are: physical abuse, sexual abuse, emotional abuse, and verbal abuse.<sup>37</sup>

When people hear the words “domestic violence,” they immediately associate that word with physical abuse, the most common type of abusive behavior.<sup>38</sup> Every minute in the United States, twenty people are victims of physical violence by an intimate partner.<sup>39</sup> And, annually, 1.3 million women are physically assaulted by an intimate partner.<sup>40</sup> Physical abuse is the use of unwanted physical force against someone in a way that injures that person.<sup>41</sup> This type of abuse is easier to recognize because it is difficult to conceal.<sup>42</sup> Moreover, physical abuse occurs when the aggressor wants to render the victim powerless and desires control within the relationship.<sup>43</sup> For example, physical abuse may include kicking, slapping, strangling, or punching the victim.<sup>44</sup> In the majority of cases, physical abuse can lead to the victim being hospitalized,<sup>45</sup> and, in the worst cases, physical abuse can be deadly.<sup>46</sup> For example, strangulation has been identified “as one of

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After he hits her, he experiences self-directed guilt. He says, “I’m sorry for hurting you.” What he does not say is, “Because I might get caught.” He then rationalizes his behavior by saying that his partner is having an affair with someone. He tells her, “If you weren’t such a worthless whore I wouldn’t have to hit you.” He then acts contrite, reassuring her that he will not hurt her again. He then fantasizes and reflects on past abuse and how he will hurt her again. . . . When she is held up in traffic and is a few minutes late, he feels completely justified in assaulting her because “You’re having an affair with the store clerk.” He has just set her up.

*Id.* (quoting *The Cycle of Domestic Violence*, CTR. FOR HOPE & SAFETY, <http://hopeandsafety.org/learn-more/the-cycle-of-domestic-violence/> (last visited Feb. 22, 2016)).

37. *Types of Domestic Violence*, *supra* note 16.

38. *Id.*

39. DIGNITY HEALTH, DOMESTIC VIOLENCE IS . . . , [http://www.dignityhealth.org/stellent/groups/public/@xinternet\\_con\\_sys/documents/webcontent/sysv2\\_m146708.pdf](http://www.dignityhealth.org/stellent/groups/public/@xinternet_con_sys/documents/webcontent/sysv2_m146708.pdf) (last visited Feb. 13, 2016).

40. PATRICIA TJADEN & NANCY THOENES, U.S. DEP’T OF JUSTICE, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 26 & exh.9 (Nov. 2000), <https://www.ncjrs.gov/pdffiles1/nij/183781.pdf>.

41. *See Types of Domestic Violence*, *supra* note 16.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Disturbing Facts About Domestic Violence*, *supra* note 6 (“Nearly one-third of the women who seek care from hospital emergency rooms are there for injuries resulting from domestic violence.”).

46. Kaofeng Lee, *Each Day, 3 Women Die Because of Domestic Violence*, NAT’L NETWORK TO END DOMESTIC VIOLENCE, <http://nnedv.org/getinvolved/dvam/1307-dvam-blog-series-1.html> (last visited Feb. 13, 2016) (reporting that “each day, three women die because of domestic violence”); *Disturbing Facts About Domestic Violence*, *supra* note 6 (“Every year, 4,000 victims of domestic violence are killed.”); *Types of Domestic Violence*, *supra* note 16.

the most lethal forms of domestic violence” because “unconsciousness may occur within seconds and death within minutes.”<sup>47</sup>

Sexual abuse, another form of physical abuse,<sup>48</sup> is the coercion of any sexual contact or behavior without consent.<sup>49</sup> “Every 2.5 minutes someone in the U.S. is sexually assaulted.”<sup>50</sup> This type of abuse may include unwanted kissing, oral sex, rough or violent sexual activity, and rape.<sup>51</sup> Approximately one in five women in the United States will be raped in their lifetime.<sup>52</sup> Mirroring its physical abuse counterpart, aggressors use sexual abuse to establish control within the relationship.<sup>53</sup> Furthermore, victims of sexual assault are three times more likely than other victims to suffer from depression and four times more likely to have suicidal thoughts.<sup>54</sup> The use of physical abuse, including sexual abuse, to maintain power and control “is a widely recognized form of domestic violence.”<sup>55</sup>

Although many consider domestic violence to solely include physical and sexual abuse, which results in bodily injury, victims of domestic violence suffer these forms of abuse as well.<sup>56</sup> Emotional and psychological abuse can be just as, if not more, harmful as physical abuse because it is more difficult to recognize the malicious, nonphysical acts of emotional and psychological abuse.<sup>57</sup> Emotional abuse involves the aggressor “[u]ndermining the individual’s sense of . . . self-

47. Gael Strack & Eugene Hyman, *Your Patient. My Client. Her Safety: A Physician’s Guide to Avoiding the Courtroom While Helping Victims of Domestic Violence*, 11 DEPAUL J. HEALTH CARE L. 33, 59 (2007) (discussing that victims may endure serious internal injuries, which can lead to death days or weeks later because of the underlying brain damage caused by the strangulation).

48. Smith & Segal, *supra* note 36 (“[P]eople whose partners abuse them physically *and* sexually are at a higher risk of being seriously injured or killed.”).

49. *Types of Domestic Violence*, *supra* note 16.

50. YWCA USA, FACT SHEET: SEXUAL ASSAULT 1 [hereinafter FACT SHEET: SEXUAL ASSAULT], [http://www.ywca.org/atf/cf/%7B3b450fa5-108b-4d2e-b3d0-c31487243e6a%7D/FACT\\_SEXUAL.pdf](http://www.ywca.org/atf/cf/%7B3b450fa5-108b-4d2e-b3d0-c31487243e6a%7D/FACT_SEXUAL.pdf) (last visited Feb. 13, 2016) (citing SHANNAN M. CATALANO, U.S. DEP’T OF JUSTICE, NCJ 214644, NATIONAL CRIME VICTIMIZATION SURVEY: CRIMINAL VICTIMIZATION, 2005, at 2 tbl.1 (2006), <http://www.bjs.gov/content/pub/pdf/cv05.pdf>).

51. *Types of Domestic Violence*, *supra* note 16.

52. BLACK ET AL., *supra* note 1, at 1; FACT SHEET: SEXUAL ASSAULT, *supra* note 50, at 1 (reporting that one in five women have experienced an attempted or completed rape).

53. *Types of Domestic Violence*, *supra* note 16; *see also* FACT SHEET: SEXUAL ASSAULT, *supra* note 50, at 1 (“Because rape is one of the most underreported crimes, available data greatly underestimate the true magnitude of the problem.”).

54. FACT SHEET: SEXUAL ASSAULT, *supra* note 50, at 2.

55. SARAH DEWARD, N.Y. STATE COAL. AGAINST DOMESTIC VIOLENCE, THE INTERSECTION OF BRAIN INJURY AND DOMESTIC VIOLENCE 1, [http://www.vawnet.org/Assoc\\_Files\\_VAWnet/IntersectionBrainInjuryDV.pdf](http://www.vawnet.org/Assoc_Files_VAWnet/IntersectionBrainInjuryDV.pdf) (last visited Feb. 13, 2016).

56. *Types of Domestic Violence*, *supra* note 16.

57. *Id.*

esteem.”<sup>58</sup> For example, it frequently includes constant criticism, humiliation, name-calling, and, if the woman is a mother, damaging her relationship with her children.<sup>59</sup> Similarly, psychological abuse is defined as the “systematic perpetration of malicious and explicit non-physical acts against an intimate partner.”<sup>60</sup> The aggressor threatens to physically harm the victim or her children, causing fear through the use of intimidation and isolating the victim from her family.<sup>61</sup> Psychological abuse often occurs simultaneously with physical or sexual abuse.<sup>62</sup>

Individuals experiencing emotional and psychological abuse often suffer from the following effects: depression, difficulty concentrating, anxiety, and poor work performance.<sup>63</sup> Thus, there is often a strong correlation between victims of abuse and negative employment consequences.<sup>64</sup> Often, victims of domestic abuse are unable to perform certain essential job requirements, which provides the employer with adequate reasoning to fire the victim or demote her from her current position.<sup>65</sup>

Accordingly, this Comment primarily focuses on emotional and psychological abuse and how these types of abuse should be recognized as a valid basis to grant unpaid leave under the FMLA.

### B. Federal Protection: The Family and Medical Leave Act

Congress enacted the FMLA in 1993 to provide federal protection to accommodate working parents.<sup>66</sup> Prior to its adoption, there was a lack of employment practices to accommodate working parents, thus forcing working parents to choose between their careers and raising their children.<sup>67</sup> To remedy this problem, Congress enacted the FMLA to assist employees in balancing the demands of the workplace

58. *Domestic Violence*, *supra* note 4.

59. *Id.*

60. YWCA LAKE CTY., FACT SHEET: PSYCHOLOGICAL ABUSE 1 [hereinafter FACT SHEET: PSYCHOLOGICAL ABUSE], [http://www.ywcalakecounty.org/atf/cf/%7B01EC7C8E-E129-43EB-8A02-FCF1D75907E1%7D/psychological\\_abuse\\_wvov.pdf](http://www.ywcalakecounty.org/atf/cf/%7B01EC7C8E-E129-43EB-8A02-FCF1D75907E1%7D/psychological_abuse_wvov.pdf) (last visited Feb. 13, 2016).

61. *Domestic Violence*, *supra* note 4.

62. FACT SHEET: PSYCHOLOGICAL ABUSE, *supra* note 60, at 2. Throughout this Comment, the terms “emotional” and “psychological abuse” are used and do not equate to the same behavior.

63. *Id.*

64. See WORKPLACES RESPOND TO DOMESTIC & SEXUAL VIOLENCE, THE FACTS ON THE WORKPLACE AND DOMESTIC VIOLENCE 2, <http://www.workplacesrespond.org/sites/default/files/imce/Backup%20of%20The%20Facts%20on%20the%20Workplace%20and%20Domestic%20Violence%2011-12-F.pdf> (last visited Feb. 13, 2016).

65. *Id.* at 2–3.

66. 29 U.S.C. § 2601(b) (2012).

67. *Id.* § 2601(a)(3).

with the needs of the family.<sup>68</sup> The FMLA sought to “accommodate the legitimate interests of employers . . . [while promoting] equal employment opportunities for [both] men and women.”<sup>69</sup> Since its enactment, the U.S. Department of Labor (DOL) is the agency that enforces the FMLA.<sup>70</sup>

The FMLA permits an eligible employee of a covered employer to take unpaid job-protected leave for up to twelve workweeks in a twelve-month period.<sup>71</sup> However, “[t]he FMLA only applies to employers that meet certain criteria.”<sup>72</sup> Under the FMLA, a covered employer includes: (1) a “[p]rivate-sector employer, with 50 or more employees in 20 or more workweeks in the current or preceding calendar year”;<sup>73</sup> (2) a public agency (local, state, or federal government) “regardless of the number of employees it employs”;<sup>74</sup> and (3) a public or private elementary school.<sup>75</sup>

The FMLA defines the term “eligible employee” as an employee who has been employed for: (1) “at least 12 months by the employer with respect to whom leave is requested”; and (2) “at least 1,250 hours of service with such employer during the previous 12-month period.”<sup>76</sup> Whether an employee has worked the minimum 1,250 hours of service under the FMLA is determined according to the Fair Labor Standards Act of 1938<sup>77</sup> principles for determining compensable hours of work.<sup>78</sup> Under the FMLA, an eligible employee, who is working for a covered employer, is allowed to take leave for the following reasons:

(A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.

(B) Because of the placement of a son or daughter with the employee for adoption or foster care.

68. 29 C.F.R. § 825.101(a) (2015).

69. *Family & Medical Leave*, U.S. DEP’T LAB., <http://www.dol.gov/dol/topic/benefits-leave/fmla.htm> (last visited Feb. 13, 2016).

70. *Summary of the Major Laws of the Department of Labor*, U.S. DEP’T LAB., <http://www.dol.gov/opa/aboutdol/lawsprog.htm> (last visited Feb. 13, 2016).

71. 29 U.S.C. § 2612(a).

72. U.S. DEP’T OF LABOR, FACT SHEET #28: THE FAMILY AND MEDICAL LEAVE ACT (rev. 2012), <http://www.dol.gov/whd/regs/compliance/whdfs28.pdf>.

73. *Id.*

74. *Id.*

75. *Id.*

76. 29 U.S.C. § 2611(2)(A).

77. Ch. 676, 52 Stat. 1060 (codified as amended at scattered sections of 5, 12, 15, 28, 29, 45, 48, and 49 U.S.C.).

78. U.S. DEP’T OF LABOR, FACT SHEET #22: HOURS WORKED UNDER THE FAIR LABOR STANDARDS ACT (rev. July 2008), <http://www.dol.gov/whd/regs/compliance/whdfs22.pdf>.

(C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.

(D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

(E) Because any qualifying exigency . . . arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on covered active duty (or has been notified of an impending call or order to covered active duty) in the Armed Forces.<sup>79</sup>

Part D permits an eligible employee to take leave to address a serious health condition that makes the employee unable to perform the duties of the position.<sup>80</sup> The FMLA defines the term “serious health condition” as an “illness, injury, impairment, or physical or mental condition that involves inpatient care or continuing treatment by a health care provider.”<sup>81</sup> According to the DOL, FMLA leave may be available to address “certain health-related issues” that result from domestic violence.<sup>82</sup> An eligible employee who is a victim of domestic violence may take leave because of her serious health condition or to care for a family member who has a serious health condition.<sup>83</sup> For example, the DOL deems an overnight hospitalization as an appropriate reason to request FMLA leave.<sup>84</sup>

As evidenced by the example above, it is quite difficult for a psychological or emotional injury to qualify as a serious health condition under the FMLA. Although the FMLA narrowly defines a “serious health condition,” state courts have difficulties interpreting whether emotional and psychological abuse are sufficient reasons for an employee to request FMLA leave.<sup>85</sup> Currently, there is a limited number of decisions that have allowed an employee to request FMLA leave due to emotional and psychological abuse. Courts remain undecided whether emotional and psychological abuse, absent physical abuse, can be a valid basis to grant unpaid leave under the FMLA.<sup>86</sup> If a victim is permitted to take unpaid leave to address these types of

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79. 29 U.S.C. § 2612(a)(1).

80. *Id.* § 2612(a)(1)(D).

81. DOL FREQUENTLY ASKED QUESTIONS, *supra* note 15, at 1.

82. *Id.* at 10.

83. *Id.*

84. *Id.* at 5.

85. *See, e.g., Municipality of Anchorage v. Gregg*, 101 P.3d 181, 188 (Alaska 2004) (finding that the employee was incapacitated by a serious health condition due to the combined effect of her pregnancy, the injuries from a car accident, and the severe emotional distress she suffered as a result of a domestic violence situation).

86. *See id.* at 188 n.14.

abuse, the victim must comply with the necessary steps to request unpaid leave under the FMLA.

According to the FMLA, an employee must first provide notice to her employer to receive unpaid leave.<sup>87</sup> An employee is required to provide at least thirty days' notice of her intention to take leave under the FMLA if said leave is foreseeable.<sup>88</sup> If the reason for requesting FMLA leave requires the leave to begin in less than thirty days, then the employee must provide notice within a reasonable time.<sup>89</sup> In addition, "[a]n employee giving notice of the need for FMLA leave does not need to expressly assert rights under [FMLA] or even mention the FMLA to meet his or her obligation to provide notice, though the employee would need to state a qualifying reason for the needed leave."<sup>90</sup>

After an employee properly notifies her employer, the employer must respond to the employee within five business days of receiving the employee's request for FMLA leave.<sup>91</sup> The employer must determine whether the employee is eligible for FMLA leave and provide written notice to the employee of her rights and responsibilities under the FMLA.<sup>92</sup> If the employee does not meet the FMLA criteria, then the employer is responsible for notifying the employee that she is ineligible for FMLA leave by specifying the criterion that the employee does not meet.<sup>93</sup> It is important to note that an employer has the complete discretion in deciding whether to grant FMLA leave to a victim of domestic violence.<sup>94</sup>

Following the employer's response, an employer may also require that a request for leave be supported by a certification issued by the eligible employee's health care provider,<sup>95</sup> even though the FMLA

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87. 29 U.S.C. § 2612(e)(1) (2012).

88. *Id.*

89. *Id.*

90. 29 C.F.R. § 825.301(b) (2015); SOCIETY OF HUMAN RES. MGMT., HOW TO APPROVE OR DENY A REQUEST FOR FMLA LEAVE 1 [hereinafter APPROVE OR DENY], [http://www.shrm.org/about/membership/documents/shrm\\_how\\_to\\_approve\\_deny\\_fmla\\_leave.pdf](http://www.shrm.org/about/membership/documents/shrm_how_to_approve_deny_fmla_leave.pdf) (last visited Feb. 14, 2016).

91. APPROVE OR DENY, *supra* note 90, at 1.

92. *Id.* ("The easiest way to comply with this response requirement is to use the FMLA model form . . ."). See generally 29 C.F.R. § 825.300(a) (listing the employer's notice requirements); Notice of Eligibility and Rights & Responsibilities (Family and Medical Leave Act) (Form WH-381) (rev. Feb. 2013) [hereinafter Form WH-381].

93. APPROVE OR DENY, *supra* note 90, at 1.

94. See U.S. DEP'T OF LABOR, *The 2000 Survey Report, Chapter 6: Administering Family and Medical Leave by Covered Establishments* (2001), [hereinafter *The 2000 Survey Report*], <http://www.dol.gov/whd/fmla/chapter6.htm>.

95. 29 U.S.C. § 2613(a). The DOL published several model certification forms that employers may provide to their employees: Certification of Health Care Provider for Employee's Serious

does not require medical certification. The employee must provide the employer with the following information: “(1) the date on which the serious health condition commenced; (2) the probable duration of the condition; [and] (3) the appropriate medical facts within the knowledge of the health care provider regarding the condition.”<sup>96</sup> The employee must be allowed up to fifteen days to return her certification to the employer.<sup>97</sup>

Lastly, after receiving the certification forms, if applicable, an employer has five business days to notify the employee whether her FMLA request has been approved or denied.<sup>98</sup> If an employee’s leave is deemed FMLA-protected, then the employee has the responsibility to be in communication with her employer during the duration of the leave.<sup>99</sup> Upon returning to work post-leave, the employer must allow the employee to return to the same, or a nearly identical, position as the employee previously held.<sup>100</sup> Although the FMLA does not explicitly permit an employee to request unpaid leave to deal with the effects of emotional and psychological abuse, VESSA specifically permits an employee to request unpaid leave to address the effects of these abuses.<sup>101</sup>

### *C. State Protection: Illinois Victims’ Economic Security and Safety Act*

In 2003, the Illinois General Assembly enacted VESSA to create protection for victims of domestic violence who face the threat of job loss.<sup>102</sup> Specifically, VESSA garnered support by addressing the “failure of existing laws to protect the employment rights of employees

Health Condition and the Certification of Health Care Provider for Family Member’s Serious Health Condition. APPROVE OR DENY, *supra* note 90, at 1–2; *see, e.g.*, Certification of Health Care Provider for Employee’s Serious Health Condition (Family and Medical Leave Act) (Form WH-380-E) (rev. May 2015); Certification of Health Care Provider for Family Member’s Serious Health Condition (Family and Medical Leave Act) (Form WH-380-F) (rev. May 2015).

96. 29 U.S.C. §§ 2613(b)(1)–(3).

97. APPROVE OR DENY, *supra* note 90, at 2.

98. *Id.* The DOL has created a form to assist the employer in notifying the employee whether her FMLA leave request has been approved. *See* Form WH-381, *supra* note 92. In addition to the Designation Notice form, an employer can provide the employee with a Rights and Responsibilities form. *See id.*

99. For example, the employee must notify the employer if she needs to extend the FMLA leave, and an employer might require the employee to provide frequent updates on the status of her return back to work. U.S. DEP’T OF LABOR, NEED TIME?: THE EMPLOYEE’S GUIDE TO THE FAMILY AND MEDICAL LEAVE ACT 8 (2015) [hereinafter EMPLOYEE’S GUIDE TO FMLA], <http://www.dol.gov/whd/fmla/employeeeguide.pdf>.

100. *Id.* at 14.

101. 820 ILL. COMP. STAT. 180/20 (2014).

102. *Id.* at 180/15.

who are victims of domestic or sexual violence and employees with a family or household member who is a victim of domestic or sexual violence.”<sup>103</sup> This legislation was needed to remedy the shortcomings of the FMLA and to explicitly provide protection to victims of domestic violence dealing with the effects of emotional and psychological abuse.<sup>104</sup>

VESSA permits an employee who is a victim of domestic or sexual violence, or who has a family or household member who is a victim of domestic violence, to take unpaid leave to address those concerns.<sup>105</sup> An employee working for an employer that has at least fifteen employees but no more than forty-nine employees is entitled to a total of eight workweeks of leave during any twelve month period.<sup>106</sup> Furthermore, an employee working for an employer that has at least fifty employees is entitled to a total of twelve workweeks of leave during any twelve-month period.<sup>107</sup> However, an employee may not take unpaid leave under VESSA in addition to the unpaid leave permitted by the FMLA.<sup>108</sup> According to VESSA, an employee may take unpaid leave from work to address domestic or sexual violence by:

(A) seeking medical attention for, or recovering from, physical or psychological injuries caused by domestic or sexual violence to the employee or the employee’s family or household member;

(B) obtaining services from a victim services organization for the employee or the employee’s family or household member;

(C) obtaining psychological or other counseling for the employee or the employee’s family or household member;

(D) participating in safety planning, temporarily or permanently relocating, or taking other actions to increase the safety of the employee or the employee’s family or household member from future domestic or sexual violence or ensure economic security; or

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103. *Id.* VESSA was also enacted to combat the fact that “[e]mployees in the United States who have been victims of domestic violence, dating violence, sexual assault, or stalking too often suffer adverse consequences in the workplace as a result of their victimization.” *Id.* at 180/5(9).

104. *Id.* at 180/15.

105. ILL. DEP’T OF LABOR, VICTIMS’ ECONOMIC SECURITY AND SAFETY ACT [hereinafter ILL. DOL SUMMARY OF VESSA], [https://www.illinois.gov/idol/Laws-Rules/EOW/Documents/VES\\_SA\\_FS.pdf](https://www.illinois.gov/idol/Laws-Rules/EOW/Documents/VES_SA_FS.pdf) (last visited Feb. 14, 2016). Ultimately, VESSA was enacted because the Illinois General Assembly recognized the need to protect victims of domestic violence. Specifically, the Illinois General Assembly recognized that “[d]omestic violence crimes account for approximately 15% of total crime costs in the United States each year.” 820 ILL. COMP. STAT. 180/5(3). In addition, “[v]iolence against women has been reported to be the leading cause of physical injury to women.” *Id.* at 180/5(4).

106. ILL. DOL SUMMARY OF VESSA, *supra* note 105.

107. *Id.*

108. 820 ILL. COMP. STAT. 180/20(a)(2).

(E) seeking legal assistance or remedies to ensure the health and safety of the employee or the employee's family or household member, including preparing for or participating in any civil or criminal legal proceeding related to or derived from domestic or sexual violence.<sup>109</sup>

Unlike the FMLA, VESSA explicitly permits an employee to take unpaid leave to seek medical attention from psychological injuries caused by domestic violence. In addition, VESSA permits an employee to take unpaid leave to obtain psychological or other counseling to address the emotional and psychological effects of the abuse. Due to the federal government's inaction, the Illinois legislature enacted supplemental legislation to address emotional and psychological abuse.<sup>110</sup> Moreover, Illinois also provides unpaid leave to find safe housing and deal with the legal ramifications of domestic violence.<sup>111</sup> To receive unpaid leave to address these concerns, victims of domestic violence must comply with specific requirements.

Under VESSA, an employee must first provide notice to her employer that she needs time off as a result of domestic violence.<sup>112</sup> Specifically, an employee must "provide the employer with at least 48 hours' advance notice of the employee's intention to take leave" unless that is not practical given the situation.<sup>113</sup>

Some entities in Illinois created a form to assist employees with filling out requests for the leave under VESSA.<sup>114</sup> The justification for the needed leave (e.g., domestic or sexual violence) is documented on this form.<sup>115</sup> However, in situations when the employer does not provide a form, the employee can write a letter to her employer explaining the situation and the reasons for the needed leave.<sup>116</sup> This is just one of the many ways Illinois's procedure to request leave is more

109. *Id.* at 180/20(a)(1).

110. *See id.* at 180/20(a)(1)(A) (recognizing the need for statutory protection for victims of domestic violence who endured emotional and psychological abuse).

111. STATE LAW GUIDE, *supra* note 17, at 4.

112. VESSA: THE VICTIMS' ECONOMIC SECURITY AND SAFETY ACT: KEEPING YOUR JOB AND KEEPING SAFE 6 (rev. Mar. 2010) [hereinafter KEEPING YOUR JOB AND KEEPING SAFE], [http://www.caepv.org/membercenter/files/illinois\\_vessa\\_manual.pdf](http://www.caepv.org/membercenter/files/illinois_vessa_manual.pdf). The employer must keep confidential all of the information provided by the employee unless the employee permits the employer to share the information. *Id.*

113. ILL. DOL SUMMARY OF VESSA, *supra* note 105.

114. *See, e.g.*, City of Chicago, Request for VESSA Leave Form (Apr. 27, 2007) [hereinafter City of Chicago VESSA Leave Form]; University of Chicago, Victims Economic Security and Safety Act (VESSA): Leave of Absence Request Form (Sept. 2010) [hereinafter University of Chicago VESSA Leave Form].

115. City of Chicago VESSA Leave Form, *supra* note 114; University of Chicago VESSA Leave Form, *supra* note 114.

116. KEEPING YOUR JOB AND KEEPING SAFE, *supra* note 112, at 11 (providing sample letters for employees to request VESSA leave).

flexible for a victim of emotional or psychological domestic abuse than that of the FMLA.

Next, an employer may require the employee to provide certification for VESSA leave similar to the certification requirements articulated within the FMLA.<sup>117</sup> An employee may be required to prove that her request for unpaid leave meets the requirements articulated in VESSA.<sup>118</sup> In addition, an employee may be required to provide proof that she is a victim of domestic violence.<sup>119</sup> This can be done by providing the employer with a sworn statement declaring that she is a victim of domestic or sexual violence.<sup>120</sup> Furthermore, if the employee has any documentation that would provide proof of her domestic abuse, including documentation of a court hearing, a police record, or documentation from a victim services organization, attorney, or physician, she must provide it to the employer.<sup>121</sup>

Lastly, similar to the FMLA, an employer must determine whether an employee is eligible for leave under VESSA.<sup>122</sup> If the employer believes that the employee is not eligible for leave under VESSA, the employer must provide the reason for disapproving the request.<sup>123</sup> When an employee's request for unpaid leave under VESSA has been approved, the employee's employment status is "on hold."<sup>124</sup> Essentially, if the employee comes back to work after completion of leave, the employee should be able to return to the same, or a very similar, position she held before beginning her leave.<sup>125</sup> If the employer fails to comply with the requirements outlined in VESSA or the FMLA, an employee may file a complaint against the employer to enforce her rights.

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117. *See id.* at 6. A victims of domestic violence need not tell the police or file criminal charges to take advantage of VESSA. *Id.* at 4. In addition, an employer may not request a police report or court order from the victim as proof that domestic violence did, in fact, occur. *Id.*

118. ILL. DOL SUMMARY OF VESSA, *supra* note 105.

119. *Id.*

120. KEEPING YOUR JOB AND KEEPING SAFE, *supra* note 112, at 6.

121. *Id.*

122. *See* City of Chicago VESSA Leave Form, *supra* note 114; University of Chicago VESSA Leave Form, *supra* note 114.

123. *See* City of Chicago VESSA Leave Form, *supra* note 114; University of Chicago VESSA Leave Form, *supra* note 114.

124. KEEPING YOUR JOB AND KEEPING SAFE, *supra* note 112, at 7.

125. *Id.*

### D. Enforcement of the Family and Medical Leave Act

The Wage and Hour Division of the DOL is responsible for administering and enforcing the FMLA.<sup>126</sup> The FMLA prohibits an employer from “interfering with, restraining, or denying the exercise of, or the attempt to exercise, any FMLA right.”<sup>127</sup> Examples of prohibited conduct include: “Refusing to authorize FMLA leave for an eligible employee, [d]iscouraging an employee from using FMLA leave, [and] . . . [u]sing an employee’s request for or use of FMLA leave as a negative factor in employment actions . . . .”<sup>128</sup>

If an employee believes that her rights under the FMLA have been violated, the employee can file a complaint against the employer.<sup>129</sup> The Code of Federal Regulations permits employees to file an administrative complaint alleging a violation under the FMLA.<sup>130</sup> The employee may either file a formal complaint with the U.S. Secretary of Labor or file a private lawsuit pursuant to Section 107 of the FMLA.<sup>131</sup> Therefore, failure to pursue administrative remedies will not bar the employee’s right to bring suit against an employer in a private action.<sup>132</sup>

#### 1. Filing a Complaint with the U.S. Secretary of Labor

An employee may file an administrative complaint in person, by mail, or by telephone with the Wage and Hour Division of the DOL alleging the violations that have occurred.<sup>133</sup> The administrative complaint must be filed within a reasonable time.<sup>134</sup> After receiving the complaint, the Wage and Hour Division will investigate the allegations outlined in the administrative complaint.<sup>135</sup> An investigator will speak to both parties of the action to determine whether a violation occurred<sup>136</sup> and, additionally, may visit an employer to examine FMLA records, privately interview certain employees, and meet with the em-

126. U.S. DEP’T OF LABOR, FACT SHEET #44: VISITS TO EMPLOYERS (Jan. 2015) [hereinafter DOL FACT SHEET #44], <http://www.dol.gov/whd/regs/compliance/whdfs44.pdf>.

127. U.S. DEP’T OF LABOR, FACT SHEET #77B: PROTECTION FOR INDIVIDUALS UNDER THE FMLA (Dec. 2011), <http://www.dol.gov/whd/regs/compliance/whdfs77b.pdf>.

128. *Id.*

129. *Enforcement of the FMLA*, U.S. DEP’T LAB., <http://webapps.dol.gov/elaws/whd/fmla/13.aspx> (last visited Feb. 14, 2016).

130. 29 C.F.R. § 825.400(a) (2015).

131. *Id.* §§ 825.400(a)(1)–(2).

132. *See id.* § 825.400(a).

133. *Enforcement of the FMLA*, *supra* note 129.

134. *Id.* A reasonable time is within two years of a FMLA violation or within three years if the violation was willful. *Id.*

135. DOL FACT SHEET #44, *supra* note 126.

136. *See id.*

ployer who had the authority to deny the leave.<sup>137</sup> After collecting all of the facts, the investigator will “commit the employer to corrective actions if violations have occurred.”<sup>138</sup>

## 2. *Filing a Private Family Medical Leave Act Lawsuit*

If an employee’s rights under the FMLA have, indeed, been violated, an employee may file a private lawsuit.<sup>139</sup> According to the FMLA, an employee may file an action to recover damages or equitable relief in either a federal or state court of competent jurisdiction.<sup>140</sup> Specifically, “[a]n employer may be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for . . . other relief, including employment, reinstatement promotion, or any other relief tailored to the harm suffered.”<sup>141</sup>

A lawsuit alleging that an employer violated an employee’s rights under the FMLA must be filed within two years “after the last action that the employee believes was in violation of the FMLA.”<sup>142</sup> However, if the employee can prove that the violation was willful, then the employee may file a claim within three years.<sup>143</sup> Generally, a court will determine when the alleged violation occurred and whether it was willful.<sup>144</sup>

### *E. Federal Preemption: The Family and Medical Leave Act Does Not Preempt the Illinois Victims’ Security and Safety Act*

Preemption is the invalidation of a state law that is in direct conflict with a federal law.<sup>145</sup> Pursuant to the Supremacy Clause of the U.S. Constitution, federal laws typically trump state laws.<sup>146</sup> However, if a federal rule or regulation clearly states whether preemption should apply, courts will adhere to legislative intent and avoid preempting state laws.<sup>147</sup> The FMLA explicitly states: “Nothing in [the FMLA] or

137. *Id.*

138. *Id.*

139. *Enforcement of the FMLA, supra* note 129.

140. U.S. DEP’T OF LABOR, FACT SHEET #28D: EMPLOYER NOTIFICATION REQUIREMENTS UNDER THE FAMILY AND MEDICAL LEAVE ACT 3 [hereinafter DOL FACT SHEET #28D], <http://www.dol.gov/whd/regs/compliance/whdfs28d.pdf> (last visited Feb. 14, 2016).

141. *Id.*

142. *Enforcement of the FMLA, supra* note 129.

143. *Id.*

144. *Id.*

145. *Preemption*, CORNELL UNIV. L. SCH., <http://www.law.cornell.edu/wex/preemption> (last visited Feb. 14, 2016).

146. *See* U.S. CONST. art. VI, cl. 2.

147. *Preemption, supra* note 145.

any amendment made by [the FMLA] shall be construed to supersede any provision of any State or local law that provides greater family or medical leave rights than the rights established under [the FMLA] or any amendment made by [the FMLA].”<sup>148</sup> The DOL has determined that the legislative history of the FMLA makes it “clear that Congress intended to protect more generous state leave laws not only from preemption by FMLA but also from preemption by [the Employee Retirement Income Security Act of 1974] and other federal laws.”<sup>149</sup> VESSA provides greater protection to victims of domestic violence than the FMLA;<sup>150</sup> thus, the FMLA does not preempt VESSA.<sup>151</sup>

Even though the FMLA does not preempt VESSA, an employee who lives in Illinois must either choose to file for FMLA leave or VESSA leave to address the effects of domestic violence.<sup>152</sup> The victim has the choice to file a VESSA or FMLA claim, but she cannot file both contemporaneously.<sup>153</sup> Fortunately for victims who suffer from emotional and psychological abuse, they can request unpaid leave under the Illinois VESSA but, unfortunately, not under the FMLA. Therefore, an amendment to the FMLA is imperative to provide uniform protection to victims of domestic violence across the United States.

### III. ANALYSIS

The FMLA currently fails to provide complete protection to all victims of domestic violence; therefore, given the prevalence of domestic violence, it should be amended to provide broader protection. Domestic violence is a nationwide problem.<sup>154</sup> According to the 2011 Census Report, “more than 67,000 victims of domestic violence sought services from domestic violence programs and shelters,” in just one day.<sup>155</sup> Because domestic violence has become so prevalent in U.S.

148. 29 U.S.C. § 2651(b) (2012).

149. Letter from John J. Canary, Chief, Div. of Coverage, Reporting & Disclosure, Office of Regulations & Interpretations, to Richard A. Ervin, Program Manager, Emp’t Standards, Dep’t of Labor & Indus. 3 (May 31, 2005), <http://www.dol.gov/ebsa/pdf/ao2005-13a.pdf>.

150. See generally KEEPING YOUR JOB AND KEEPING SAFE, *supra* note 112, at 7 (explaining how the two statutes work together).

151. See Letter from John J. Canary, *supra* note 149, at 3.

152. See 820 ILL. COMP. STAT. 180/20(a)(2) (2014).

153. *Id.* (“VESSA does not create a right for an employee to take unpaid leave that exceeds the unpaid leave time allowed under, or is in addition to the unpaid leave time permitted by [FMLA].”).

154. See *Disturbing Facts About Domestic Violence*, *supra* note 6.

155. NAT’L RES. CTR. ON DOMESTIC VIOLENCE, HOW PREVALENT IS DOMESTIC VIOLENCE?, <http://www.nrcdv.org/dvam/sites/default/files2/Prevalence-TalkingPointsForm.pdf> (last visited Feb. 14, 2016).

society, there is a growing and urgent need for the federal government to provide greater protection for these victims. Specifically, Congress should amend the FMLA to provide broader protection for victims of domestic violence that expressly encompasses emotional and psychological abuse, mirroring VESSA, and, thus, increasing productivity in the workplace.

This Part explains the need for an amendment to the FMLA and discusses the arguments in support of amending the FMLA, which include: (1) emotional and psychological abuse are much more common in today's society, and the effects have a lasting impact on victims of domestic violence;<sup>156</sup> (2) state legislatures have taken action to supplement the disparities within the FMLA by enacting their own statutes to provide greater protection to victims of domestic violence;<sup>157</sup> (3) the FMLA has been amended in the past to meet the current needs of our society;<sup>158</sup> and (4) currently domestic violence has a detrimental impact on productivity in the workplace.<sup>159</sup> Lastly, this Part advocates that an amendment to the FMLA should mirror VESSA because it provides the most complete protection to victims who have endured emotional and psychological abuse.

*A. The Family and Medical Leave Act Should Be Amended To  
Provide Broader Protections to Victims  
of Domestic Violence*

The FMLA does not provide complete protection to victims of domestic violence; therefore, it is imperative that Congress amend the FMLA to provide broader protections to victims of domestic violence by encompassing emotional and psychological abuse. Currently, the FMLA permits a victim of domestic violence to take unpaid leave to address a "serious medical condition."<sup>160</sup> Under the FMLA, a "serious medical condition" is defined as requiring continued treatment or supervision by a health care provider.<sup>161</sup> Thus, a victim of domestic violence has the right to take leave to address and deal with physical

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156. See James Patterson, *Long-Term Effects of an Emotionally Abusive Relationship*, LIVES-TRONG.COM, <http://www.livestrong.com/article/93111-longterm-effects-emotionally-abusive-relationship/> (last updated May 5, 2015).

157. See STATE LAW GUIDE, *supra* note 17, at 1–10.

158. See Elissa Stone, Comment, *How the Family and Medical Leave Act Can Offer Protection to Domestic Violence Victims in the Workplace*, 44 U.S.F. L. REV. 729, 746–47 (2010).

159. See *Society for Human Resource Management, Too Much, Too Long? Domestic Violence in the Workplace: Hearing Before the S. Subcomm. on Empl't & Workplace Safety* (2007) (statement of Sue K. Willman, on behalf of the Society for Human Resource Management).

160. See DOL FREQUENTLY ASKED QUESTIONS, *supra* note 15, at 1.

161. *Id.*

injuries.<sup>162</sup> For example, if the victim must be hospitalized overnight, she may exercise her right to take leave under the FMLA.<sup>163</sup>

The FMLA's narrow definition of "serious medical condition" is not practical in today's society. A victim suffering from emotional and psychological abuse may not need to receive continued treatment or supervision by a health care provider; thus, her condition would not qualify as a "serious medical condition" under the FMLA.<sup>164</sup> Because the FMLA does not explicitly provide unpaid leave for victims of emotional and psychological abuse, a victim is not likely to request this leave. If, in fact, a victim does decide to request FMLA leave to address the emotional and psychological effects of her abuse, her request will likely be denied. An employer who is faced with a victim of purely emotional or psychological abuse may not know whether this type of abuse qualifies for FMLA leave. Because the employer has the sole discretion to determine whether to grant unpaid leave, the employer is likely to deny leave if the abuse does not physically manifest itself. Recognizing the impact of emotional and psychological abuse, Congress must amend the FMLA to provide broader protection to victims of domestic violence and explicitly include emotional and psychological abuse absent physical abuse.

### 1. *The Impact of Emotional and Psychological Abuse on Victims of Domestic Violence*

The FMLA should be amended to explicitly provide unpaid leave for victims of domestic violence to deal with emotional and psychological abuse due to the long-term effects abuse of this kind can have on victims. Historically, domestic violence referred to physical abuse; however, today, experts "recognize that there are other forms of abuse."<sup>165</sup> Many victims suffer from emotional and psychological abuse, which is sometimes worse than physical abuse.<sup>166</sup> According to the American Psychological Association: "Nearly half of all women in the United States have experienced at least one form of psychological

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162. See Stone, *supra* note 158, at 737. A victim of domestic violence cannot request FMLA leave to address all physical injuries. For example, if the victim of domestic violence endured a black eye or a sprained wrist, her injuries may not qualify as a serious medical condition under the FMLA, and, thus, she would not be permitted to take unpaid leave. *Id.*

163. DOL FREQUENTLY ASKED QUESTIONS, *supra* note 15, at 10.

164. See *id.*

165. Susan Landrum, *The Ongoing Debate About Mediation in the Context of Domestic Violence: A Call for Empirical Studies of Mediation Effectiveness*, 12 CARDOZO J. CONFLICT RESOL. 425, 430-31 (2011).

166. *Types of Domestic Violence*, *supra* note 16.

aggression by an intimate partner.”<sup>167</sup> This type of abuse is just as, if not more, severe because these types of abuses can result in the development of several health problems that tend to affect the victim’s life even after the abusive relationship is over.<sup>168</sup> Victims of domestic violence suffer from a multitude of long-term mental health problems, including depression, anxiety, post-traumatic stress disorder, psychosomatic disorders, and alcohol and substance abuse.<sup>169</sup> Furthermore, victims are at a higher risk of developing heart disease, chronic pain, asthma, and arthritis.<sup>170</sup> Victims of domestic violence who endure emotional and psychological abuse are likely to experience poor physical health, depression, anxiety, poor work performance, suicidal thoughts, or suicide attempts.<sup>171</sup>

Notwithstanding this research, the FMLA does not currently provide victims of domestic violence with unpaid leave to address the effects of emotional and psychological abuse. These types of abuses severely impact the way a victim “thinks and interacts with the world around them.”<sup>172</sup> Because victims of domestic violence are controlled by their abuser, victims can develop a negative outlook on their life.<sup>173</sup> Victims may feel damaged, unmotivated, or unworthy of a better life.<sup>174</sup> Furthermore, victims that have endured emotional abuse, consisting of constant criticisms or insults, tend to have negative self-esteem, and their “sense of self in relation to the world” is also negative.<sup>175</sup> These long-term effects of emotional and psychological abuse can affect the victim for the rest of her life, particularly if she

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167. *Intimate Partner Violence: Facts & Resources*, AM. PSYCHOL. ASS’N, <http://www.apa.org/topics/violence/partner.aspx> (last visited Feb. 14, 2016).

168. Joseph Pittman, *What’s Worse: Physical Scars or Mental Scars?*, DOMESTIC VIOLENCE STAT. (June 12, 2012), <http://domesticviolencestatistics.org/whats-worse-physical-scars-or-mental-scars/>; see Carole Warshaw et al., *Mental Health Consequences of Intimate Partner Violence*, in INTIMATE PARTNER VIOLENCE: A HEALTH BASED PERSPECTIVE 147, 150 (Connie Mitchell & Deirdre Anglin eds., 2009) (“On average, over half of women seen in a range of mental health settings either currently are or have been abused by an intimate partner, although rates vary widely among studies.”).

169. Warshaw et al., *supra* note 168, at 152.

170. Tara Culp-Ressler, *The Hidden Consequences of Domestic Violence Linger for Decades*, THINKPROGRESS (Sept. 26, 2014, 1:13 PM), <http://thinkprogress.org/health/2014/09/26/3571723/domestic-violence-long-term-effects/> (“[Victims of domestic violence are] at a higher risk for some of the largest health problems that our country is facing today . . .”).

171. NAT’L COAL. AGAINST DOMESTIC VIOLENCE, FACTS ABOUT DOMESTIC VIOLENCE AND PSYCHOL. ABUSE (2015) [hereinafter NCADV FACTS], <http://ncadv.org/files/Domestic%20Violence%20and%20Psychological%20Abuse%20NCADV.pdf>.

172. *Effects of Domestic Violence*, JOYFUL HEART FOUND., <http://www.joyfulheartfoundation.org/learn/domestic-violence/effects-domestic-violence> (last visited July 12, 2015).

173. *Id.*

174. *Id.*

175. *Id.*

does not seek professional help, which is often the case because the victim will likely not leave work to do so for fear of being fired.<sup>176</sup> This lack of protection forces the victim of domestic violence to believe that she only has two options: keeping her job and ignoring the devastating effects of the abuse or risk losing her job by seeking protection and care for herself and her family.<sup>177</sup>

Granting unpaid leave under the FMLA to individuals dealing with the aftermath of emotional and psychological domestic violence would provide victims with the opportunity to obtain an order of protection, seek legal assistance, and search for housing to escape the domestic violence.<sup>178</sup> In many cases, the aggressor controls the victim's life by isolating her from her family and preventing her from going to work.<sup>179</sup> A victim may be fearful to notify her employer about the abuse because employers are often unwilling to grant leave.<sup>180</sup> Employers tend to fire employees who have been domestically abused because victims often struggle dealing with the negative impacts of the abuse, which can contribute to decreased work productivity and high absenteeism.<sup>181</sup> As a result, the victim may be afraid to disclose the issues she is facing to her employer for fear of reprisal.<sup>182</sup> Because the victim fears that she could lose her job for requesting time off, she will

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176. See NCADV FACTS, *supra* note 171 (“[A] number of studies have demonstrated that psychological abuse independently causes long-term damage to a victim’s mental health.”); Patterson, *supra* note 156 (“According to the . . . ‘Journal of Emotional Abuse,’ one of the most common and frequent psychological effects of emotional abuse is damaged self-confidence and self-worth.”).

177. See Nina W. Tarr, *Employment and Economic Security for Victims of Domestic Abuse*, 16 S. CAL. REV. L. & SOC. JUST. 371, 371 (2007) (“The public policy interests here are primal, not complex: the protection of a victim from physical and emotional violence; and the protection of a victim’s livelihood . . . . The two are connected. A victim should not have to seek physical safety at the cost of her employment.” (quoting *Apessos v. Mem’l Press Grp.*, No.01-1474-A, 2002 WL 31324115, at \*3 (Mass. Super. Ct. Sept. 30, 2002))).

178. See Weiser & Widiss, *supra* note 9, at 4.

179. *What Is Abuse?—A Warning List*, DOMESTICVIOLENCE.ORG, <http://www.domesticviolence.org/what-is-abuse> (last visited Feb. 14, 2016).

180. Weiser & Widiss, *supra* note 9, at 4.

181. See *id.*

182. See, e.g., *Apessos*, 2002 WL 31324115, at \*1. Sophia Apessos was employed as a newspaper reporter in Plymouth, Massachusetts. *Id.* On Saturday, July 29, 2000, her then-husband assaulted her in her home. *Id.* The police immediately arrested her husband, charged him with assault and battery, and helped Ms. Apessos obtain a temporary restraining order. *Id.* Because the temporary restraining order could not be extended unless Ms. Apessos appeared in court during regular business hours, and because her husband’s arraignment was scheduled for Monday, July 31, 2000, she called her work supervisor and left a message that she would be absent on Monday to attend court proceedings relating to domestic violence. *Id.* When she reported to work on Tuesday morning, the human resources director called her into her office and fired her. *Id.*

become less inclined to leave her abusive relationship.<sup>183</sup> The most dangerous and vulnerable time a victim will face is when she attempts to leave her abuser;<sup>184</sup> therefore, the utmost protection is needed to ensure that the victim can leave safely.

Although leaving is of the utmost importance, victims of domestic violence may need time to file an order of protection, seek legal assistance, or find housing before they feel comfortable leaving the abusive relationship.<sup>185</sup> Typically, these matters can only be addressed during regular business hours.<sup>186</sup> Over 1 million people apply for protective orders each year, and the majority of these people are forced to miss work to attend court hearings.<sup>187</sup> If victims had the opportunity to handle these matters during business hours, it is more likely that they would be able to escape the cycle of abuse. Aggressors maintain control and power over their victims by knowing their work schedules and punishing the victims for coming home later than expected.<sup>188</sup> Thus, even if the victim was able to handle these matters after business hours, the cycle of abuse still makes it almost impossible to escape the aggressor.<sup>189</sup> It is imperative that the victim receive unpaid leave to address these concerns during work hours to prevent further abuse.<sup>190</sup> The possibility does exist that the aggressor may notice the lack of a paycheck if the victim is permitted to take unpaid leave. However, it is likely that the aggressor will not notice the lack of a paycheck for several weeks, thus allowing the victim to take the necessary measures

183. See Stone, *supra* note 158, at 729–30; *Common Myths and Why They Are Wrong*, DOMESTICVIOLENCE.ORG [hereinafter *Common Myths*], <http://www.domesticviolence.org/common-myths/> (last visited Feb. 14, 2016) (“There are many reasons why women may not leave. Not leaving does not mean that the situation is okay or that the victim[s] want to be abused.”); see also LEGAL MOMENTUM: THE WOMEN’S LEGAL DEFENSE AND EDUCATION FUND, DOMESTIC & SEXUAL VIOLENCE AND THE WORKPLACE 2 [hereinafter DOMESTIC & SEXUAL VIOLENCE AND THE WORKPLACE], <https://www.legalmomentum.org/resources/domestic-sexual-violence-and-workplace-fact-sheet> (“Victims also lose [their] jobs because of: Stereotypes or fear of domestic or sexual violence, lack of workplace accommodations, or changes that an employer deems costly . . .”).

184. *Common Myths*, *supra* note 183.

185. Stone, *supra* note 158, at 734.

186. *Id.*

187. Sandra S. Park, Note, *Working Towards Freedom from Abuse: Recognizing a “Public Policy” Exception to Employment-at-Will for Domestic Violence Victims*, 59 N.Y.U. ANN. SURV. AM. L. 121, 128 (2003).

188. See *Promoting Safety and Nonviolence in the Workplace*, in NAT’L ADVISORY COUNCIL ON VIOLENCE AGAINST WOMEN, TOOLKIT TO END VIOLENCE AGAINST WOMEN ch.8, at 3, <https://www.ncjrs.gov/pdffiles1/206041.pdf> (last visited Feb. 14, 2016). An employer can play a role in ending violence against women. For example, an employer can “[v]ary or revise a victim’s work schedule, change her telephone extension or e-mail address, and offer to assist her in monitoring or documenting harassing telephone calls, faxes, and e-mails.” *Id.*

189. Weiser & Widiss, *supra* note 9, at 4.

190. See *id.* at 2.

to escape the aggressor. Allowing a victim of domestic violence to receive unpaid leave during her attempt to escape the aggressor would alleviate the fears that the victim has of becoming unemployed.

The victim's fear of becoming unemployed often inhibits her from taking the necessary steps to leave her abuser.<sup>191</sup> The loss of employment can have a major impact on victims of domestic violence.<sup>192</sup> Without financial stability, many victims feel forced to return to their abuser to avoid homelessness.<sup>193</sup> Consequently, Congress should amend the FMLA to provide unpaid leave to victims of domestic violence to address these matters because it would provide the victim with the strength, courage, and opportunity to potentially leave her abusive relationship.<sup>194</sup> Rather than reverting back to their abusers, victims of domestic violence would be more confident in taking the necessary steps to leave their abusive situation if this legislation existed. Also, the victim would not need to choose between jeopardizing her employment at the cost of seeking help for herself and her family members. Although the federal government has failed to address these concerns, a few state legislatures have recognized the disparities in the FMLA and, as a result, have enacted legislation to supplement the Act's disparities.<sup>195</sup>

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191. Weiser & Widiss, *supra* note 9, at 4.

192. *Id.*

193. *Id.* ("The cumulative effect of domestic violence on the job security of women is enormous. Women who have experienced domestic violence are more likely than other women to be unemployed, to suffer from health problems that can affect employability and job performance, to report lower personal income, and to rely on welfare."); see DOMESTIC & SEXUAL VIOLENCE AND THE WORKPLACE, *supra* note 183 ("Studies indicate that one of the best predictors of whether a victim will separate from her abuser is the victim's degree of economic independence.").

194. Stone, *supra* note 158, at 749. The proposal advocated in this Comment is different from the proposal in Stone's Comment for several reasons. Stone's proposal does not explicitly permit a victim to take unpaid leave to address the psychological injuries associated with domestic violence. In addition, Stone's proposal does not explicitly permit a victim to take leave to seek legal assistance to ensure the safety of the victim. By not explicitly permitting a victim to take leave to address these concerns, Stone's proposal unfortunately is similar to the FMLA, in the fact that it allows the employer to use its discretion in denying a victim's request for unpaid leave. Rather than including broad and vague terms in the proposed amendment, the proposal in this Comment argues for explicit language, mirroring VESSA, to get rid of the employer's ability to exercise its discretion and provide victims with unpaid leave to address the emotional and psychological effects of domestic violence.

195. See STATE LAW GUIDE, *supra* note 17, at 1; see *infra* notes 196–219 and accompanying text (discussing the supplemental legislation enacted by the following states: California, Colorado, Connecticut, Florida, Hawaii, Illinois, Kansas, Maine, North Carolina, New Jersey, New Mexico, New York, Oregon, Philadelphia, Rhode Island, and Washington).

## 2. Existing State Legislation Addresses Disparities Within the Family and Medical Leave Act

In the United States, only sixteen states have enacted legislation that provides victims of domestic violence the ability to request leave from work to address the violence in their lives without the fear of losing their job.<sup>196</sup> Several of these state statutes explicitly provide unpaid leave for a victim to file a restraining order, attend court proceedings, or seek housing to escape the abuse.<sup>197</sup> Each state statute varies with respect to the qualifying reasons for granting unpaid leave and the amount of unpaid leave that victims of domestic violence can request.<sup>198</sup> The benefit of these statutes is that they cover more than just physical injuries associated with domestic violence. Through the enactment of these state statutes, it is clear that state legislatures have recognized that domestic violence is a widespread problem in the United States.<sup>199</sup> Because the majority of the states have not enacted laws that provide additional protection for victims of domestic violence, victims of these states can only request unpaid leave under the narrow definition of a “serious medical condition” within the FMLA.<sup>200</sup> Unfortunately, domestic violence is not a state specific issue; rather, “one in five employed adults is a victim of domestic violence” nationwide.<sup>201</sup> Consequently, instead of waiting for states to individually supplement the FMLA, Congress should amend the FMLA to ensure the utmost protection for victims nationwide.

The difference between the states’ laws is vast. For example, the difference between Connecticut and Ohio laws illustrate how a victim living in a state with a comprehensive statute is afforded greater protection than a victim who must exclusively rely on the FMLA. Compare the following examples: Katie, in Connecticut, and Yianna, in

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196. STATE LAW GUIDE, *supra* note 17 (citing CAL. LAB. CODE §§ 230–230.1, COLO. REV. STAT. §24-34-402.7 (2016), CON. GEN. STAT. § 31-51ss (West 2011), FLA. STAT. § 741.313 (2015), HAW. REV. STAT. § 378-72–73 (2015), 820 ILL. COMP. STAT. 180/20 (2012), KAN. STAT. ANN. §§ 44-1131–32 (2016); ME. REV. STAT. ANN. tit. 26, § 850, S.B. 2177, 215th Leg. (N.J. 2012) (codified as amended at N.J. STAT. ANN. § 34:11C-1 (West 2013)), N.Y. EXEC. LAW §§ 296-1(a), 292(34) (2016), N.M. STAT. ANN. §§ 50-4A-1 to 4A-8 (1978), N.C. GEN. STAT. ANN. § 50B-5.5 (West 2013), OR. REV. STAT. § 659A.272 (2009), R.I. GEN. LAWS § 12-28-10, WASH. REV. CODE § 49.76.).

197. *Id.* at 4–7 (citing *see, e.g.*, 820 ILL. COMP. STAT. 180/20(a)(1)(E); ME. REV. STAT. ANN. tit. 26, § 850; N.M. STAT. ANN. §§ 50-4A-1 to 4A-8; N.C. GEN. STAT. ANN. § 50B-5.5; OR. REV. STAT. § 659A.272).

198. *See* STATE LAW GUIDE, *supra* note 17, at 117.

199. Stone, *supra* note 158, at 745.

200. *Id.* at 737.

201. *Id.* at 744.

Ohio.<sup>202</sup> Katie and her husband, George, have lived in Connecticut their entire lives. Katie and George have a four-year-old son, Isaiah. Katie is currently employed at a corporation in Connecticut. George has emotionally and psychologically abused Katie for over two years.<sup>203</sup> During that time, George constantly criticized and humiliated Katie, which undermined her sense of self-esteem. George made negative comments about Katie's friends and became angry when she spent time with them. He often forced Katie to stay home with him rather than going out with her friends. In addition, George also limited the visits she had with her family, attempting to isolate her from her family and friends.

After suffering from the abuse for two years, Katie decided to inform her employer about her personal situation. Katie requested unpaid leave under the Connecticut state statute that explicitly applies to victims of domestic violence. The Connecticut statute provides that an employer must permit victims of domestic violence to take unpaid leave "to seek medical care or psychological or other counseling for physical or psychological injury . . . for the victim."<sup>204</sup> Assuming that Katie has met the prerequisites to be covered by the Connecticut statute, the employer must grant Katie leave to address her psychological injuries.<sup>205</sup> In addition, the employer must grant Katie leave to obtain services from an organization, relocate to a secure home, and seek legal assistance.<sup>206</sup> The employer cannot exercise its discretion in determining whether to grant leave because it is explicitly stated within the Connecticut statute.<sup>207</sup> Also, the statute prohibits an employer from threatening loss of employment, discharging, or penalizing an employee who is a victim of domestic violence.<sup>208</sup> Because the Connecticut statute permits Katie to receive unpaid leave to address these issues and prohibits any adverse employment actions for taking this

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202. This example is adapted from *id* at 744–45. This example illustrates that state-by-state legislation is not a sufficient solution to addressing the FMLA's discrepancies. Unfortunately, this type of approach leads to a lack of uniformity among the states, thus, resulting in a lack of protection for victims of domestic violence across the United States. See, e.g., John J. Phelan IV, Comment, *The Assault Weapons Ban-Politics, The Second Amendment, and the Country's Continued Willingness to Sacrifice Innocent Lives for "Freedom,"* 77 ALB. L. REV. 579, 597 (2014).

203. See generally *Domestic Violence*, *supra* note 4 (defining emotional and psychological abuse).

204. CONN. GEN. STAT. ANN. § 31-51ss(b)(1) (West 2011).

205. See *id.* § 31-51ss(b).

206. See *id.* § 31-51ss(b)(2).

207. *Id.*

208. *Id.* § 31-51ss(h).

leave, Katie will most likely feel confident that she can take measures to leave her abusive relationship and still maintain her career.<sup>209</sup>

However, Yianna, who is dealing with a similar situation of emotional and psychological abuse, lives in Ohio and will not have the same protection as Katie.<sup>210</sup> Because Ohio's legislature has not enacted its own state law that provides greater protection for domestic abuse victims, Yianna will only be permitted to request leave under the FMLA.<sup>211</sup> As a result, it would be quite difficult for Yianna to seek leave to address the issues associated with domestic violence. For example, if Yianna wanted to meet with a psychologist to deal with the effects of her abuse, or with a lawyer to file an order of protection, she would be denied unpaid leave under the FMLA. Unfortunately, both of these requests do not qualify as a serious medical condition as required under the FMLA.<sup>212</sup> Because the FMLA does not explicitly provide leave for psychological domestic violence injuries, Yianna's employer will most likely deny her request for leave.<sup>213</sup> Thus, even if Yianna wanted to leave her abusive relationship, she would have to risk the possibility of losing her job to do so.<sup>214</sup>

Many victims of domestic violence who are in similar situations would rather tolerate the domestic abuse than risk losing their job.<sup>215</sup> This example illustrates that federal legislation must be enacted to explicitly require an employer to allow victims of domestic violence unpaid leave to address the effects of emotional and psychological domestic violence. This legislation would provide equal protection for all victims of domestic violence nationwide.

To provide victims with a statutory remedy to escape domestic violence using the current method, each state would need to enact its own legislation. This way, addressing the widespread problem of domestic violence would be left to the discretion of each state legislature, which would be free from federal interference. Proponents of federalism argue that this is the best approach because there is a need to constrain the federal government's power.<sup>216</sup> Further, they contend

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209. See Weiser & Widiss, *supra* note 9, at 4.

210. Ohio has not enacted its own legislation to address the discrepancies in the FMLA. See STATE LAW GUIDE, *supra* note 17, at 12.

211. If a state has not yet enacted its own legislation, the only option for a victim of domestic violence is to seek unpaid leave under the FMLA. See *id.* at 1.

212. See 29 U.S.C. § 2612 (2012).

213. *Id.*

214. See Weiser & Widiss, *supra* note 9, at 4.

215. *Id.*

216. See, e.g., *Permanent Policy Principles for State-Federal Relations*, NAT'L GOVERNORS ASS'N, <http://www.nga.org/cms/home/federal-relations/nga-policy-positions/page-ec-policies/col2-content/main-content-list/principles-for-state-federal-rel.html> (last visited Feb. 14, 2016).

that the federal government should recognize that certain issues, such as domestic violence, could be addressed at the state and local levels rather than at the federal level.<sup>217</sup> Even though certain issues should be addressed at the state level, opponents of federalism would argue that federal action is required to address problems that are truly national in scope.<sup>218</sup> Because domestic violence has become a nationwide epidemic,<sup>219</sup> federal action should be taken. In addition, the FMLA currently permits victims of domestic violence to request leave to address physical injuries associated with the abuse; thus, it would not be difficult to amend the FMLA to include emotional and psychological abuse. As the example provided *supra* demonstrates, the problem with the state-by-state approach is that too many victims of domestic violence are left without proper remedies as a result of the inequalities across the states.<sup>220</sup> Rather than solving this problem state-by-state, amending the FMLA would provide consistent protection to victims across the United States.

### 3. *Past Amendments to the Family and Medical Leave Act*

The FMLA should be amended to address the current needs of our society<sup>221</sup> like it has been in the past. As of 2007, “at least 3,300 members of the U.S. military have died since the beginning of the Iraq war in March 2003.”<sup>222</sup> In addition, there was an enormous amount of public concern surrounding the need to respect the sacrifices that the young women and men made fighting in Iraq and Afghanistan and the enormous debt our nation owed to those who were injured and killed.<sup>223</sup> On January 28, 2008, President George W. Bush recognized the medical and emotional concerns of military personnel and their family members and, as a result, amended the FMLA.<sup>224</sup>

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217. See, e.g., *id.*

218. See, e.g., *id.*

219. See *Disturbing Facts About Domestic Violence*, *supra* note 6.

220. *Supra* notes 202–214 and accompanying text (discussing inequalities across the states).

221. See *supra* notes 202–213 and accompanying text.

222. *A Timeline of the Iraq War*, THINKPROGRESS (Mar. 17, 2013, 6:10 PM), <http://thinkprogress.org/report/iraq-timeline/>.

223. PRESIDENT’S COMMISSION ON CARE FOR AMERICA’S RETURNING WOUNDED WARRIORS, FINAL REPORT: SERVE, SUPPORT, SIMPLIFY 3 (July 2007), [http://www.dcoe.mil/Content/Navigation/Documents/President%27s\\_Commission\\_on\\_Care\\_for\\_Wounded\\_Warriors\\_Final\\_Report\\_July\\_30\\_07.pdf](http://www.dcoe.mil/Content/Navigation/Documents/President%27s_Commission_on_Care_for_Wounded_Warriors_Final_Report_July_30_07.pdf).

224. *The Family and Medical Leave Act and National Defense Authorization Act for FY 2008*, U.S. DEP’T LAB., [http://www.dol.gov/whd/fmla/NDAA\\_fmla.htm](http://www.dol.gov/whd/fmla/NDAA_fmla.htm) (last visited Feb. 14, 2016). See generally H.R. 4986, 110th Cong. (2008) (Pub. L. No. 110-181, 122 Stat. 3 (2008) (codified as amended in scattered sections of 5, 10, and 29 U.S.C.)).

The National Defense Authorization Act for Fiscal Year 2008<sup>225</sup> amended the FMLA to provide two types of military family leave for eligible employees.<sup>226</sup> The FMLA referred to these two amended regulations as “qualifying exigency leave” and “military caregiver leave.”<sup>227</sup> Under the new amendment, an eligible employee is permitted to take FMLA leave for “any qualifying exigency” rising out of the fact that the spouse, or the son, daughter, or parent of the employee, is on active duty or has been notified of an impending call or order to active duty.<sup>228</sup> Additionally, the amendment permits an eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered military member who is recovering from a serious injury or illness incurred in the line of duty, to take up to twenty-six workweeks of unpaid leave to care for the military member.<sup>229</sup>

The 2008 amendment to the FMLA demonstrates how a recognized problem in the United States can be corrected by federal legislation.<sup>230</sup> Like the 2008 amendment addressed the needs of military personnel, today, an amendment should act to broaden the protections afforded to victims of domestic violence who suffer from emotional and psychological abuse.<sup>231</sup> Congress should recognize that domestic violence has become an epidemic in society,<sup>232</sup> and, as a result, it should amend the FMLA to provide greater protection for victims of domestic violence.

Critics argue that the FMLA was not enacted to specifically address the effects of domestic violence; therefore, an amendment would not be warranted.<sup>233</sup> This argument fails as evidenced by the amendment to the FMLA addressing the needs of military personnel.<sup>234</sup> The FMLA was not enacted to address the needs of military personnel, but, rather, in 2008, Congress recognized the importance in amending the FMLA to meet the current needs of society.<sup>235</sup> Similar to the care

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225. Pub. L. No. 110-181, 122 Stat. 3 (codified as amended in scattered sections of 5, 10, and 29 U.S.C.).

226. U.S. DEP'T OF LABOR, MILITARY FAMILY LEAVE PROVISIONS OF THE FMLA (FAMILY MEDICAL LEAVE ACT): FREQUENTLY ASKED QUESTIONS AND ANSWERS 1 (2008), <http://www.dol.gov/whd/fmla/finalrule/MilitaryFAQs.pdf>.

227. *Id.* (quoting 29 C.F.R. §§ 825.126–.127 (2015)).

228. 29 C.F.R. § 825.126(a).

229. *Id.* § 825.127(a).

230. Stone, *supra* note 158, at 746–47.

231. *Id.*

232. See DIGNITY HEALTH, *supra* note 39.

233. See 29 U.S.C. § 2601(b) (2012).

234. See National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 585, 122 Stat. 3, 128–32 (codified as amended in scattered sections of 5 and 29 U.S.C.) (amending the FMLA to provide family leave to injured members of the armed forces).

235. *Id.*

of military personnel, domestic violence has become such a prevalent problem that the current federal legislation must be amended.

#### 4. *Domestic Violence's Current Impact on the Employment Sector*

Currently, domestic violence has a detrimental effect on the employment sector; therefore, action is imperative. Because the FMLA provides limited protection for victims of domestic violence, and because only a minority of states across the country have adopted Domestic Leave Acts to supplement the FMLA, many victims of domestic violence lack employment protection to take unpaid leave to address their individual situations.

Not only does domestic violence affect the victim, but it also affects the victim's workplace.<sup>236</sup> Victims of domestic violence are likely to suffer from serious health and mental problems that can affect their performance at work and their opportunities for future advancement.<sup>237</sup> Furthermore, women who are stalked or threatened by their abuser report missing work an average of eleven days per year.<sup>238</sup>

The effects of emotional and psychological abuse lead to a decrease in productivity in the workplace and an increase in absenteeism.<sup>239</sup> "Sixty-one percent of recently surveyed senior executives stated that domestic violence has a harmful effect on their company's productivity and 70% said domestic violence negatively affects employee attendance."<sup>240</sup> In addition, the U.S. Department of Health and Human Services estimates that the annual cost of lost productivity due to domestic violence equates to \$727.8 million.<sup>241</sup>

236. *Who Does Domestic Violence Affect?*, COLO. B. ASS'N, <http://www.cobar.org/index.cfm/ID/0/subID/2924/Who-Does-Domestic-Violence-Affect?/> (last visited Feb. 14, 2016).

237. *Id.* ("[D]omestic violence [has] caused: 56 percent of employed abused women to be late for work at least five times a month; 28 percent to leave early at least four days a month; 54 percent to miss at least three full days of work a month; and at least 20 percent to lose their jobs." (citing EDK ASSOCIATES, *THE MANY FACES OF DOMESTIC VIOLENCE AND ITS IMPACT ON THE WORKPLACE* 2-4 (1997))).

238. *Domestic Violence in the Workplace*, NAT'L COAL. AGAINST DOMESTIC VIOLENCE, [http://www.academia.edu/7530836/workplace\\_violence](http://www.academia.edu/7530836/workplace_violence) (last visited Feb. 23, 2016).

239. *Id.*

240. WISC. COALITION AGAINST DOMESTIC VIOLENCE, *FACT SHEET ON DOMESTIC VIOLENCE AND THE WORKPLACE*, <http://endabusewi.org/sites/default/files/resources/Fact%20Sheet%20on%20the%20Workplace%20and%20Domestic%20Violence%20from%20Wisconsin%20Coalition%20Against%20Domestic%20Violence.pdf> (last visited Feb. 14, 2016) (citing 2008 SURVEY, CORPORATE ALLIANCE TO END PARTNER VIOLENCE (2008)).

241. U.S. DEP'T OF HEALTH & HUMAN SERVS., *COSTS OF INTIMATE PARTNER VIOLENCE AGAINST WOMEN IN THE UNITED STATES* 26 tbl.7, 31 (Mar. 2003) [hereinafter *HHS COST OF VIOLENCE*], <http://www.cdc.gov/violenceprevention/pdf/IPVBook-a.pdf>.

Furthermore, domestic violence also increases the employer's business costs.<sup>242</sup> An aggressor will "attempt to weaken the victim's economic independence" by interfering with the victim's ability to work.<sup>243</sup> Abusers may inflict visible injuries on the victim, destroy the victims clothing, or force the victim to stay up all night the day before a crucial meeting or presentation.<sup>244</sup> According to a survey conducted by the U.S. General Accounting Office, 56% of women reported that their abuser had harassed them at work either in person or by phone.<sup>245</sup> A number of women have even been "murdered in their workplace as a result of intimate partner violence."<sup>246</sup>

It is clear that these activities not only have a negative impact on the victim but also impact the employer's bottom line. According to the Bureau of National Affairs, domestic violence costs employers an estimated three to five billion dollars annually in lost time and productivity.<sup>247</sup> Lastly, the implications of victims of domestic violence not being fully covered under the FMLA not only hurts the victims and their employers but, also, the entire U.S. economy. Specifically, "[d]omestic violence is responsible for the loss of 8 million paid days of work annually, the equivalent of 32,000 full time jobs."<sup>248</sup>

If the FMLA were amended to provide explicit protection for victims of domestic violence to address the effects of their abuse, it would also benefit the employment sector. Further, amending the FMLA to provide greater protection to victims of domestic violence

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242. Timothy John Durbin, Note, *Accommodating Employers' Interests into the Discussion of Employment Protections for Victims of Domestic Violence*, 22 J.L. & POL'Y 845, 854 (2014).

243. *Id.*

244. Tarr, *supra* note 177, at 376–77 ("[A]busers stalk [victims] at work, make harassing phone calls to their place of employment, prevent them from going to work because of abuse or other interfering behavior, and call supervisors to get the victims in trouble."); Maria Amelia Calaf, Student Article, *Breaking the Cycle: Title VII, Domestic Violence, and Workplace Discrimination*, 21 LAW & INEQ. 167, 171 (2003).

245. U.S. GEN. ACCOUNTING OFFICE, GAO/HEHS-99-12, DOMESTIC VIOLENCE: PREVALENCE AND IMPLICATIONS FOR EMPLOYMENT AMONG WELFARE RECIPIENTS 7–8 (1998), <http://www.gao.gov/archive/1999/he99012.pdf>.

246. DIGNITY HEALTH, *supra* note 39 (reporting that between 2003–2006, 142 women were murdered in the workplace as a result of intimate partner violence); see, e.g., Gina Barton, 53 in *Wisconsin Killed by Domestic Abusers with Illegal Gun Since 2000*, J. SENTINEL (Sept. 30, 2013), <http://www.jsonline.com/news/crime/4-domestic-abusers-in-wisconsin-used-illegal-guns-to-kill-report-says-b99109594z1-225824051.html>; Dinesh Ramde, *Radcliffe Haughton Had History of Abuse; Killed 3, Himself at Azana Day Spa in Wisconsin*, HUFFINGTON POST, [http://www.huffingtonpost.com/2012/10/22/radcliffe-haughton-profile-abuse\\_n\\_2000235.html](http://www.huffingtonpost.com/2012/10/22/radcliffe-haughton-profile-abuse_n_2000235.html) (last updated Dec. 22, 2012, 5:12 PM).

247. 820 ILL. COMP. STAT. 180/5(21) (2014) ("Other reports have estimated that domestic violence costs United States employers \$13,000,000,000 annually.").

248. WHITE HOUSE COUNCIL ON WOMEN & GIRLS, KEEPING AMERICA'S WOMEN MOVING FORWARD: THE KEY TO AN ECONOMY BUILT TO LAST 19 (2012) [http://www.whitehouse.gov/sites/default/files/email-files/womens\\_report\\_final\\_for\\_print.pdf](http://www.whitehouse.gov/sites/default/files/email-files/womens_report_final_for_print.pdf).

would result in better coverage for victims and allow them to continue to be productive in the workplace.<sup>249</sup>

*B. The Family and Medical Leave Act Should Model the Language of the Victim's Economic Security and Safety Act*

To provide guaranteed protection to victims of domestic violence, an amendment to the FMLA should model the language of VESSA. Of the sixteen states that have enacted additional legislation, Illinois provides the most comprehensive law to address the fundamental gaps in the FMLA.<sup>250</sup> The Illinois legislature has recognized the importance of solving the widespread problem in our society and has enacted legislation to provide victims with unpaid leave to deal with the aftermath of domestic violence.<sup>251</sup>

The major difference between the FMLA and VESSA is that the FMLA does not provide explicit protection for victims who suffer from emotional and psychological abuse in the absence of physical abuse.<sup>252</sup> Conversely, VESSA explicitly permits an employee to take unpaid leave to seek medical attention for current and recovering psychological injuries.<sup>253</sup> If a victim who has endured psychological abuse does not seek professional assistance to deal with the effects of the abuse, the development of psychological distress and psychiatric morbidity increases.<sup>254</sup> An amendment to the FMLA that models the language in VESSA will likely prevent victims from developing additional psychological illnesses.<sup>255</sup>

In addition, VESSA provides unpaid leave to victims of domestic violence to obtain services from a victim services organization, participate in safety planning, and seek legal assistance to ensure the health and safety of the victim.<sup>256</sup> James Champlin is one of several Staff Attorneys with the Domestic Violence Legal Clinic located within the domestic violence courthouse in Chicago, Illinois. Mr. Champlin assists victims of domestic violence with obtaining orders of protection and, with some victims, he is able to provide full representation in

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249. DOMESTIC & SEXUAL VIOLENCE AND THE WORKPLACE, *supra* note 183, at 2–4.

250. Meg Hobday, *Domestic Violence Comes to Work: The Need for a Work-Related Response*, BENCH & B. MINN. (Mar. 1, 2010), <http://mnbenchbar.com/2010/03/domestic-violence-comes-to-work/> (“Illinois has taken the lead in comprehensively addressing this societal issue.”).

251. See 820 ILL. COMP. STAT. 180/20(a)(1).

252. See 29 U.S.C. § 2612 (2012).

253. 820 ILL. COMP. STAT. 180/20(a)(1)(A).

254. Warshaw et al., *supra* note 168, at 149.

255. See generally *id.* at 150–61 (describing the heightened risk for victims to develop psychological illnesses).

256. 820 ILL. COMP. STAT. 180/20(B), (D)–(E).

pursuing a legal claim against their aggressors.<sup>257</sup> The Domestic Violence Courthouse personnel have “worked diligently, with the assistance of advocacy groups to ensure that the courthouse and its processes are as accessible as possible, but there is only so much that can be done given the amount of time it takes to complete court filings and the emergency nature of the proceedings.” As a Staff Attorney, Mr. Champlin sees firsthand that these legal matters are primarily addressed during the regular business hours and that the process to obtain an order of protection is very time consuming.<sup>258</sup>

When a victim of domestic violence comes to the domestic violence courthouse seeking an order of protection against her abuser, Mr. Champlin assists the victim in preparing the necessary paperwork and drafting an affidavit explaining the instances of abuse.<sup>259</sup> Many of the victims that come to court to file an order of protection chose not to inform their employers of the real reasons for their absence.<sup>260</sup> Victims “might be embarrassed, or afraid that their personal issues may be spread around the workplace; others are scared that their employer, worried about other employees or the effects of the abuse on the workplace, might take actions against them or even fire them.”<sup>261</sup> Therefore, many victims do not provide their employees with any reason for taking a half-day off when they are attempting to seek a legal remedy that protects them from their abusers.<sup>262</sup>

Based on Mr. Champlin’s experience, victims of domestic violence come to the courthouse various times throughout the day, but the busiest time period tends to be between the hours of 9:00AM–10:00 AM.<sup>263</sup> Many of the victims who come to the courthouse in the morning hope that they can obtain a civil order of protection before having to return to work.<sup>264</sup> Unfortunately, the process of obtaining an order of protection takes longer than many victims anticipate. Depending on the victim’s situation,<sup>265</sup> it takes approximately an hour and a half to two

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257. Interview with James Champlin, Staff Attorney, Domestic Violence Legal Clinic, in Chi., Ill. (May 2, 2016).

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.*

263. Interview with James Champlin, *supra* note 257.

264. *Id.*

265. When a victim of domestic violence has a police report, she is sent back to the State’s Attorney’s Office to speak to an attorney about pressing charges, a process that can take anywhere from ten minutes to three or four hours, or even longer if the attorney is able to go forward with the charges. *Id.* After speaking with the attorney about her options, she will have the opportunity to fill out the paperwork for the civil order of protection. *Id.*

hours<sup>266</sup> to conduct the client interview and prepare the materials required to obtain an order of protection.<sup>267</sup> After the victim has completed the paperwork, it takes the clerks anywhere from fifteen to forty-five minutes to get the paperwork filed.<sup>268</sup> By the time that process is completed, many of the judges have already stopped accepting new cases in order to finish the cases already in front of them.<sup>269</sup> According to Mr. Champlin, the judges who work at the domestic violence courthouse stop accepting cases between 12:00 PM and 12:30 PM and do not start taking new cases until 2:00 PM, thus requiring the victim to wait until at least 2:00 PM for the judge to hear her case.<sup>270</sup> Because victims have only requested a few hours of leave from work, many of the victims end up leaving the courthouse before the judge has reviewed their case without an order of protection to shield them from their abuser.<sup>271</sup> Thus, a lot of victims must return to the courthouse another day to finish the process, and, unfortunately, some never come back to finish.<sup>272</sup> Even though this experience occurred in Illinois, it is very likely that women across the country frequently face this dilemma.

Fortunately, as of 2003, attorneys practicing in this area of the law have been able to inform victims of domestic violence employed in Illinois that they are permitted to take VESSA leave to address the effects of domestic violence.<sup>273</sup> Once Mr. Champlin explains to the victim the broad protections afforded to her pursuant to VESSA, the victim's fear of being fired from her job tends to dissipate.<sup>274</sup> Specifically, under VESSA, the employer is required to keep the reason for the victim's absence confidential, "which is a huge relief for a lot of victims of domestic violence."<sup>275</sup> This makes the process of obtaining an order of protection a lot easier, and the victim is more willing to disclose to her employer the actual reason for requesting the unpaid leave.<sup>276</sup> As a result, the victim gains the courage to file an order of

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266. If a victim is paired with an agency or advocate, the time it takes a victim to file the paperwork for an order of protection may take even longer. *Id.* Advocates are trained to ensure that the victim is thorough in her statements discussing the abuse to ensure an order of protection is granted. *Id.*

267. *Id.*

268. *Id.*

269. Interview with James Champlin, *supra* note 257.

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.*

275. Interview with James Champlin, *supra* note 257.

276. *Id.*

protection and takes the necessary steps to leave her abusive situation, thus escaping the cycle of abuse. Unfortunately, the protections afforded to victims of domestic violence employed in Illinois are not available to victims employed in a majority of other states. Therefore, an amendment to the FMLA that explicitly provides unpaid leave to address the effects of domestic abuse has the potential to help victims across the United States obtain orders of protection without the fear of losing their jobs.<sup>277</sup>

Additionally, because the FMLA's language does not explicitly provide unpaid leave for victims to address emotional and psychological abuse, not all states have applied the FMLA to victims of domestic violence.<sup>278</sup> Specifically, the FMLA only provides unpaid leave to victims of domestic violence in certain circumstances. For instance, an employee could successfully request leave if she endured physical injuries that require hospitalization.<sup>279</sup> However, the FMLA permits the employer to use its discretion in determining whether leave should be granted for these victims.<sup>280</sup> Under VESSA, Illinois employers do not have the discretion to determine whether to grant unpaid leave to victims of domestic violence because the Act specifically permits victims of domestic violence to request leave to address the consequences of the abuse.<sup>281</sup> As compared to other states, VESSA provides the greatest protection for domestic violence because it provides up to twelve weeks of unpaid leave to address a wide range of effects associated with domestic violence. Therefore, an amendment to the FMLA that models the language in VESSA would guarantee that all victims of domestic violence receive the same protection across the country, eliminating the employers' discretion. This amendment would have a profound impact on victims of domestic violence, the employment sector, and the court system.

#### IV. IMPACT

Domestic violence has been a pervasive problem for millions of individuals within the United States for many decades.<sup>282</sup> Because of

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277. Tarr, *supra* note 177, at 411, 425–27.

278. Danielle Krause, Note, *The Domestic Violence Leave Act: The Need for Victim Workplace Leave on a Federal Level and in North Dakota*, 87 N.D. L. REV. 167, 173–74 (2011).

279. DOL FREQUENTLY ASKED QUESTIONS, *supra* note 15, at 10.

280. *The 2000 Survey Report*, *supra* note 94.

281. 820 ILL. COMP. STAT. 180/20 (2014).

282. FUTURES WITHOUT VIOLENCE, THE FACTS ON DOMESTIC, DATING AND SEXUAL VIOLENCE (2009), <http://www.helpingservices.org/DVA-training/Resources/DV%20Dynamics/Facts%20on%20Domestic,%20Dating,%20and%20Sexual%20Violence%20from%20Futures%20without%20Violence.pdf>.

the current political and media attention surrounding this issue, U.S. citizens are more aware of the impact of domestic violence on women.<sup>283</sup> From professional football players abusing their significant others<sup>284</sup> to President Barack Obama outwardly recognizing domestic violence as an issue of national concern,<sup>285</sup> these highly publicized events have influenced U.S. citizens to demand change. According to Vice President Joe Biden: “We had to let the nation know [about the issue of domestic violence] . . . because I was absolutely convinced—and remain absolutely convinced—in the basic decency of the American people, and that if they knew, they would begin to demand change.”<sup>286</sup> It is apparent that this is the perfect opportunity to amend the FMLA to provide broader protection for victims across the United States, which will have a profound impact in many ways.

### A. *Impact on Domestic Violence Victims Nationwide*

An amendment to the FMLA that explicitly provides greater protection to victims of domestic violence would provide women across the nation with consistent protection. All women in the United States would be afforded equal rights regardless of the state that they reside

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283. See, e.g., Jarret Bell, *Video Surfaces of Ray Rice's Domestic Violence Incident*, USA TODAY: SPORTS (Sept. 8, 2014, 11:27 AM), <http://www.usatoday.com/story/sports/nfl/ravens/2014/09/08/ray-rice-tmz-video-roger-goodell/15272689/>; Tanya Somanader, “*Even One Case Is Too Many*”: Vice President Biden Marks the 20th Anniversary of the Violence Against Women Act, WHITE HOUSE: BLOG (Sept. 9, 2014, 7:54 PM), <https://www.whitehouse.gov/blog/2014/09/09/even-one-case-too-many-vice-president-biden-marks-20th-anniversary-violence-against->

284. See, e.g., Bell, *supra* note 283; Jon Schuppe, *Still Playing: 12 NFL Players Have Domestic Violence Arrests*, NBC NEWS (Sept. 17, 2014, 4:57 AM), <http://www.nbcnews.com/storyline/nfl-controversy/still-playing-12-nfl-players-have-domestic-violence-arrests-n204831>. In September 2014, a video went viral that captured Ray Rice, a professional football player for the Baltimore Ravens, brutally punching his fiancé, Janay Palmer, inside a hotel elevator. Bell, *supra* note 283. Before this incident occurred, many believed that domestic violence only affected individuals with low-socioeconomic status; however, this incident demonstrated that “[d]omestic violence affects people of all socioeconomic backgrounds.” See *What Is Domestic Violence?*, WRAP, <http://www.wrapn.org/domestic-violence.html> (last visited Feb. 14, 2016).

285. See *President Obama Asks To End Violence Against Women at Grammys*, FOXNEWS.COM (Feb. 8, 2015), <http://www.foxnews.com/entertainment/2015/02/08/president-obama-asks-to-end-violence-against-women-at-grammys/>. On February 1, 2015, President Barack Obama, who is known for using alternative outlets to convey his message, spoke during the 57th Annual Grammy Awards about the issue of domestic violence within the United States. *Id.* President Obama stated: “Together we can change our culture for the better by ending violence against women . . . .” *Id.* (quoting President Barack Obama). The President asked the citizens of the United States to join him “to create a culture ‘where violence isn’t tolerated, [and] where survivors are supported.’” Morgan Chilson, *Obama's Grammys PSA Takes a Stand Against Domestic Violence*, NEWSMAX (Feb. 9, 2015, 3:33 PM), <http://www.newsmax.com/TheWire/obama-grammys-public-service-announcement-domestic-violence/2015/02/09/id/623696/> (quoting President Barack Obama).

286. Somanader, *supra* note 283 (quoting Vice President Joe Biden).

in. Women would have the right to request unpaid leave to: (1) seek medical treatment to address the effects of emotional and psychological abuse; (2) pursue legal protection; and (3) obtain safe housing without the fear of facing unemployment.<sup>287</sup> The amendment to the FMLA would afford the survivor the opportunity to seek the necessary medical treatment, including counseling and prescribed medication, which would likely result in a more stable emotional state for her.<sup>288</sup> Furthermore, the likelihood of survivors developing more severe psychological or mental illnesses would decrease.<sup>289</sup> The amended act would also permit victims to seek legal protection without fearing unemployment.<sup>290</sup> Victims would have the opportunity to obtain legal counsel, gain a better understanding of their rights under the FMLA, and understand the process necessary to exercise those rights.<sup>291</sup> Victims' realization that they are entitled to request unpaid leave without jeopardizing their employment would make them one step closer to leaving their abusive relationships and ultimately escaping the cycle of abuse.<sup>292</sup> Obtaining safe housing without the fear of facing unemployment is another crucial step toward freedom from their abuser.<sup>293</sup>

### B. *Impact on the Employment Sector*

Amending the FMLA to provide broader protections for victims of domestic violence would also have a direct impact on the employment sector. Employers would be required to provide training or publish written guidance to employees regarding the amendment.<sup>294</sup> Initially, employers would have to deal with the increase in requests for unpaid

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287. 820 ILL. COMP. STAT. 180/20 (2014).

288. See ANNE H. FLITCRAFT ET AL., AM. MED. ASS'N, DIAGNOSTIC AND TREATMENT GUIDELINES ON DOMESTIC VIOLENCE 4 (1992), [http://www.ncdsv.org/images/AMA\\_Diag&TreatGuideDV\\_3-1992.pdf](http://www.ncdsv.org/images/AMA_Diag&TreatGuideDV_3-1992.pdf).

289. See *Mental Health Treatment & Services*, NAT'L ALLIANCE ON MENTAL ILLNESS, <https://www.nami.org/Learn-More/Treatment> (last visited Apr. 26, 2016).

290. See generally 820 ILL. COMP. STAT. 180/20(a)(1)(E) (allowing a victim to seek legal assistance).

291. See Jennifer S. Rosenberg & Denise A. Grab, INST. FOR POL'Y INTEGRITY: N.Y.U., SUPPORTING SURVIVORS: THE ECONOMIC BENEFITS OF PROVIDING CIVIL LEGAL ASSISTANCE TO SURVIVORS OF DOMESTIC VIOLENCE, INSTITUTE FOR POLICY INTEGRITY: NEW YORK UNIVERSITY SCHOOL OF LAW 7–9 (2015), <http://policyintegrity.org/documents/SupportingSurvivors.pdf>.

292. See Weiser & Widiss, *supra* note 9, at 4.

293. *Domestic Violence and Housing*, STOP VIOLENCE AGAINST WOMEN, [http://www.stopvaw.org/domestic\\_violence\\_and\\_housing](http://www.stopvaw.org/domestic_violence_and_housing) (last updated Aug. 2013) (“[F]or women who fear for their safety and for their lives, housing is an immediate and pivotal issue on which the question of escape itself rests.” (quoting *Safe and Affordable Housing*, UNWOMEN, <http://www.endvawnow.org/en/articles/1458-safe-and-affordable-housing.html> (last visited Feb. 23, 2016))).

294. See DOL FACT SHEET #28D, *supra* note 140, at 1.

leave and would need to recognize that there would be a decrease in productivity. However, because victims would be afforded the opportunity to seek legal counsel and medical attention, this would also have a long-term, positive effect on employers.<sup>295</sup> Victims would be better equipped to deal with the effects of the emotional and psychological abuse, which would eventually result in a decrease of absenteeism and an increase in productivity.<sup>296</sup> Lastly, the employer's annual cost of productivity would eventually decrease,<sup>297</sup> thus benefiting the employment sector and the economy overall.

Another benefit to employers is that they would no longer need to allocate resources to determine whether a request from a victim is permitted under the FMLA. Given that the amended Act would explicitly permit victims to request unpaid leave to address the effects of the abuse, the amount of discretion an employer currently exercises would be eliminated. In addition, an amendment to the FMLA would improve the employee–employer relationship. Employees, who have been domestically abused would be more willing to disclose their personal situation to their employer because these employees would no longer fear losing their job.<sup>298</sup>

Lastly, the implementation of an amendment to the FMLA would minimally increase the costs for employers because they are familiar with the FMLA and have procedures in place that handle employees' absences and litigation.<sup>299</sup> Although the implementation costs to an employer would be minimal, the costs associated with providing unpaid leave to a victim of domestic violence would be significant to an employer. When an employer grants unpaid leave to an employee, the employer is alleviated from the cost of paying the employee's salary.<sup>300</sup> Yet, the employer loses the value that the employee brings to the company, which ultimately impacts the employer's bottom line.<sup>301</sup>

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295. See generally WISC. COAL. AGAINST DOMESTIC VIOLENCE, *supra* note 240 (noting the cost on attendance and productivity).

296. See NAT'L WORKPLACE RES. CTR. ON DOMESTIC VIOLENCE, THE WORKPLACE RESPONDS TO DOMESTIC VIOLENCE: A RESOURCE GUIDE FOR EMPLOYERS, UNIONS, AND ADVOCATES 89 [hereinafter GUIDE FOR EMPLOYERS], <https://www.azmag.gov/Documents/pdf/cms.resource/DV-employer%20handbook.pdf> (last visited Feb. 14, 2016).

297. See generally 820 ILL. COMP. STAT. 180/5(18) (2014) (noting that sexual assault causes a loss in productivity).

298. See GUIDE FOR EMPLOYERS, *supra* note 296, at 16.

299. See *id.* at 6.

300. National Partnership for Women & Families, GUIDE TO THE FAMILY AND MEDICAL LEAVE ACT (FMLA): QUESTIONS AND ANSWERS, (8th ed., 2016), <http://www.nationalpartnership.org/research-library/work-family/fmla/guide-to-fmla.pdf>.

301. See Tom Borg, *How Much Value Do Your Employees Bring to the Bottom Line?*, ENTREPRENEUR (Nov. 14, 2014), <https://www.entrepreneur.com/article/239463>.

The upfront cost associated with providing unpaid leave does pale in comparison to the regained productivity once the victim comes back to work after dealing with the negative effects of her abuse.<sup>302</sup> Today, domestic violence costs the United States over \$5.8 billion dollars annually.<sup>303</sup> The cost to implement an amendment to the FMLA is insignificant when compared to the current costs of domestic violence on our economy.<sup>304</sup>

### C. *Impact on the Court System*

When an employer has violated the FMLA and the employee has filed a lawsuit, the court is required to use its discretionary powers to interpret the FMLA. An amendment to the FMLA would eliminate the court's ability to use its discretionary powers to interpret the FMLA and decide whether to grant unpaid leave to victims of domestic violence. Because the amendment would explicitly permit victims of domestic violence to obtain unpaid leave, courts would be required to uniformly provide unpaid leave to victims nationwide.<sup>305</sup> Initially, when the amendment to the FMLA is implemented, there would be an increase in the amount of requests for orders of protection and the amount of assault and battery charges filed; thus, there would be an increase in the amount of time it takes the court to process these charges.<sup>306</sup> The workload of the courts would also increase, which could increase the current backlog or create a backlog.<sup>307</sup> Unfortunately, “[w]hen the caseload piles up, some cases may not get a court date until the next calendar year.”<sup>308</sup> Even though there may be a back log when this amendment is enacted, the court system will be able to absorb the workload. Over time the number of orders of protection filed by victims of domestic violence will decrease, thus allowing the courts to handle each case efficiently. An amendment to the FMLA may burden the court system at the beginning; however, in the long run, the amendment to the FMLA would provide better protection to victims of domestic violence by allowing them to seek the

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302. *See id.*

303. HHS COST OF VIOLENCE, *supra* note 241, at 2.

304. *See* GUIDE FOR EMPLOYERS, *supra* note 296, at 6.

305. Krause, *supra* note 278, at 189.

306. *See* Sonia Goltz et al., *University Women's Experiences in Bringing Second Generation Sex Discrimination Claims: Further Support for Adoption of a Structural Approach*, 18 TEX. J. WOMEN 7 L. 145, 176 (2009) (stating that “new legislation . . . increas[ed] the average time it took to process a charge”).

307. *See id.* (stating that “new legislation increased the backlog of cases”).

308. *See* Ron Cooper, *The Price of Delay: Why Court Backlog Is a Serious Problem for Charlottesville*, CVILLE (Jan. 31, 2014, 7:00 AM), <http://www.c-ville.com/the-price-of-delay-why-court-backlog-is-a-serious-problem-for-charlottesville/#.VbcAlfViko>.

legal assistance that they need without having the fear of losing their jobs.

The best interests of our citizens should be at the forefront of Congress's mind when enacting legislation. Specifically, amending the FMLA would have a profound impact on victims of domestic violence because they would receive consistent protection nationwide.

## V. CONCLUSION

"Domestic violence is the leading cause of injury to women" in the United States.<sup>309</sup> It is "more [common] than car accidents, muggings, and rapes combined."<sup>310</sup> Traditionally, domestic violence only encapsulated physical abuse; however, today's society recognizes that emotional and psychological abuse can be just as harmful.<sup>311</sup> Domestic violence not only impacts millions of women across the United States, but it also affects their employment.<sup>312</sup> Victims who attempt to escape the cycle of abuse often face challenges in the workplace.<sup>313</sup> While the victim attempts to escape from her abusive relationship, she is often forced to take several days off of work to seek legal assistance, obtain an order of protection, or find a safe house to reside, which ultimately impacts her workplace productivity.<sup>314</sup> Unfortunately, the FMLA does not currently provide unpaid leave to address those concerns; thus, many victims face adverse employment consequences when attempting to ameliorate the effects of the abuse.<sup>315</sup> Without the economic security that a job provides, many victims tend to feel that it is imperative to return to their abuser.<sup>316</sup> Thus, the cycle of domestic abuse is never broken.<sup>317</sup>

State legislatures have recognized the discrepancies within the FMLA and have enacted statutes to supplement the FMLA.<sup>318</sup> Although this approach is effective in some states, it does not provide complete protection to victims of domestic violence across the United States, and it leaves some victims subject to the discretion of both their employers and the courts. Therefore, the FMLA should be

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309. *Domestic Violence Statistics*, DOMESTIC VIOLENCE STAT., <http://domesticviolencestatistics.org/domestic-violence-statistics/> (last visited Feb. 14, 2016).

310. *Id.*

311. *See Types of Domestic Violence*, *supra* note 16.

312. *See Weiser & Widiss*, *supra* note 9, at 4.

313. *Id.*

314. *Id.*

315. *See id.*

316. *Id.* at 4.

317. *Id.*

318. *Supra* notes 196–235 and accompanying text.

amended to provide broader protections to victims of domestic violence by explicitly including emotional and psychological abuse. The amendment's language should mirror VESSA, which has proven to be effective at increasing productivity in the workplace in Illinois. This legislation would provide consistent nationwide protection for victims of domestic violence and, therefore, could contribute to addressing the widespread problem of domestic violence in the United States.

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