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CALIFORNIA'S SURVIVORS OF DOMESTIC VIOLENCE EMPLOYMENT LEAVE ACT: THE TWENTY-FIVE EMPLOYEE MINIMUM IS NOT A GOOD RULE OF THUMB

Hilary Mattis*

I. INTRODUCTION

Domestic violence is deeply ingrained in our society. For instance, at common law, a husband could lawfully beat his wife with a rod thinner than his thumb.1 Although this is now a familiar colloquial expression, the “rule of thumb” is a vestige of a history littered with domestic violence.2 Domestic violence continues to be a pervasive problem in American society, cutting across gender, race, economic class, religion, educational status, and sexual orientation.3 Accordingly, numerous states have enacted specific criminal and civil laws to protect victims of domestic violence.4

The California Survivors of Domestic Violence Employment Leave Act (the “Act”)5 protects California employees who are victims of domestic violence. The Act allows effected employees time off work to address the

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*Senior Comments Editor, Volume 50 of the Santa Clara Law Review; J.D. Candidate 2010, Santa Clara University School of Law. I would like to thank the Board of Editors for helping to shape this comment into its final form and Professor Julie Saffren, my friends, and family for their support.


2. See id.


4. See infra notes 78–92.

violence in their lives and prohibits employers from retaliating against such employees by discharging or discriminating against them. This legislation does not, however, reach all California employers, and thus subjects employees of small businesses to restricted leave provisions. This comment addresses this inconsistency of the Act, and explains why survivors of domestic violence should be afforded leave provisions in the state of California that are not based exclusively on the size of his or her employer.

Part II of this comment introduces the complex issues surrounding domestic violence and how they impact the workplace. This section also provides an introduction to California's Survivors of Domestic Violence Employment Leave Act, and specifically explores a subsection of the Act—section 230.1. Part III identifies the problem with the discrepancy between the employer size requirement of California Labor Code sections 230 and 230.1. Part IV analyzes why California should change the scope of the section 230.1 to include all employers, regardless of their number of employees. Finally, Part V explores how California can broaden the Act to provide protection to almost all California employees, without overburdening smaller employers.

II. BACKGROUND

A. What is Domestic Violence?

In broad terms, "domestic violence" refers to "violence between intimates living together or who have previously cohabited." Because both men and women are perpetrators

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6. Id. §§ 230(c), 230.1(a).
7. Section 230.1 only applies to businesses with twenty-five employees or more. Id. § 230.1(a).
8. See infra Part II.D.
9. See infra Part IV–V.
10. See infra Part II.A–C.
11. See infra Part II.D.
12. See infra Part III.
13. See infra Part IV.
14. See infra Part V.
of domestic violence, this definition is gender neutral.\footnote{See id.} The abuse can be physical, emotional, sexual, psychological, or economic, and may include any number of different kinds of behavior\footnote{For more information about the various types of domestic abuse, see Tina de Benedictis, Jaelline Jaffe, \\& Jeanne Segal, Domestic Violence and Abuse: Types, Signs, Symptoms, Causes, and Effects, http://www.aaets.org/article144.htm (last visited Feb. 9, 2010).}—"some obviously criminal in nature, others more manipulative, which in total are intended to exercise coercive control . . . used to dominate another person."\footnote{BUZAWA \\& BUZAWA, supra note 15, at 5.} Approximately 1.3 million women and 835,000 men are physically assaulted by an intimate partner annually in the United States.\footnote{U.S. DEP'T OF JUSTICE, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY, iv (2000), available at http://www.ncjrs.gov/pdffiles1/nij/183781.pdf.} Estimates of how many women in the United States have been affected by domestic violence are as high as one out of four.\footnote{Jennifer Gaines, Comment, Employer Liability for Domestic Violence in the Workplace: Are Employers Walking a Tightrope Without a Safety Net?, 31 TEX. TECH. L. REV. 139, 143 (2000) (citing Nancy Hatch Woodward, Domestic Abuse Policies in the Workplace, HR MAGAZINE, May 1, 1998, at 116).} If these estimates are accurate, there are roughly 3.5 million women who are affected by domestic violence every year.\footnote{Id.} While the U.S. Department of Justice reports that each year more than one million people are victims of a violent assault by an intimate partner,\footnote{Id.} it is difficult to determine the exact figure. Many victims are reluctant to report abuse and chose to remain silent, so "these statistics grossly underestimate the actual prevalence of domestic violence in our society."\footnote{Henry, supra note 3 (citing Fred C. Pampel \\& Kirk R. Williams, Intimacy and Homicide: Compensating for Missing Data in the SHR, 38 CRIMINOLOGY 661, 661 (2000)).} This silence is a success for perpetrators because they were able to control their victim—their ultimate goal.\footnote{See Lea B. Vaughn, Symposium on Integrating Responses to Domestic Violence: Victimized Twice—The Intersection of Domestic Violence and the Workplace: Legal Reform Through Curriculum Development, 47 LOY. L. REV. 231, 232 (2001).}

Though both men and women are victims of domestic violence, this definition is gender neutral. The abuse can be physical, emotional, sexual, psychological, or economic, and may include any number of different kinds of behavior—"some obviously criminal in nature, others more manipulative, which in total are intended to exercise coercive control . . . used to dominate another person." Approximately 1.3 million women and 835,000 men are physically assaulted by an intimate partner annually in the United States. Estimates of how many women in the United States have been affected by domestic violence are as high as one out of four. If these estimates are accurate, there are roughly 3.5 million women who are affected by domestic violence every year. While the U.S. Department of Justice reports that each year more than one million people are victims of a violent assault by an intimate partner, it is difficult to determine the exact figure. Many victims are reluctant to report abuse and chose to remain silent, so "these statistics grossly underestimate the actual prevalence of domestic violence in our society." This silence is a success for perpetrators because they were able to control their victim—their ultimate goal.

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violence, criminal statistics show that women are more likely to be victims than men—about eighty-five percent of domestic violence victims are women.²⁵ Because women are predominately the victims of domestic violence,²⁶ this comment will generally assess violence against women. It is, however, important to emphasize that domestic violence against men is an equally serious problem, especially because the effects of domestic violence against men are less documented and are only recently beginning to be studied by psychologists.²⁷

Aside from physical abuse, many scholars, as well as the U.S. Department of Justice, have begun including stalking as part of their analysis of domestic violence.²⁸ Stalking is "the act of deliberately and repeatedly following or harassing another to create fear in the victim or to coerce him or her to accede to the wishes of the stalker."²⁹ Stalking is often coupled with domestic violence,³⁰ and is more frequently committed in the domestic violence context than in any other relationship.³¹ Stalking usually occurs during the dangerous "separation period" that begins immediately after the victim leaves her abuser.³² It is a common tactic that the abuser employs as a means of regaining control over the victim.³³ Although stalking may seem less serious than actual abuse, it

²⁶. See id.
²⁸. See BUZAWA & BUZAWA, supra note 15, at 120.
²⁹. Id. at 14.
³⁰. In addressing the relationship between stalking and domestic violence, the U.S. Department of Justice stated in a Report to Congress:
   Domestic violence is about control, power, and domination. While stalking may be perpetrated by strangers, acquaintances, or current or former intimate partners, stalking is most often committed against women in the domestic violence context. When victims of domestic violence leave their abusers, abusers often stalk victims in an effort to regain control.
³¹. Id.
³². Id. See infra notes 56–59 and accompanying text for further discussion of separation periods.
³³. Id.
creates a “psychological prison” that denies victims the freedom of security, and it is part of the abusive cycle of control of domestic violence.

B. Domestic Violence Affects the Workplace

Considering a vast majority of Americans work outside of the home, “domestic violence has found a home in the workplace.” Seventy-five percent of female victims of domestic violence use company time and resources to handle domestic-violence related matters. Further, seventy-five percent of female victims were harassed by their abusers, either in person or by telephone, while on the job, and seventy percent reported that this harassment caused difficulty in performing their jobs. Fifty-six percent of abused women were late for work several times per month, and fifty-four percent missed at least three days of work per month due to the abuse. Thirty percent of women reported that the domestic violence ultimately led to the loss of their jobs. Thirty-seven percent of abused women reported that the abuse had an overall effect on their work, resulting in tardiness, missed work, or a decreased ability to keep a job or

34. Id.
37. Gaines, supra note 20, at 143.
40. Vaughn, supra note 24, at 236 (citing U.S. DEPT OF LABOR, WOMEN'S BUREAU, supra note 38).
41. Matejkovic, supra note 38, at 311.
42. Id.
obtain a promotion.\textsuperscript{43}

These startling figures show that domestic violence affects not only victims, but also employers, who bear increased agency costs as a result of upset, distracted, or absent employees.\textsuperscript{44} In 1990, the Bureau of National Affairs found that domestic violence costs U.S. companies three to five billion dollars annually.\textsuperscript{45} Meanwhile, the Department of Health and Human Services estimates that domestic violence victims “lose a total of nearly 8.0 million days of paid work—the equivalent of more than 32,000 full-time jobs—and “nearly 5.6 million days of household productivity as a result of the violence.”\textsuperscript{46} Employers who think domestic violence is merely a domestic problem are mistaken.\textsuperscript{47}

Furthermore, women who have suffered domestic violence are likely to suffer from Post-Traumatic Stress Disorder (PTSD).\textsuperscript{48} Victims of domestic violence report that the psychological, verbal, and emotional abuse suffered is often more harmful and lasts longer than the physical abuse.\textsuperscript{49} Domestic violence victims “constitute a significant proportion of the total number of people who experience [PTSD] symptoms” because of the severe mental, physical, and sexual abuse that many victims endure.\textsuperscript{50} Because PTSD includes symptoms such as violent flashbacks, depression, difficulty concentrating, irritability, and “explosions of emotions for no apparent reasons, it can affect a victim’s productivity in the workplace.”\textsuperscript{51}

\textsuperscript{44} See supra notes 38-43.
\textsuperscript{47} For more discussion on the root of the term “domestic violence” and why activists purposely chose to include the word “domestic” to indicate the family nature of this problem, see Ellen Pence & Shamita Das Dasgupta, Re-Examining ‘Battering’: Are All Acts of Domestic Violence the Same? 2 (unpublished manuscript), http://asistahelp.org/VAWA/Pence%20Dasgupta%20Reexamining%20Battering%20%2008-06.pdf.
\textsuperscript{48} See BUZAWA & BUZAWA, supra note 15, at 25.
\textsuperscript{49} Id.
\textsuperscript{50} Id.
\textsuperscript{51} Epigee.org, Post Traumatic Stress Disorder, http://www.epigee.org/
C. Why Don’t These Women Just Leave?

Employers that are faced with an employee’s domestic violence situation may find themselves asking the all-too-easy question: “why don’t these women just leave?” One survivor’s journal entry provides four major examples of obstacles that a woman will face when she eventually chooses to leave: (1) the necessity of a feasible safety plan that includes a place to live, (2) help and support of others, (3) a financial plan that can accommodate daily living expenses and potential attorney’s fees for divorce and custody disputes, and (4) overcoming the guilt of leaving a spouse or father of her children. Sarah Buel, a professor of law at University of Texas, and survivor of domestic violence, has worked with thousands of other mental health/ptsd.html (last visited Jan. 5, 2009).


It is when my head makes contact with the wall that I freeze, though his fist is coming toward me again. I have not yet taken behavior psychology and do not know that some animals flee when attacked. It would take me yet another year of planning, forgiving, calling, reaching for help, before I could leave. The Legal Aid Office told me there was a three-year wait, even for a divorce when you were getting hit. All the private attorneys wanted at least $10,000 for a retainer since he threatened to contest custody. The judge told me I needed to keep the family together. The priest told me to diversify the menu and stop cooking so much Italian food. Only the older, male marriage counselor told me that it was dangerous for me to stay. So, now I’m a single Mom, without child support and trying to go to night school and keep my job. But with minimum wage, I can’t seem to pay both day care and the rent, so sometimes I think about going back, just to make sure my son has enough to eat. It hurts more to watch him eat macaroni with ketchup for the third night, than it ever did to get beaten.

Id.

53. Ms. Buel is a Clinical Professor at the University of Texas School of Law, a co-founder of the University of Texas Voices Against Violence program, and a survivor of domestic violence. Id.

She was a welfare mother for a short time before working full time in the day and going to school at night for seven years to obtain her undergraduate degree in 1987. She then graduated cum laude from Harvard Law School in 1990, where she founded the Harvard Battered Women’s Advocacy Project, the Harvard Women in Prison Project, and the Harvard Children and Family Rights Project, while active in the Harvard Legal Aid Bureau.

victims. She contends that there are upwards of fifty valid reasons why a victim would choose to stay with a batterer.

One of the most cited reasons for a victim to stay with her abusive partner is that she believes that the abuser will kill her or her children if she leaves. "It is estimated that a battered woman is seventy-five percent more likely to be murdered when she tries to flee or has fled, than when she stays." This period, known as the "separation period," is the most dangerous time for a victim, which is one reason why proper safety planning is a critical requirement for the victim, in order to be able to leave her abuser safely.

Another reason why victims of domestic violence stay with their abusers is that many women find that they have nowhere to go if they leave. Some victims are turned away from domestic violence shelters for various reasons. Some domestic violence shelters require women to leave their jobs. These policies stem from the fear that the batterer will follow the woman from her workplace to the shelter, putting the lives of others in danger. This puts women in a serious predicament—she may either remain at the shelter without an income or leave to stay employed. Some domestic violence shelters also turn away particularly vulnerable women, such as homeless women and women with

54. Buel, supra note 52, at 19.
55. See id.
56. See id.
58. See U.S. DEP'T. OF JUSTICE, supra note 30, at vii; see also BUZAWA & BUZAWA, supra note 15, at 56.
60. Buel, supra note 52, at 24.
61. Id. (citing Jody Raphael, Domestic Violence and Welfare Receipt: Toward a New Feminist Theory of Welfare Dependency, 19 HARV. WOMEN'S L.J. 201, 223 (1996) (stating that "some shelters require women to quit their jobs once they enter a shelter so that the abuser cannot follow them from work to the shelter.").
62. Id.
63. Abusers are commonly able to approach or threaten their victims who have left them by contacting the victim at her workplace. Therefore, victims face a lose-lose situation when they are forced between choosing their immediate physical safety over their long-term need for financial independence from their abusers. ELLEN RIDLEY, ET AL., DOMESTIC VIOLENCE SURVIVORS AT WORK: HOW PERPETRATORS IMPACT EMPLOYMENT, 8–13 (2005), available at http://www.maine.gov/labor/labor_stats/publications/dvreports/survivorstudy.pdf.
drug or alcohol addictions.\textsuperscript{64} Homeless women are turned away because they are "believed to be too manipulative, 'street-wise,' or anti-social."\textsuperscript{65} In California, many shelters do not allow those with severe substance abuse problems to stay at their facilities, but instead refer them to other agencies or to counseling.\textsuperscript{66} Thus, it is unfair to assume that every victim of domestic violence can easily leave her abuser and stay at a shelter, because this choice can be fraught with barriers.

Some women who are caught in the cycle of abuse remain hesitant to leave because they have been convinced that they are not capable of financially providing for themselves.\textsuperscript{67} This is a common abuse tactic: the abuser controls the family's finances, has sole access to all the financial records, and may even convince the victim that she is incapable of handling her own finances.\textsuperscript{68} This forces some women to believe that they could not manage without the financial support of the perpetrator.\textsuperscript{69} Poverty is an enormous barrier for victims who want to leave their batterers,\textsuperscript{70} particularly for those who lack

\begin{itemize}
\item Financial abuse results when the abuser is controlling money and/or bank accounts; withholding economic resources such as money or credit cards; withholding financial information; stealing from or defrauding a partner of money or assets; exploiting the intimate partner's resources for personal gain; withholding physical resources such as food, clothes, necessary medications, or shelter from a partner; preventing the spouse or intimate partner from working or choosing an occupation; controlling the money or controlling how partner is allowed to spend money; concealing joint assets or shared money; keeping their partner impoverished; controlling finances, taking victim's money, giving victim an allowance or making victim ask for money; insisting that victim account for all her expenditures and/or have no knowledge of the family finances; blowing money or running up debts; taking or disabling the vehicle; destroying property; withholding child support; or sabotaging work or school or the victim's ability to make a living or provide for oneself.
\end{itemize}

\textsuperscript{65} Id.
\textsuperscript{67} Buel, supra note 52, at 20.
\textsuperscript{68} Id.

\textsuperscript{69} See Buel, supra note 52, at 20.
\textsuperscript{70} See Henry, supra note 3, at 68.
the education or training to pursue a job that will support themselves and their dependents.\textsuperscript{71}

Most people assume upon hearing about domestic violence that victims can just leave their abusers,\textsuperscript{72} there are formidable obstacles, particularly for women with children.\textsuperscript{73} Women must have a safety plan to deal with the dangerous separation period that includes financial planning, arrangements for a safe place to go, and some protection from the legal system, either in the form of an emergency protective order,\textsuperscript{74} or a restraining order.\textsuperscript{75}

\textbf{D. Laws Addressing Domestic Violence in the Workplace}

Because leaving may not be a safe or easy choice for victims of domestic violence,\textsuperscript{76} lawmakers around the nation have begun considering the issue of how to address the effects of domestic violence in the workplace.\textsuperscript{77} Several states, including Alaska,\textsuperscript{78} Arizona,\textsuperscript{79} California,\textsuperscript{80} Colorado,\textsuperscript{81}

\begin{itemize}
\item \textsuperscript{71} See id.
\item \textsuperscript{73} Buel, supra note 52, at 19–26.
\item \textsuperscript{74} An emergency protective order can be issued by the police 24 hours a day. This order serves as immediate protection from the batterer. It provides a "kick out" order so that the batterer must move from the residence. Temporary custody of the children is given to the person to be protected by the order. It restrains the batterer from harassing or assaulting the victim. If the batterer violates this order, the batterer will be arrested.
\item \textsuperscript{75} See California State Bar, Domestic Violence: Can the Law Help Protect Me From Domestic Violence?, http://www.calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10581&id=2181#2 (last visited Feb. 9, 2010) (explaining how a restraining order can protect a domestic violence victim).
\item \textsuperscript{76} See supra Part II.C.
\item \textsuperscript{77} See infra notes 78–92.
\item \textsuperscript{78} ALASKA STAT. § 12.61.017 (2006) (prohibiting an employer may not penalize an employee who is required to attend a court proceeding as a victim).
\item \textsuperscript{79} ARIZ. REV. STAT. ANN. § 13-4439 (West Supp. 2010) (providing that an employer may not fire an employee who has to leave work because he or she is a victim of a crime).
\item \textsuperscript{80} CAL. LAB. CODE § 230.1 (Deering 2006) (providing that employers with more than twenty-five employees may not discharge or discriminate against an employee who is a victim of domestic violence and must allow victims of domestic violence time off to seek medical attention, obtain services from a domestic violence shelter, to obtain counseling or to participate in safety
Connecticut, Florida, Hawaii, Illinois, Kansas, Maine, Missouri, New York, Oregon, Rhode Island, and Washington have established statutory provisions that...
provide for job protection or time off from work for domestic violence survivors who seek to leave their batterers. These statutes vary considerably in who and what they cover, so employers and their attorneys should be careful to ensure compliance with the particular details of their state’s statutes.\textsuperscript{93}

The California Survivors of Domestic Violence Employment Leave Act\textsuperscript{94} provides victims of domestic violence with job protection when they take time off from work to seek judicial intervention to stop the abuse.\textsuperscript{95} Section 230 of the Act, in part, provides that:

\begin{quote}
[A]n employer may not discharge or in any manner discriminate or retaliate against an employee who is a victim of domestic violence or a victim of sexual assault for taking time off from work to obtain or attempt to obtain any relief, including, but not limited to, a temporary restraining order, restraining order, or other injunctive relief, to help ensure the health, safety, or welfare of the victim or his or her child.\textsuperscript{96}
\end{quote}

Section 230 applies to all employers, regardless of the number of employees.\textsuperscript{97} But, it only provides a brief period of time off of work to obtain judicial relief.

In addition to the provisions of section 230, subsection 230.1 provides many more tools for a victim of domestic violence, as it prohibits an employer with twenty-five employees or more from retaliating against an employee for taking up to twelve full weeks off from work to seek medical services or services from a domestic violence shelter, to obtain counseling related to domestic violence, or to participate in safety planning.\textsuperscript{98} Under section 230.1, the employee must seek treatment by a health care provider, to obtain services from a victim service provider, to obtain mental health counseling, or to participate in safety planning, including relocation or other actions).

93. See Matejkovic, supra note 38, at 342.
94. CAL. LAB. CODE § 230.1 (Deering 2006).
95. Id. § 230.1.
96. Id.
97. See id.
98. Id. For the purposes of the Act, the term “domestic violence” is defined by the types of abuse set forth in section 6211 of the California Family Code. This definition is beneficial to survivors of domestic violence, as section 6211 of the Family Code provides a very broad definition of domestic violence, encompassing many kinds of domestic relationships. Section 6211 defines domestic violence as abuse against:
give her employer reasonable advance notice of her intention to take time off from work, unless advance notice is not possible.\textsuperscript{99} When an absence occurs without prior notification to the employer, the employee must provide certification to her employer within a reasonable time that her absence was related to domestic violence.\textsuperscript{100} This certification can consist of a police report of domestic violence, a court order “protecting or separating the employee from the perpetrator of an act of domestic violence,” or “other evidence from the court or prosecuting attorney that the employee appeared in court.”\textsuperscript{101} The certification can also consist of “[d]ocumentation from a medical professional, domestic violence advocate or advocate for victims of sexual assault, health care provider, or counselor that the employee was undergoing treatment for physical or mental injuries or abuse resulting in victimization from an act of domestic violence or sexual assault.”\textsuperscript{102} The Act requires employers to maintain the confidentiality of employees who request leave under this provision.\textsuperscript{103}

In addition to an extended amount of time off from work, section 230.1 provides additional job security for victims beyond the scope of section 230. The relevant sections provide that reinstatement and reimbursement for lost wages are owed to any employee who is discharged, threatened with discharge, or retaliated against in any way for taking time off of work pursuant to the Act.\textsuperscript{104} Furthermore, it is a misdemeanor for employers to refuse to reinstate employees who are eligible for rehiring after being wrongfully discharged.\textsuperscript{105} Employees whose rights have been violated under the Act have one year from the date of the occurrence

\textsuperscript{99} See CAL. LAB. CODE § 230.1.
\textsuperscript{100} See id.
\textsuperscript{101} Id.
\textsuperscript{102} Id.
\textsuperscript{103} See id.
\textsuperscript{104} Id. § 230.1(c).
\textsuperscript{105} CAL. LAB. CODE § 230.1(c) (Deering 2006).
of the violation to report it to the Division of Labor Standards Enforcement of the Department of Industrial Relations.\textsuperscript{106}

The employee-victim may use whatever accrued unpaid or paid time off that is available to her under the terms of her employment,\textsuperscript{107} but section 230.1 does not allow for an employee to take off more unpaid leave than allowed by the federal Family and Medical Leave Act (FMLA) of 1993.\textsuperscript{108} The FMLA provides up to twelve weeks off work to address "serious health concerns."\textsuperscript{109} So, women taking time off work under section 230.1 may not take more than a total of twelve weeks off.\textsuperscript{110}

The adoption of the Act was a substantial step by the state of California to address domestic violence as a problem that affects the workplace. However, the discrepancy between the protections of sections 230 and 230.1 creates a formidable barrier for women who work in small companies and need time off to leave their abusive partners.

\textbf{III. THE PROBLEM WITH SECTION 230.1}

While section 230.1 is a comprehensive and powerful tool for a victim who is seeking to end her relationship with her batterer, it does not apply to every employee in California;\textsuperscript{111} it only applies to employees who work in companies with over twenty-five employees.\textsuperscript{112} When an employer has less than twenty-five employees, those employees are left only with the minimal protections of section 230.\textsuperscript{113} The protections that are set forth for victims of domestic violence in section 230 pale in comparison to the protections of subsection 230.1.\textsuperscript{114} This discrepancy in protection of domestic violence victims is a serious problem for California employees, because the number of employees at her place of work, a fact beyond her control, creates a drastic and arbitrary distinction in a

\begin{footnotes}
\item[106] Id. § 230.1(d)(1).
\item[107] See id. § 230.1(e).
\item[108] Id. (referring to 29 U.S.C. § 2601 et seq. (2000)).
\item[110] See CAL. LAB. CODE § 230.1.
\item[111] See id.
\item[112] Id.
\item[113] Id. § 230.
\item[114] See infra Part IV.
\end{footnotes}
victim’s ability to escape violence in her life.

IV. ANALYSIS

While both sections 230 and 230.1 provide equal job protection, section 230 only allows a victim of domestic violence a brief amount of time off from work to obtain judicial relief.\textsuperscript{115} A restraining order, temporary or permanent, may aid a victim of domestic violence,\textsuperscript{116} but it may not provide the victim with all the tools necessary to end the abusive relationship and ensure the safety of herself and her children. Section 230.1, in contrast, provides up to twelve weeks off for a woman to seek judicial relief,\textsuperscript{117} medical attention for injuries,\textsuperscript{118} services from a domestic violence shelter,\textsuperscript{119} counseling,\textsuperscript{120} and safety planning.\textsuperscript{121}

Under section 230.1, a woman can take time off to find a new residence, get a restraining order, set up a new bank account, get a new cellular phone, go shopping to replace clothing and other necessary items that were left behind, and consult a doctor and a psychologist.\textsuperscript{122} Conversely, a woman who is employed at a small company may not be able to do all or any of those things, for fear that taking too much time off could jeopardize her job—particularly because many victims of domestic violence may already have a history of absence

\begin{itemize}
\item[115] See \textbf{CAL. LAB. CODE} \textsection{} 230.
\item[116] A temporary domestic violence restraining order in California prohibits (1) the restrained person from contacting the filer, (2) the restrained person from possessing a gun, and (3) the parties from living in the same household. \textbf{Superior Court of California, County of Sacramento}, General Information on Restraining Orders, \url{http://www.saccourt.ca.gov/restraining-orders/general.aspx} (last visited Feb. 13, 2010). A temporary domestic violence restraining order can also require the respondent to pay child or spousal support to the petitioner. \textit{Id.}
\item[117] \textbf{CAL. LAB. CODE} \textsection{} 230.1; see \textit{id.} \textsection{} 230. The protections of section 230 are included in section 230.1.
\item[118] \textbf{CAL. LAB. CODE} \textsection{} 230.1(a)(1).
\item[119] \textit{Id.} \textsection{} 230.1(a)(2).
\item[120] \textit{Id.} \textsection{} 230.1(a)(3).
\item[121] \textit{Id.} \textsection{} 230.1(a)(4).
\item[122] These things a woman \textit{might} have to do to rebuild her life are examples of the difficulties facing those leaving an abuser. If the woman has children, she must do even more to ensure their safety as well. For a compelling example of how a domestic violence survivor worked to rebuild her life, see \textbf{Escape From Abuse and Rebuilding Your Life}, \url{http://www.parentsworld.com/modules.php?op=modload&name=News&file=article&sid=86&mode=thread&order=0&thold=0} (last visited Jan. 5, 2009).
\end{itemize}
from work due to the abuse. A woman employed at a small company must juggle the responsibilities of work with the responsibilities of starting a new life on her own. The resulting stress could eventually force her to give up and return to her abuser. As many as fifty percent of women who go to shelters eventually return to their abusive relationships. On average, a victim of domestic violence leaves the abusive relationship seven times before she finally leaves permanently. Not allowing a victim the extra time off of work to rebuild her life may increase the likelihood that she will return to her abuser.

A. The Important Role of Small Businesses

The American economy is fueled by small businesses. Between 2003 and 2004, California companies with one to nineteen employees created roughly 166,000 new jobs, totaling 14,000 jobs more than companies with less than 499 employees, and 48,000 more jobs than companies with more than 500 employees.

In California, roughly two and a half million people work at companies with less than twenty employees. At least this many California employees do not qualify for the extended time off from work provisions of section 230.1. If one out of every four women is a victim of domestic violence, well over 300,000 women in California are

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123. See Matejkovic, supra note 38, at 311 (detailing the consequences of domestic violence on the victim's work).
127. Id.
128. Id.
129. Id.
131. See CAL. LAB. CODE § 230.1 (Deering 2006).
132. Gaines, supra note 20, at 143.
suffering from abuse and cannot take extended time off of work under section 230.1.133

Aside from providing the most new jobs in the nation and in California,134 according to Congresswoman Velázquez, small businesses are also important because they provide an entry into the job market, particularly for less skilled employees.135 Women who are less skilled or less educated and are trying to leave an abusive relationship are particularly vulnerable if they either work at, or will seek employment at, a small business, because they may not qualify for the section 230.1 extended time off provisions and additional job security.

B. Why is Twenty-Five the Magic Number?

When section 230.1 was first proposed in the California Assembly on April 12, 2000, it applied to employers with fifty or more employees.136 Fifty was the magic number because the section originally incorporated the existing leave provisions of the California Family Rights Act (CFRA).137 CFRA was modeled to comply with the Family and Medical Leave Act (FMLA),138 which exempts small businesses of less than fifty employees.139 The FMLA exemption was based on reports that small businesses would face increased per employee costs and the possibility that thousands of employees nationwide could lose their jobs due to the increased costs of family and medical leave.140 Also, the "fifty employee . . . provision" of the Act [was] designed to remove the burden of providing FMLA leave from employers who do

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133. I reached this approximation by dividing 2.5 million by two (as this comment is addressing women, approximately one-half of the population) and then dividing that figure by four because estimates range that as many as one out of every four women is abused.
134. See U.S. Small Business Administration supra note 126, at 2.
137. See id.
not have an abundant supply of temporary replacements.”

Unsurprisingly, many Congressional Representatives, Republican and Democrat alike, opposed the fifty employee minimum of the FMLA. Both Congressmen Grandy (R-Iowa) and Michel (R-Ill.) maintained that this minimum was “arbitrary,” and Congressman Michel questioned the minimum arguing that it “just does not make sense.” Congressman Moakley (D-Mass.) argued that the FMLA “is a very modest proposal that should not be a burden on businesses,” citing a report from the General Accounting Office. The report estimated that the cost of the FMLA will be less than five dollars per employee—“a small price to pay for valued employees.” Furthermore, Congressman Moakley highlighted how medical leave policies benefit businesses by reducing turnover, thus eliminating unnecessary hiring and training costs. Congresswoman Shepherd (D-Utah) found that as a small business owner herself, she personally experienced the benefits of family and medical leave. She stated that “[w]hen I made a real, solid commitment to my employees, they did the same for me. Far from strapping my business economically, family and medical leave created strong bonds between myself and my employees. Our cooperation naturally led to profitability and

142. See infra notes 143–49 and accompanying text.
143. 139 CONG. REC. H366, 368 (statement by Congressman Grandy (R-Iowa), (“I represent small business. But I want to talk about the sins of omission. I want to talk about all those employees who are automatically excluded under this because we have an arbitrary threshold of [fifty] employees or less. Ironically it is those people who work for small employers, who probably are making the low incomes, who live from paycheck to paycheck, and who need this wage replacement. And the median income in this country right now, Mr. Speaker, is $29,000; [fifty-nine] percent of the workers in this country do not even make that much.”); id. at 370 (statement by Congressman Michel (R-Ill.) (“The gentleman from Iowa [Mr. Grandy], a few moments ago, raised a very legitimate question that I have. Why this arbitrary line of [fifty] or more employees? Is it any different for people who work for an employer with fewer than [fifty] employees or more than [fifty]? It just does not make sense. Why do we draw the distinction?”).
144. Id.
145. Id. at 368 (statement by Congressman Moakley (D-Mass.), chairman of the Committee on Rules).
146. Id. at 368 (statement by Congressman Moakley (D-Mass.), chairman of the Committee on Rules).
147. Id.
148. Id. at 371 (statement by Congresswoman Shepherd (D-Utah)).
When California enacted the CFRA, it relied on the arbitrary employee minimum of the FMLA. The second reading, on May 26, 2000, before the Act was passed did not include a minimum employee exception; it would have applied to all employers, regardless of size. But, by the third reading of the bill, on August 31, 2000, the minimum employee exception had been reintroduced into the bill. This time, the minimum was twenty-five employees, and the explanation was given that the exception had been added pursuant to the request of the Governor without providing the Governor's rationale.

Because the Governor requested that the leave benefit be restricted only to employers with twenty-five employees or more, and because the bill includes a provision stating that unpaid leave shall not exceed the time allowed under the FMLA, the Governor likely relied on the arbitrary small business exception of the FMLA and CFRA when requesting that the exception. The Act includes an arbitrary twenty-five employee minimum without proof that the Act would adversely affect the agency costs of California's small businesses, without the inclusion of such a minimum.

C. California Should Abolish the Twenty-Five Employee Minimum

California should not have adopted the small business
exception created in the FMLA.\textsuperscript{157} Section 230.1 exception for employers with less than twenty-five employees creates a drastic difference in the amount of time that a victim of domestic violence can take off work.\textsuperscript{158} There does not appear to be a rational reason why the presence of one less employee should have such a drastic effect on a domestic violence victim's ability to take time off from work to access necessary services like counseling and domestic violence programs.

Survivors of domestic violence deserve identical leave provisions, regardless of the size of her employer. The State should make an effort to accommodate these victims as much as possible, particularly when it would not impose a heavy burden on employers and would greatly benefit these victims. For instance, survivors of domestic violence who have finally gained the strength to leave their abusers are in a fragile position and are likely to return to their abusers for myriad reasons.\textsuperscript{159} A comprehensive study of victims of domestic violence found that "eighty-five percent of the victims calling hotlines, emergency rooms, and shelters had left their abusers a minimum of five times previously, with the number one reason cited for returning to the batterer being financial despair."\textsuperscript{160} These women should have the support of their employers when they decide to finally break the cycle of violence—they need to be able to have time to find a safe place to go, arrange their affairs, and seek medical and psychological help.\textsuperscript{161}

Furthermore, allowing victims of domestic violence to have the option to take time off work does not adversely affect small businesses as much as one would imagine. Women who are able to take leave under the Act will most likely not be able take the full unpaid twelve weeks off from work, as studies have shown that most American workers cannot

\textsuperscript{157} See supra note 156 and accompanying text.
\textsuperscript{158} See supra Part IV.A-B.
\textsuperscript{159} These reasons include many of the reasons why women stay with abusive spouses in the first place—guilt, love, hope that he will change, financial despair, concern for needs of their children, etc. See Giles-Sims, supra note 124, at 66.
\textsuperscript{161} See supra Part II.C.
afford to take unpaid time off work;\textsuperscript{162} thus victims will likely take as little time off as possible before economic constraints force them to return to work.\textsuperscript{163} The Act is not a free ride for victims of domestic violence. Women who take time off work under section 230.1 can take any paid time off they may have accrued,\textsuperscript{164} but, like most other Americans who cannot afford to take time off under the FMLA, women in California will not be in a financial situation that allows them to take more unpaid time off than is absolutely necessary.\textsuperscript{165}

Section 230.1 includes an exception for businesses with twenty-five employees or less that was included without any legislative inquiry into whether the Act would have an adverse financial impact on California businesses.\textsuperscript{166} The inconsistency between the protections of section 230 and 230.1 is subjectively inequitable because it creates an enormous discrepancy in time off of work,\textsuperscript{167} a discrepancy that impacts the victims of domestic violence who work in a large and important sector of the California job market—small businesses.\textsuperscript{168}

V. PROPOSED AMENDMENT TO SECTION 230.1

California should amend section 230.1 to encompass all businesses, regardless of the number of employees, and thus put an end to the exception for small businesses. Instead of relying on an exception based on merely the number of employees at a business, California should adopt a more flexible and limited exception that will allow a greater number of domestic violence victims to take the extended time off of work pursuant to section 230.1. In light of this amendment, some businesses may face a legitimate hardship


\textsuperscript{163} See \textit{id.} at 21. Like all other American workers, victims of domestic violence would be concerned about the difficulty in paying their bills while on unpaid leave from the company, which would force them to return to work before the full allowed twelve weeks off pursuant to the FMLA.

\textsuperscript{164} See \textit{CAL. LAB. CODE} § 230.1(e).

\textsuperscript{165} See Waldvogel, \textit{supra} note 162, at 18.

\textsuperscript{166} See supra Part IV.A–B.

\textsuperscript{167} See supra Parts III, IV.B.

\textsuperscript{168} See supra Part IV.A.
from the temporary absence of an employee with extraordinarily unique skills—a problem that can be addressed by a limited "undue hardship" exception for small businesses.

A. Exception for Small Businesses Facing "Undue Hardship"

To provide sufficient support and protection to all California employees coping with domestic violence, while also protecting small employers against significant financial hardship, California should adopt the "undue hardship" exception in Maine's domestic violence employment leave statute.169

Maine's Domestic Violence Leave Act,170 legislation that is not as broad or detailed as the California Survivors of Domestic Violence Leave Act, provides that "an employer must grant reasonable and necessary leave from work" to victims of domestic violence.171 The Maine statute applies to all employers, regardless of size, but provides three exceptions: (1) where an "employer would sustain undue hardship from the employee's absence";172 (2) when "the request for leave is not communicated to the employer within a reasonable time under the circumstances";173 or (3) when "the requested leave is impractical, unreasonable or unnecessary based on the facts then made known to the employer."174 While this law covers all employers, some scholars argue that due to these exceptions, the Maine statute is not as broad as it appears.175 Ralph Henry, a professor of law at George Mason University School of Law, argues that Maine's undue hardship clause "makes it unclear whether Maine's leave law is truly any more expansive in practice than other laws that limit coverage by size" of the business.176 The exceptions are very broad and could arguably be applied to deny any request for time off of work by a victim of domestic violence.

170. Id.
171. Id.
172. Id. § 850(2)(A).
173. Id. § 850(2)(B).
174. Id. § 850(2)(C).
175. Henry, supra note 3, at 85.
176. Id. at 85–86.
There are no concrete factors listed in the Maine statute that a business or employee can use to determine whether the business will face “undue hardship” from an employee taking leave.\textsuperscript{177} However, Maine’s Department of Labor, in a subsequent memorandum, set forth five factors that an employer should assess in determining whether a business can rightfully assert the “undue hardship” exception.\textsuperscript{178} The first factor asks the employer to consider “the nature and cost of the action(s) requested or required to accommodate the victim.”\textsuperscript{179} The second factor assesses “the overall financial resources of the employer and the effect of the action(s) requested or required on expenses and resources.”\textsuperscript{180} The third factor looks at “the number of persons employed at the establishment and the effect of the requested or required action(s) on the staffing of the establishment,”\textsuperscript{181} while the fourth factor assesses “the safety and health of the employees, customers, and the public and the effect of the requested or required action(s) on meeting those safety and health requirements.”\textsuperscript{182} Finally, the fifth factor points out that “the assessment of undue hardship includes the fiscal, operational, and geographic relationship of other establishments owned or operated by the employer or by any parent corporation or entity of the employer.”\textsuperscript{183}

The primary limitation imposed by Maine’s “undue hardship” factors is that victims of domestic violence who seek time off are probably unaware whether these factors apply to their employer without consulting a lawyer. This creates additional time and expense. Furthermore, an employer facing serious economic hardship may also be unsure as to whether he or she may properly deny a victim/employee time off without facing legal repercussions.

The Maine statute, even with its limitations, remains a good model for California. It provides a working example of

\textsuperscript{177} See ME. REV. STAT. ANN. tit. 26, § 850.
\textsuperscript{179} Id.
\textsuperscript{180} Id.
\textsuperscript{181} Id.
\textsuperscript{182} Id.
\textsuperscript{183} Id.
state legislation that has applied the time off of work for victims of domestic violence provisions to all employers, regardless of their size. Modifying the language from the statute so that the undue hardship exceptions are easier to understand and more limited in their application, can easily fix the statute’s vagueness and overbreadth. By adding language limiting the application of the undue hardship exception, more victims could take advantage of the statutory protection, while still protecting those businesses that need the undue hardship exception.

Using the Maine statute as a model, California should amend the Act, so that the added protections of section 230.1 apply to all employers unless the business the exception applied, with clearly designated factors defining undue hardship on the face of the statute. If the “undue hardship” exception is clear, both the employer and employee can easily assess whether section 230.1 applies to the employer, without the additional burden of consulting an attorney or fear of litigation.

B. California Already Has a Viable Model for an “Undue Hardship” Exception

The Eastern District of California already has “undue hardship” exceptions for employers, which exempt certain employees from jury service if the employee meets the clear and straightforward criteria. Employees are excused from jury service in the Eastern District if their “absence from the job would cause undue hardship to the employer because other employees of the same employer have been called for jury duty at the same time or previously,” or if they are “employee[s] with unique skills or particular responsibilities that cannot be adequately performed by others and whose absence from the job would impose an extreme financial burden or a risk of material injury to their employers’ property.”

California should apply these same exceptions, albeit a bit modified, to section 230.1. Applying these exceptions to all companies, regardless of size, would be beneficial to every

185. See CAL. CODE REGS. tit. 2, § 5.5(c)(2) (2010).
186. Id. § 5.5(d)(10).
187. Id. § 5.5(d)(9).
employer, as the employees who fall under these exceptions are often essential employees to the business. Applying these two “undue hardship” exceptions benefits all employers, while still ensuring protection for small businesses that rely on certain key employees.

With the addition of the Eastern District’s “undue hardship” exceptions for employers of twenty-five employees or less, and with amendment of the Act to apply to all employers, the protections of the Act would be available to almost every domestic violence victim in California. In addition, those victims whose employers could invoke the “undue hardship” exceptions would at least still be able to get the judicial intervention protections of section 230. Because the exceptions would presumably affect only a very small number of employees, as opposed to the enormous number of employees affected by the current twenty-five employee minimum, this is the best way to ensure job security and time off of work for victims of domestic violence, without overburdening California employers.

C. Proposed Survivors of Domestic Violence Employment Leave Act

In order for the Survivors of Domestic Violence Employment Leave Act to protect California’s survivors of domestic violence, section 230.1 must apply to all employers, regardless of size. This proposed version of the Act applies to all employers with the addition of undue hardship exceptions for certain small businesses.

Proposed Addition to the California Labor Code section 230.1:

(g) Employers with less than twenty-five employees are exempt from this Section if the employer would sustain undue hardship due to the time off of:

(1) Employees with extraordinarily unique skills or particular responsibilities that cannot be adequately performed by others and whose absence from the job would impose an extreme financial burden or a risk of material injury to their employers’ property; or

(2) Employees whose absence from the job would cause undue hardship to the employer because other employees of the same employer are on leave under Cal. Lab. Code section 230.1 at the same time or have
been previously in the past six months.

VI. CONCLUSION

California’s domestic violence survivors should have the right to take time off from work to heal their physical and psychological wounds and rebuild their lives. For this reason, California needs to extend the provisions of section 230.1 to cover all victim/employees, regardless of the size of the victim’s employer. The exception for small businesses facing "undue hardship" is a reasonable and equitable way to extend the necessary provisions of section 230.1 to all California workers, without unduly burdening small employers. The "undue hardship" exception is the best "rule of thumb," as it includes a significantly greater number of victims of domestic violence in the protections of section 230.1, without resorting to an arbitrary employee minimum.