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Safe Leave from Work Post-*Dobbs*

By Robin R. Runge*

Abstract

Given the increasing restrictions on how and where a person who becomes pregnant may seek abortion care, and the large number of workers who experience reproductive coercion including birth control interference, and/or pregnancy-related abuse, who may need to seek abortion related services, it is important to examine their rights as workers to take leave from work to seek these services without fear of job loss.

Domestic violence impacts a high percentage of working women and people who become pregnant every year. Pregnancy-related abuse, reproductive coercion, birth control sabotage, and interference with abortion-related decision-making are common forms of gender-based violence and harassment that may lead a survivor to seek abortion-related medical care. Without access to leave from work for this purpose, many victims of domestic and sexual violence may not seek the services necessary to ensure their health and their safety. Survivors should be able to take job guaranteed time off from work, ideally paid, to seek medical care for a dangerous pregnancy and/or seek other pregnancy related health care including abortion care, which may require travel to another state if their state prohibits abortions, without fear of job loss.

This essay examines how state laws providing leave from work to victims of gender-based violence and harassment may

* Distinguished Professorial Lecturer in Law, The George Washington University School of Law. Thank you to Nicole Buonocore Porter, Professor of Law and Director, Martin H. Malin Institute for Law and the Workplace, Chicago-Kent College of Law, Illinois Institute of Technology for the invitation to present and write this paper for the symposium, *The Effect of Dobbs on Work Law*, in March 2023, to Professors Mike Selmi and Marcy Karin for their thoughtful feedback and guidance, and to Meredith Gusky for her expert research assistance.

be utilized to obtain necessary medical services, including abortion care, to address pregnancy-related abuse and reproductive coercion, birth control sabotage, and interference with abortion-related decision-making that is increasingly necessary post-Dobbs.

I. INTRODUCTION

Since the issuance of the *Dobbs v. Jackson Women's Health Organization* decision, the National Domestic Violence Hotline has experienced a 99 percent increase in callers reporting reproductive coercion from the previous year.¹ This increase has been interpreted as evidence of abusers using this form of gender-based violence against victims because they know they will not be able to exercise their personal autonomy to seek abortion care.² In addition, it has been estimated that there have been 64,000 pregnancies caused by rape in states with a total ban on abortion since issuance of the *Dobbs v. Jackson Women's Health Organization* decision.³

The purpose of this essay is to ensure that exploration of employment protections and rights for workers who become pregnant to seek abortion care post-*Dobbs* includes consideration of laws providing leave from work to specially address the impacts of domestic and sexual violence in employees' lives. There is limited knowledge or use of these laws, although they provide critically needed rights and protections to employed survivors intended to enable them to become safe without fear of job loss which may inhibit their ability to leave an abusive relationship. This essay will focus on the specific employment needs of survivors of domestic violence and sexual violence seeking abortion care and how laws intended to provide these groups of workers with particular protections related to their victimization may be utilized at this critical time.

¹ See Carter Sherman, *Domestic Abusers Are Using Abortion Bans to Control Their Victims*, VICE (July 13, 2023, 6:00 AM), <https://www.vice.com/en/article/dy3yny/abortion-bans-domestic-abusers> (describing how calls increased from 1,230 the year before *Dobbs* to 2,442 since the decision was issued).

² *Id.*

³ Samuel L. Dickman, Kari White, David U. Himmelstein, Emily Lupez, Elizabeth Schrier & Steffie Woolhandler, *Rape-Related Pregnancies in the 14 US States with Total Abortion Bans*, 184 JAMA INTERN MED. 330 (2024).

Section II of this paper describes domestic and sexual violence, two of the most prevalent forms of gender-based violence and harassment. It also defines pregnancy related domestic violence and reproductive coercion which are two of the more common forms of gender-based violence and harassment that lead to the need for abortion care. Section III of this paper describes the state laws that provide paid and unpaid job guaranteed leave from work to employees specifically to address the impact of domestic and sexual violence on their lives. Section IV examines how survivors may use these laws to take leave from work to seek abortion care.

II. DOMESTIC AND SEXUAL VIOLENCE

Domestic violence is a pattern of abusive behavior that is used by one partner to gain or maintain power and control over an intimate partner.⁴ It may include physical, emotional, sexual, economic, psychological, and/or technology-based actions or threats of actions, or other patterns of coercive behavior to influence another person within an intimate partner relationship. It includes behaviors that intimidate, manipulate, humiliate, isolate, frighten, terrorize, coerce, threaten, blame, hurt, injure, or wound someone.⁵

Domestic violence is widespread in the United States and around the globe. Between 2003–2012, domestic violence made up 21 percent of all violent victimization.⁶ Anyone may be a victim;⁷ however, the majority of survivors are girls and women. Nearly one in four women in the United States report experiencing violence by a current or former spouse or boyfriend at some point in her lifetime.⁸ Women of

⁴ *Domestic Violence*, OFF. OF VIOLENCE AGAINST WOMEN, U.S. DEP'T OF JUST. (Dec. 6, 2023), <https://www.justice.gov/ovw/domestic-violence>.

⁵ *Id.*

⁶ JENNIFER L. TRUMAN & RACHEL E. MORGAN, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., SPECIAL REPORT NCJ 244697, NONFATAL DOMESTIC VIOLENCE, 2003–2012, at 1 (2014), <https://bjs.ojp.gov/content/pub/pdf/ndv0312.pdf>.

⁷ Throughout this essay, the author uses the terms “victim” and “survivor” interchangeably reflecting the diversity of how individuals who experience gender-based violence and harassment identify themselves.

⁸ MICHELE C. BLACK, KATHLEEN C. BASILE, MATTHEW J. BREIDING, SHARON G. SMITH, MIKEL L. WALTERS, MELISSA T. MERRICK, JIERU CHEN & MARK R. STEVENS, CTR. FOR DISEASE CONTROL & PREVENTION, DIV. OF VIOLENCE PREVENTION, NAT'L INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY, 2010

color, Native American women, and immigrant women experience higher rates of gender-based violence and harassment. Forty-five percent of Black women report physical violence, sexual violence, and/or stalking by an intimate partner in their lifetime and 48 percent of Native American and Alaska Native women report physical violence, sexual violence, and/or stalking by an intimate partner in their lifetime.⁹ Domestic violence also occurs in LGBTQI relationships at high rates with transgender women three times more likely to be stalked and experience financial abuse than those who do not identify as transgender.¹⁰ Over 43 percent of lesbian women and 61.1 percent of bisexual women have experienced rape, physical abuse and/or stalking by an intimate partner¹¹ and 26 percent of gay men and more than 37 percent of bisexual men have experienced rape, physical abuse and/or stalking by an intimate partner.¹²

Sexual violence is similarly rampant in the United States, and a large percentage of rape victims identify as survivors of domestic violence. One in 4 women in the United States has reported a completed or attempted rape in her lifetime.¹³ Fifty-one percent of female victims of rape report being raped by an intimate partner and 40.8 percent of female rape victims report being raped by an acquaintance.¹⁴ As described below, many survivors of gender-based violence and harassment are workers.

SUMMARY REPORT 43 (2011),
https://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf.

⁹ *Id.*

¹⁰ EMILY WATERS, NAT'L COALITION OF ANTI-VIOLENCE PROGRAMS, LESBIAN, GAY, BISEXUAL, TRANSGENDER, QUEER, AND HIV-AFFECTED INTIMATE PARTNER VIOLENCE IN 2015, at 9–10 (2016), http://avp.org/wp-content/uploads/2017/04/2015_ncavp_lgbtqipvreport.pdf.

¹¹ CTR. FOR DISEASE CONTROL & PREVENTION, INTIMATE PARTNER VIOLENCE IN THE UNITED STATES—2010, at 2, 30–31 (2014), https://www.cdc.gov/violenceprevention/pdf/cdc_nisvs_ipv_report_2013_v17_single_a.pdf.

¹² *Id.*

¹³ CTR. FOR DISEASE CONTROL & PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2016-2017 REPORT ON SEXUAL VIOLENCE 3 (2022), <https://www.cdc.gov/violenceprevention/pdf/nisvs/nisvsReportonSexualViolence.pdf>.

¹⁴ *Id.*

A. Pregnancy-Related Gender-Based Violence and Harassment

Pregnancy-related abuse is prevalent, and people who become pregnant are particularly vulnerable to domestic violence.¹⁵ Domestic violence is the most common health problem among women during pregnancy.¹⁶ An estimated 156,000 to 332,000 pregnant people in the United States experience domestic violence annually.¹⁷ For one in six pregnant people, the abuse begins for the first-time during pregnancy.¹⁸ Studies indicate that between 11 and 28 percent of pregnant women in the United States experience physical assault, 36 percent experience psychological or verbal abuse, and 20 percent experience sexual violence by current or former partners.¹⁹ It is difficult to accurately calculate the number of pregnancies that result from rape, however, estimates are that between 17,000 and 32,000 people become pregnant as a result of rape every year²⁰ and one in

¹⁵ See A. Rachel Camp, *Coercing Pregnancy*, 21 WM & MARY J. WOMEN & L. 275, 291–95 (2015) (describing relationship between pregnancy-related abuse and domestic violence); Elizabeth Miller, Michele R. Decker, Heather L. McCauley, Daniel J. Tancredi, Rebecca R. Levenson, Jeffrey Waldman, Phyllis Schoenwald & Jay G. Silverman, *Pregnancy Coercion, Intimate Partner Violence and Unintended Pregnancy*, 81 CONTRACEPTION 316, 316 (2010). (California survey of women and girls seeking services from family planning clinics who reported physical abuse in their intimate relationships). More than one third of participants in this study reported some form of reproductive coercion. *Id.* at 319. Of those who reported reproductive coercion, almost three-quarters reported experiencing intimate partner abuse. *Id.* From this the report concluded that where reproductive coercion is used, the relationship is likely physically violent.

¹⁶ See Claudia Boyd-Barrett, *Solutions for the Most Dangerous Part of Pregnancy: Violence in the Home*, CAL. HEALTH REP. (Mar. 9, 2022), <https://www.calhealthreport.org/2022/03/09/the-most-dangerous-part-of-pregnancy-violence-in-the-home>.

¹⁷ See Tina Bloom, Linda F.C. Bullock, Phyllis Sharps, Kathryn Laughon & Barbara J. Parker, *Intimate Partner Violence during Pregnancy*, in FAMILY VIOLENCE AND NURSING PRACTICE 155, 156 (Janice Humphreys & Jacquelyn C. Campbell eds., 2d ed. 2011); see also *Ibn-Tamas v. United States*, 407 A.2d 626, 629–31 (D.C. 1979) (account of severe abuse during pregnancy).

¹⁸ Bloom et al., *supra* note 17, at 156.

¹⁹ Beth A. Bailey, *Partner Violence During Pregnancy: Prevalence, Effects, Screening, and Management*, 2 INT'L J. WOMEN'S HEALTH 183, 185 (2010).

²⁰ *Parental Rights and Sexual Assault*, NAT'L CONF. OF STATE LEGISLATURES (Mar. 9, 2020), <http://www.ncsl.org/research/human-services/parental-rights->

twenty women in the U.S. experience a pregnancy either from rape, sexual coercion, or both in their lifetime.²¹ Pregnant women who are abused during pregnancy regularly report being kicked or punched in the abdomen by their partner.²² Domestic violence during pregnancy has been documented to result in significant health-related impacts on women and is a significant threat to their health.²³ Pregnant people who experience domestic violence are at an increased risk of suffering pregnancy complications, miscarriages, and mental health issues.²⁴ Women have also reported being assaulted or have been murdered by the person who impregnated them because they would not submit to abortion.²⁵ Complications from this abuse may also include an increase of perinatal death, including miscarriage.²⁶

B. Reproductive Coercion

Reproductive coercion/abuse is another prevalent form of domestic violence that may lead to unintended pregnancies and/or unsafe pregnancies for which a survivor may need to seek necessary medical care, including abortion care. Reproductive coercion includes behaviors and actions that maintain power and control over another

[and-sexual-assault.aspx#1](#); Melissa M. Holmes, Heidi S. Resnick, Dean G. Kilpatrick & Connie L. Best, *Rape-Related Pregnancy: Estimates and Descriptive Characteristics from a National Sample of Women*, 175 AM. J. OBSTETRICS & GYNECOLOGY 320, 322 (1996).

²¹ Denise V. D'Angelo, Yang Liu, Kathleen C. Basile, Sharon G. Smith, Jieru Chen, Norah W. Friar, Mark Stevens, *Rape and Sexual Coercion Related Pregnancy in the United States*, 66 AM. J. PREV. MED. 389 (2024).

²² See Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 15 WIS. WOMEN'S L.J. 149, 172 (2000).

²³ See Judith McFarlane, Jacquelyn C. Campbell, Phyllis Sharps & Kathy Watson, *Abuse During Pregnancy and Femicide: Urgent Implications for Women's Health*, 100 OBSTETRICS & GYNECOLOGY 27, 28 (2002).

²⁴ Joanna Cook & Susan Bewley, *Acknowledging a Persistent Truth: Domestic Violence in Pregnancy*, 101 J. ROYAL SOC'Y. MED. 358, 359–60 (2008).

²⁵ See Catherine T. Coyle, Martha W. Shuping, Anne Speckhard & Jennie E. Brightup, *The Relationship of Abortion and Violence Against Women: Violence Prevention Strategies and Research Needs*, 30 ISSUES IN L. & MED. 111, 117 (2015) (citations omitted).

²⁶ See Ann L. Coker, Maureen Sanderson & Beili Dong, *Partner Violence During Pregnancy and Risk of Adverse Pregnancy Outcomes*, 18 PEDIATRIC & PERINATAL EPIDEMIOLOGY 260 (2004).

person by trying to control their reproductive choices and may include sexual assault, rape, forcing a partner not to use birth control or forcing them to use birth control, birth control sabotage, pressuring a person to become pregnant when they do not want to, or forcing them to continue a pregnancy or to end a pregnancy against their will.²⁷ A national survey of survivors calling the National Domestic Violence Hotline found that 25 percent reported that they had experienced reproductive coercion as a part of domestic and dating violence abuses including being forced to have sex without a condom.²⁸ These forms of abuse have led to a higher percentage of unintended pregnancy among abused women than non-abused women²⁹ and support arguments for a need to legally respond to birth control sabotage as a form of domestic violence.³⁰

²⁷ See generally LINDA CHAMBERLAIN & REBECCA LEVENSON, FUTURES WITHOUT VIOLENCE & AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, ADDRESSING INTIMATE PARTNER VIOLENCE REPRODUCTIVE AND SEXUAL COERCION 6–7 (3d ed. 2013),

<https://www.futureswithoutviolence.org/userfiles/file/HealthCare/Reproductive%20Health%20Guidelines.pdf>.

²⁸ *1 in 4 Callers to the Domestic Violence Hotline Report Birth Control Sabotage and Pregnancy Coercion*, NAT'L DOMESTIC VIOLENCE HOTLINE (Feb. 15, 2011), <https://www.thehotline.org/news/1-in-4-callers-to-the-national-domestic-violence-hotline-report-birth-control-sabotage-and-pregnancy-coercion>.

²⁹ See Jeanne E. Hathaway, Lorelei A. Mucci, Jay G. Silverman, Daniel R. Brooks, Rahel Mathews & Carlene A. Pavlos, *Health Status and Health Care Use of Massachusetts Women Reporting Partner Abuse*, 19 AM. J. PREVENTIVE MED. 302, 305 (2000) (finding 40 percent of pregnant women who have been exposed to abuse report that their pregnancy was unintended, compared to just eight percent of non-abused women); Ann M. Moore, Lori Frohwirth & Elizabeth Miller, *Male Reproductive Control of Women Who Have Experienced Intimate Partner Violence in the United States*, 70 SOC. SCI. & MED. 1737, 1741–42 (2010) (reporting that one respondent had eight abortions for unwanted pregnancies with one partner).

³⁰ See Shane M. Trawick, Comment, *Birth Control Sabotage as Domestic Violence: A Legal Response*, 100 CALIF. L. REV. 721, 724–25 (2012) (suggesting new legal remedies for birth control sabotage, including a tort claim for intentional fraudulent misrepresentation and criminalization); Alexandra Brodsky, “Rape-Adjacent”: *Imagining Legal Responses to Nonconsensual Condom Removal*, 32 COLUM. J. GENDER & L. 183, 185 (2017) (proposing new tort of “stealthing” for nonconsensual condom removal during intercourse).

C. Survivors of Domestic and Sexual Violence as Employees

A large percentage of the workforce identifies as survivors of domestic and sexual violence, and many of them struggle to remain connected to the workforce as they face numerous challenges in obtaining and maintaining employment as a consequence of the abuse including pregnancy-related abuse and reproductive coercion. In 2005, 21 percent of employed adults, men and women, self-identified as victims of intimate partner violence, 64 percent of whom indicated that their ability to work was impacted by the abuse.³¹ The National Violence Against Women Survey indicates that women in the United States lose nearly eight million days of paid work each year because of domestic violence.³² Between one-quarter and one-half of domestic violence victims report that they lost a job, at least in part, due to domestic violence.³³ Seventy-eight percent of survivors in a survey reported that the abuser showed up at the workplace; the same percentage stated that they were late to work because of the domestic abuse; 13 percent reported being assaulted at work; 98 percent reported the abuse caused them to have difficulty concentrating on work tasks.³⁴ Others miss work because of health reasons caused or

³¹ CAEPV National Benchmark Telephone Survey, WORKPLACEVIOLENCE911, https://www.workplaceviolence911.com/sites/workplaceviolence911.com/files/20051015_1.htm (last visited Mar. 25, 2024).

³² DEP'T OF HEALTH & HUM. SERVS., CTRS. FOR DISEASE CONTROL & PREVENTION & NAT'L CTR. FOR INJURY PREVENTION & CONTROL, COSTS OF INTIMATE PARTNER VIOLENCE AGAINST WOMEN IN THE UNITED STATES 19 (2003), <https://www.cdc.gov/violenceprevention/pdf/ipvbook-a.pdf>.

³³ Therese M. Zink & Morgan Sill, *Intimate Partner Violence and Job Instability*, 59 J. AM. WOMEN'S MED. ASS'N 32 (2004).

³⁴ ELLEN RIDLEY, JOHN RIOUX, KIM C. LIM, DESIRAE MASON, KATE FARAGHER HOUGHTON, FAYE LUPPI & TRACEY MELODY, ME. DEP'T OF LAB. & FAM. CRISIS SERVS., DOMESTIC VIOLENCE SURVIVORS AT WORK: HOW PERPETRATORS IMPACT EMPLOYMENT 4 (2005) https://www.maine.gov/labor/labor_stats/publications/dvreports/survivorstudy.pdf; see also JULIE GOLDSCHIED & ROBIN RUNGE, ABA COMM'N ON DOMESTIC VIOLENCE, EMPLOYMENT LAW AND DOMESTIC VIOLENCE: A PRACTITIONER'S GUIDE (2009), https://www.americanbar.org/content/dam/aba/administrative/domestic_violenc_e1/projects/workplace/ABA_CDV_Employ.pdf; Deborah A. Widiss, *Domestic Violence and the Workplace: The Explosion of State Legislation and the Explosion of State Legislation and the Need for a Comprehensive Strategy*, 35 FLA. ST. U.L. REV. 669 (2008).

exacerbated by domestic violence for which they may need medical assistance.³⁵

Economic insecurity is a primary barrier survivors face when attempting to leave abusive relationships and maintain safety for themselves and their children. A 2018 survey found that nearly three in four respondents (74 percent) remained in abusive relationships due to financial insecurity.³⁶ This precarity was often driven by partners' abusive behaviors and a lack of secure employment or access to quality job opportunities.³⁷ People who commit domestic violence use economic abuse to limit survivors' ability to achieve economic security and independence as a part of the victimization. In one study of survivors, 94 percent had experienced some form of economic abuse, including employment sabotage.³⁸

In an effort to address economic insecurity as a barrier to safety for survivors of domestic violence, anti-domestic violence and workers' rights advocates successfully advocated for the passage of state and federal laws providing employment rights and protections for survivors. These laws are intended to enable survivors who need legal assistance, victim services, and medical care related to domestic and sexual violence to take paid time off without fear of job loss. In the next section, this essay describes these state laws and Section IV explores how they may be used by employees who are survivors of domestic violence to obtain necessary medical services to address the health-related impacts of domestic and sexual violence including abortion care which has become more urgent post-*Dobbs*.

³⁵ RIDLEY ET AL., *supra* note 34, at 4.

³⁶ See CYNTHIA HESS & ALONA DEL ROSARIO, DREAMS DEFERRED: A SURVEY ON THE IMPACT OF INTIMATE PARTNER VIOLENCE ON SURVIVORS' EDUCATION, CAREERS, AND ECONOMIC SECURITY 33 (2020), https://iwpr.org/wp-content/uploads/2020/09/C475_IWPR-Report-Dreams-Deferred.pdf.

³⁷ *Id.* at 41.

³⁸ Judy L. Postmus, Sara-Beth Plummer & Amanda M. Stylianou, *Measuring Economic Abuse in the Lives of Survivors: Revising the Scale of Economic Abuse*, 22 VIOLENCE AGAINST WOMEN 692, 701 (2016).

III. LEAVE FOR SURVIVORS NEEDING PREGNANCY-RELATED MEDICAL ASSISTANCE INCLUDING ABORTION-RELATED CARE³⁹

The high percentage of workers who become pregnant as a result of or related to gender-based violence and harassment face increased limits on access to abortion care requiring examination of their employment rights and protections. The U.S. Supreme Court decision in *Dobbs* issued in June 2022 immediately limited access to abortion care in many states.⁴⁰ The Court held that there is no constitutional right to abortion, overturning almost fifty years of jurisprudence from *Roe v. Wade* in 1973 to *Casey v. Planned Parenthood* in 1992, leaving it to individual states to determine legal access to abortion.⁴¹ Abortion access in several states was limited prior to *Dobbs*, and thirteen states had “trigger” laws that went into effect as soon as the *Dobbs* decision was issued.⁴² Trigger laws were adopted by states so that if the U.S. Supreme Court ever decided a case, like *Dobbs*, removing the right to abortion, the state would immediately limit, or attempt to ban all forms of abortion care.⁴³ Although advocates continue to introduce legislation to further limit access and extensive litigation is ongoing, at the time of this writing, fifteen states have almost total bans on

³⁹ It is important to situate this essay in the larger discussion of the limited employment rights of people who become pregnant even though it is common for workers to become pregnant while employed. *See generally* Stephanie Bornstein, *The Politics of Pregnancy Accommodation*, 14 HARV. L. & POL’Y REV. 293 (2020); David Fontana & Naomi Schoenbaum, *Unsexing Pregnancy*, 119 COLUM. L. REV. 309 (2019); Saru M. Matambanadzo, *Reconstructing Pregnancy*, 69 SMU L. REV. 187 (2016); Deborah A. Widiss, *The Interaction of the Pregnancy Discrimination Act and the Americans with Disabilities Act After Young v. UPS*, 50 UC DAVIS L. REV. 1423 (2017).

⁴⁰ *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 231 (2022) (holding that *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) must be overruled because the Constitution makes no reference to abortion and no such right is implicitly protected by any constitutional provision).

⁴¹ *Id.*

⁴² *Interactive Map: US Abortion Policies and Access after Roe*, GUTTMACHER INST. (Mar. 13, 2024), <https://states.guttmacher.org/policies>; Jesus Jiménez, *What Is a Trigger Law? And Which States Have Them?*, N.Y. TIMES (May 4, 2022), <https://www.nytimes.com/2022/05/04/us/abortion-trigger-laws.html> (describing what a trigger law is and listing the states that had them).

⁴³ *See, e.g.*, MO. REV. STAT. § 188.017 (2023) (making it a felony to perform an abortion except in the event of a medical emergency).

abortion services (Alabama, Arkansas, Idaho, Indiana, Kentucky, Louisiana, Mississippi, Missouri, North Dakota, Oklahoma, South Dakota, Tennessee, Texas, West Virginia, and Wyoming).⁴⁴ In addition, two states prohibit abortion services after six weeks, at which point most people who can become pregnant are not yet aware that they are pregnant (Georgia and Kentucky).⁴⁵ Several other states permit abortion care at different stages of pregnancy and accept people who travel from other states for this purpose.⁴⁶ Definitions of abortion care vary across states, but an inclusive definition encompasses information about abortion, management of an abortion and post-abortion care, care related to miscarriage, induced abortion, incomplete abortion and fetal death.⁴⁷ These limitations have dire health implications for all people who can become pregnant, including survivors of domestic and sexual violence.

A. Unpaid Job Guaranteed Leave from Work

One of the first set of employment protections adopted by states for survivors of domestic violence was unpaid leave from work modeled after the federal Family and Medical Leave Act (FMLA). The FMLA requires covered employers⁴⁸ to provide twelve weeks of job

⁴⁴ *After Roe Fell: Abortion Laws by State*, CTR. FOR REPROD. RTS., <https://reproductiverights.org/maps/abortion-laws-by-state> (last visited Mar. 25, 2024); *State Bans Throughout Pregnancy*, GUTTMACHER INST., <https://www.guttmacher.org/state-policy/explore/state-policies-later-abortions> (last visited Mar. 25, 2024).

⁴⁵ *State Bans Throughout Pregnancy*, *supra* note 44; GA. CODE ANN. §16-12-141 (2023); KY. REV. STAT. § 311.7705.

⁴⁶ *See, e.g.*, H.B. 4664, 103d Gen. Assemb., Reg. Sess. (Ill. 2023) (codified at 775 ILL. COMP. STAT. §§ 55/1-10 (definitions), 55/1-20 (prohibited state actions), and 255 ILL. COMP. STAT. § 60/22 (C) (limiting medical malpractice disciplinary action).

⁴⁷ *Abortion*, WORLD HEALTH ORG. (Nov. 25, 2021), <https://www.who.int/news-room/fact-sheets/detail/abortion> (defining comprehensive abortion care to include “the provision of information, abortion management and post-abortion care, care related to miscarriage (spontaneous abortion and missed abortion), induced abortion (the deliberate interruption of an ongoing pregnancy by medical or surgical means), incomplete abortion as well as fetal death”).

⁴⁸ An employer is defined as “any person engaged in commerce or in an industry or activity affective commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year” 29 C.F.R. § 825.102.

guaranteed unpaid leave from work every twelve months to qualifying employees⁴⁹ to care for their own serious health condition, that of their family members, and for reasons related to deployment.⁵⁰ Despite decades of calls to expand it, the FMLA still is the only federal law that requires private employers to provide job guaranteed unpaid leave from work to employees, and it does not specifically mention the needs of survivors of domestic violence as a permissible reason to take leave. However, it has been interpreted to apply to employees who have serious health conditions caused by domestic violence and otherwise meet the requirements of the FMLA.⁵¹ Nonetheless, the FMLA was never intended to comprehensively address the needs of employees experiencing domestic and sexual violence.

In response to the need for survivors of domestic and sexual violence to have job guaranteed leave from work to address the impact of the victimization in their lives, sixteen states have adopted laws that require employers to provide job guaranteed, unpaid leave from work to employees who are survivors of domestic violence to go to

⁴⁹ To qualify for FMLA leave an employee must have worked for 12 months and 1250 hours for an employer. 29 C.F.R. § 825.102.

⁵⁰ Family and Medical Leave Act, 29 U.S.C. §§ 2601–2654.

⁵¹ See *Anchorage v. Gregg*, 101 P. 3d 181, 190 n.21 (Alaska 2004) (“any victim of domestic violence who meets the tests for a ‘serious health condition’ as Gregg did, certainly has a right to statutory leave”). Recovery from an abortion may rise to the level of a serious health condition as defined by the FMLA and therefore is a permissible reason for taking leave. See *Call v. Fresenius Medical Care Holdings, Inc.*, 534 F. Supp. 2d 184, 194–97 (a mother who took leave to care for her daughter recovering from an abortion met the definition of serious health condition); see also Jeff Nowak, *Viewpoint: Does The FMLA Cover Abortion and Related Travel?*, SHRM (July 21, 2022), <https://www.shrm.org/resourcesandtools/hr-topics/benefits/pages/fmla-coverage-abortion-and-related-travel.aspx> (citing the legislative history of the FMLA to assert that time off for an abortion and to recover for an abortion are permissible reasons for taking leave under the FMLA). Nonetheless, the FMLA leave only covers employees who work for employers with fifty or more employees within a seventy-five-mile radius of the employee’s work site and have worked for that employer for a year and a minimum of 1,250 hours in the last year; only 56 percent of employees are covered by the FMLA. See SCOTT BROWN, JANE HERR, RADHA ROY & JACOB ALEX KLERMAN, ABT ASSOCIATES, *EMPLOYEE AND WORKSITE PERSPECTIVES OF THE FMLA: WHO IS ELIGIBLE?* 1 (2020), https://www.dol.gov/sites/dolgov/files/OASP/evaluation/pdf/WHd_FMLA2018P_B1WhoIsEligible_StudyBrief_Aug2020.pdf. Moreover, only 38 percent of low-wage workers are covered. *Id.* at 2.

court, to access supportive services, and/or to seek attention for medical needs caused by the abuse that did not rise to the level of a serious health condition.⁵² The size of the employer, number of days and accrual of leave time, and permissible uses of the leave vary from state to state; nonetheless, they do offer some critical protections for survivors.

For example, Hawaii's law states that an employee may take up to thirty days of unpaid leave per calendar year if they work for an employer with fifty or more employees, or up to five days per calendar year for an employer with fewer employees, if the employee or their minor child is a victim of domestic or sexual violence.⁵³ An employee may take the leave to seek medical attention for physical or psychological injury or disability caused by domestic or sexual violence, obtain services from a victim services organization, obtain counseling, relocate, take legal action, or take "other actions for the health or safety for the employee, the employee's minor child, or the safety of those who associate with or work with the employee."⁵⁴ When the leave is for medical reasons, the employer may request a health care provider's documentation about how many days are necessary and approving the employee's return to work.⁵⁵

In Missouri, an employee may take unpaid leave from work to address domestic or sexual violence, including to seek medical attention for, or recover from, physical or psychological injuries caused by domestic or sexual violence to the employee or the employee's family or household member.⁵⁶ An employer with fifty or more employees may take up to two workweeks of leave during any twelve-month period, and an employee working for an employer that

⁵² These states include California, Colorado, Connecticut, Florida, Hawaii, Illinois, Maine, Massachusetts, Minnesota, Missouri, Nevada, New Jersey, New Mexico, North Carolina, Oregon, and Washington. CHAMBERLAIN & LEVENSON, *supra* note 27; STATE GUIDE ON EMPLOYMENT RIGHTS FOR SURVIVORS OF DOMESTIC VIOLENCE, SEXUAL ASSAULT, AND STALKING 14, 16–17, 19–20, 27–28, 34–35, 38, 46–47, 50–51, 55–56, 59–60, 66, 69–71, 73–74, 77, 84–85, 105–07 (2022), <https://www.workplacesrespond.org/wp-content/uploads/2017/01/State-Employment-Guide.pdf>.

⁵³ HAW. REV. STAT. § 378-72-73 (2022).

⁵⁴ *Id.* § 378-72.

⁵⁵ *Id.* § 378-72(c).

⁵⁶ MO. REV. STAT. § 285.630.1(1) (2022).

employs at least twenty but not more than forty-nine employees may take up to one workweek of leave during any twelve-month period.⁵⁷

Some states do not affirmatively provide unpaid leave from work to employees who are survivors. Rather, their laws state that an employee who is a survivor of domestic violence may take time from work to address the impact of the victimization. For example, North Carolina's law prohibits an employer from firing, demoting, and otherwise disciplining an employee because they took "reasonable time off" to obtain or attempt to obtain relief for domestic violence.⁵⁸ In Washington state, an employee may take "reasonable leave" from work, intermittent leave, or leave on a reduced work schedule, with or without pay for these reasons, among other things: to seek legal or law enforcement assistance or remedies to ensure the health and safety of the employee or employee's family members; to seek treatment by a health care provider for physical or mental injuries caused by domestic violence, sexual assault, or stalking; or to attend a health care treatment for a family member who is a victim.⁵⁹ An employer may require notice of the need to take the leave unless it is an emergency, and an employer may require proof that the person is a victim, which may be a court document or a letter from an attorney or health care professional.⁶⁰ In Oregon, unless it poses an undue hardship, employers with six or more employees are required to allow an employee to take reasonable leave from employment for reasons very similar to those in Washington state.⁶¹ These statutes have proved difficult for survivors to use and employers to implement because what is "reasonable" and what is an "undue hardship" is undefined in the statutes and because of the notice and documentation requirements.⁶² When survivors seek leave, they are

⁵⁷ *Id.* § 285.630.2.

⁵⁸ N.C. GEN. STAT. §§ 50B-5.5, 95-270(a) (2022).

⁵⁹ WASH. REV. CODE § 49.76.030 (2022).

⁶⁰ *Id.* §49.76.040 (2022).

⁶¹ OR. REV. STAT. § 659A.272 (2022).

⁶² See Lauren Rosenblatt, *This Seattle Woman Is Fighting Amazon to Help Domestic Violence Survivors*, SEATTLE TIMES, <https://www.seattletimes.com/business/this-seattle-woman-is-fighting-amazon-to-help-domestic-violence-survivors> (Oct. 17, 2022, 11:18 AM); Conversations with Leslie Tullis who is suing Amazon for alleged unlawful termination for asserting her right to take leave to address the impacts of domestic violence, with survivors, and with attorneys attempting to assist survivors use this law in Oregon (Nov. 2022) (on file with author) (hereinafter "Conversation Notes").

often told by their employer that the request is unreasonable or that it causes an undue hardship, and an employee who is afraid of losing their job doesn't have the relative bargaining power to fight such a determination and so they don't take the leave and do not file a complaint to enforce their rights.⁶³ Those who do attempt to enforce their rights may face years of litigation.⁶⁴

These laws may enable a survivor to take unpaid leave from work for domestic and sexual violence specifically caused by reproductive coercion, pregnancy-related abuse, and interference with abortion-related decision-making, as discussed further in Section IV of this paper.

B. Paid Sick and Safe Leave from Work

One of the critical challenges with the leave from work described above is that it is unpaid, limiting its accessibility to a large percentage of survivors who cannot afford it.⁶⁵ Many survivors of domestic and/or sexual violence are the one in four who lack paid sick leave, or who do have paid sick leave voluntarily provided by their employer, that cannot be used to take steps to address the impact of domestic violence on their lives, or who do not want to have to disclose why they are using the leave. In this way, survivors face choosing

⁶³ Conversation Notes, *supra* note 62.

⁶⁴ Rosenblatt, *supra* note 62; Jodi Kantor, Karen Weise & Grace Ashford, *Inside America's Worst Human Resources Problem*, N.Y. TIMES, <https://www.nytimes.com/2021/10/24/technology/amazon-employee-leave-errors.html> (Nov. 3, 2021); *In re Amazon Digital Servs.*, No. 2022-016-PL (Dir. Wash. Dep't of Lab. & Indus. July 14, 2022), https://lni.wa.gov/workers-rights/_docs/2022-016-PL_AmazonDigital.pdf (former employee has been fighting for her rights under the Washington state leave for victims of domestic violence law for years at the cost of hundreds of thousands of dollars); Conversation Notes, *supra* note 62.

⁶⁵ There is no federal law requiring private employers to provide paid leave of any kind of employees. Only 77 percent of the private sector workforce has access to paid sick time. This data is downloaded from the *National Compensation Survey: Employee Benefits in the United States Table 7: Leave Benefits by Average Wage Category, Private Industry Workers, March 2022*, U.S. BUREAU OF LAB. STAT. (Sept. 2022), <https://www.bls.gov/ebs/publications/september-2022-landing-page-employee-benefits-in-the-united-states-march-2022.htm>.

Employees in higher paid positions and sectors such as management, business or finance are more likely to have access to sick leave and those in food service and similar occupations have less access. *Id.*

between their health and safety and their jobs, knowing that if they miss one day of work, they are likely to be fired. As a result, advocates have successfully argued for the need for paid leave from work for survivors of gender-based violence and harassment.

The Healthy Families Act, which has been pending in Congress since 2007, would require employers with fifteen or more employees to provide to their employees one hour of paid sick time for every thirty hours worked up to fifty-six hours annually.⁶⁶ Employers with fewer than fifteen employees are to provide fifty-six hours of unpaid sick time to their employees annually.⁶⁷ Permissible reasons for using leave include, *inter alia*:

[a]n absence resulting from domestic violence, sexual assault, or stalking, if the time is to:

- a. Seek medical attention for the employee or the employee's child, parent, spouse, domestic partner, or an individual related to the employee by blood or affinity whose close association with the employee is the equivalent of a family relationship to recover from physical or psychological injury or disability caused by domestic violence, sexual assault, or stalking
- b. Obtain or assist a related person as described above in obtaining services from a victim services organization
- c. Obtain or assist a related person as described above in obtaining psychological or other counseling
- d. Seek relocation or
- e. Take legal action, including preparing for or participating in any civil or criminal legal proceeding related to or resulting from domestic violence, sexual assault, or stalking.⁶⁸

If the leave is more than three consecutive workdays, an employer may require that the request include certification issued by the health

⁶⁶ Healthy Families Act S. 1195, 117th Cong. § 5(a)(1) (2021).

⁶⁷ *Id.* §§ 5(a)(1), (3). Employees begin to earn paid sick time when they begin their employment and they shall be entitled to use paid sick time beginning on the sixtieth calendar day following their first day of work. *Id.* § 5(a)(4).

⁶⁸ *Id.* § 5(b)(4).

care provider.⁶⁹ If the leave taken is related to domestic violence, sexual assault or stalking, an employer may require the request be supported by documentation. The certification must state the reason that the leave is necessary with the minimum information necessary to establish a need of the employee to be absent from work. The employee is not required to explain the details of the domestic violence, sexual assault, or stalking involved.⁷⁰ Employers are prohibited from interfering with, restraining, or denying the exercise of or the attempt to exercise the right to leave, including firing or discriminating against any individual, including a job applicant, for exercising or attempting to exercise any right provided under the Act.⁷¹ In this way, the Healthy Families Act would provide access to much needed paid, job guaranteed leave from work for survivors of domestic violence, sexual assault, or stalking that may be used to seek abortion care.

While this legislation has been pending, fourteen states, Washington, DC and sixteen cities and counties have adopted paid sick and safe day laws that require private employers to provide paid sick days from work to their employees following the model of the Healthy Families Act.⁷² These laws cover employers of different sizes and describe different levels of hours of accrual of the leave based on the size of the employer and the number of hours worked by the employee in an effort to include part-time workers. Generally, they entitle a full-time employee to up to forty hours per year of paid sick

⁶⁹ *Id.* § 5(d)(2)(A)(i).

⁷⁰ *Id.* § 5(d)(3)(A).

⁷¹ *Id.* § 7(a)(1).

⁷² A BETTER BALANCE, OVERVIEW OF PAID SICK TIME LAWS IN THE UNITED STATES, <https://www.abetterbalance.org/paid-sick-time-laws/?export> (last visited Mar. 25, 2024); *see also* Molly Weston Williamson, *The State of Paid Sick Time in the US in 2023*, CTR. FOR AM. PROGRESS (Jan. 5, 2023), <https://www.americanprogress.org/article/the-state-of-paid-sick-time-in-the-u-s-in-2023> (listing Arizona, California, Colorado, Connecticut, Maryland, Massachusetts, Michigan, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington state); ARIZ. REV. STAT. ANN. § 23-373 (2023); CAL. LAB. CODE § 246 (West 2020); COLO. REV. STAT. § 8-13.3-404 (2023); IDAHO CODE § 67-5333 (2023); MD. CODE ANN., LAB. & EMPL. § 3-1305 (LexisNexis 2022); MASS. GEN. LAWS ch.149, §§ 148C–148D (2023); N.J. STAT. ANN. § 34:11D-2 (West 2023); N.Y. LAB. LAW § 196-b (McKinney 2020); OR. REV. STAT. § 653.606 (2021); 28 R.I. GEN. LAWS § 28-57-6 (2023); VT. STAT. ANN. tit. 21 § 482 (2023); WASH. REV. CODE § 49.46.200 (2023). Illinois adopted paid sick leave in 2023. 820 Ill. COMP. STAT. 192/1–99 (Supp. 2023).

time. Unlike paid sick days provided by employers voluntarily, which generally limit use of the leave to an employee caring for their own illness or that of a family member, all of these statutes expressly permit employees to use accrued paid sick leave to address the impact of domestic violence on their lives.⁷³

For example, in Arizona, employers with fifteen or more employees must provide up to forty hours of earned paid sick time per year, accrued based on number of hours worked.⁷⁴ One of the permissible uses of the accrued paid sick time is for “an absence from work necessary due to domestic violence, abuse, or stalking, provided that the leave is to allow the employee to obtain for the employee or the employee’s family member,” *inter alia*, “medical attention needed to recover from physical or psychological injury or disability caused by domestic violence, sexual violence, abuse or stalking.”⁷⁵ An employer may require reasonable documentation that the paid sick time has been used for a permitted purpose.⁷⁶ If the leave is taken because of domestic violence, sexual violence, abuse, or stalking, “a signed statement from a medical or other professional affirming that the employee or the employee’s family member is a victim and a written statement by the employee that they or their family member identify as a victim of domestic violence, sexual violence, abuse, or stalking is sufficient.”⁷⁷

This documentation requirement does not waive any confidential or privileged communication between a victim and the medical provider or other service provider.⁷⁸ The employer may not require that the documentation explain the nature of the health condition or the details of the domestic violence, sexual violence, abuse or stalking.⁷⁹ In contrast, under the Vermont paid sick leave law, a survivor may use their accrued sick leave (maximum of forty hours per year) to, among other reasons, obtain medical care related to domestic violence or sexual assault where the employee is a victim of

⁷³ See generally A BETTER BALANCE, *supra* note 72.

⁷⁴ ARIZ. REV. STAT. ANN. § 23-372.

⁷⁵ *Id.* § 23-373(A)(4)(a).

⁷⁶ *Id.* § 23-373(G).

⁷⁷ *Id.* §§ 23-373G(5), 23-373(G)(6).

⁷⁸ *Id.* § 23-373(H).

⁷⁹ *Id.* § 23-373 (I).

domestic violence, sexual assault, or stalking.⁸⁰ Given the permissible uses of this leave, a survivor would need to argue that a termination of a pregnancy for health or other reasons is a “physical or psychological injury or disability caused by domestic violence,” which may be difficult. See Section IV of this paper for a more extensive discussion of the usage of these laws for this purpose.⁸¹

C. Paid Family and Medical Leave from Work

In addition to paid sick and safe day laws, there are also laws that provide workers with paid family and medical leave from work, a few of which specifically include leave for workers who are survivors of domestic and/or sexual assault to address the effect of the victimization on their lives.

Reintroduced in 2023, the Family and Medical Insurance Leave Act (FAMILY Act) would provide employees with up to twelve weeks of partial wage replacement when they take time for their own serious health condition, including pregnancy and childbirth recovery, the serious health condition of a family member, the birth or adoption of a child, and to address the effects of domestic violence, sexual assault, or stalking, and/or to make certain arrangements arising from the military deployment of a spouse, child, or parent. It covers all workers

⁸⁰ VT. STAT. ANN. tit. 21, § 483(a)(4) (2023); VT. STAT. ANN. tit. 15, § 1151(3) (defining domestic violence and citing to definition of abuse in *id.* § 1101(1)).

⁸¹ In addition, in 2015, President Obama signed an executive order establishing paid sick leave for federal contractors. Exec. Order 13706, 80 Fed. Reg. 54697 (Sept. 7, 2015), <https://www.govinfo.gov/content/pkg/DCPD-201500601/pdf/DCPD-201500601.pdf>. Covered contractors must provide up to seven days of paid sick leave to an employee annually including leave for family and medical care. A contractor must permit an employee to use paid sick leave because of a physical or mental illness, injury or medical condition of the employee, obtaining diagnosis, care or preventive care from a health care provider by the employee, caring for the employee’s child, parent spouse, domestic partner, or any other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship, 29 C.F.R. § 13.5(c)(1)(v) (2023), and for domestic violence, sexual assault, or stalking if the absence is for a physical or mental illness, injury or medical condition of the employee, *id.* § 13.5(c)(1)(iv). Analysis of access to this leave by survivors for abortion care is beyond the scope of this paper.

regardless of employer size and includes part-time, contingent, and self-employed workers.⁸²

In the meantime, eleven states have passed paid family and medical leave laws that provide up to twelve weeks of leave to employees for the employee's own serious health condition, parental leave, caregiving leave, deployment-related leave, and leave for the needs of survivors of domestic violence.⁸³ Of these eleven laws, four—Colorado, Connecticut, New Jersey, Oregon—include among permitted uses addressing the impact of domestic violence.⁸⁴ This type of leave is often referred to as “safe leave” and may include seeking medical care necessitated by domestic violence.⁸⁵ For example, Colorado's paid leave law lists among permissible uses for taking the leave “safe leave” which includes leave taken because the employee or the employee's family member is a victim of domestic violence, stalking, or sexual assault or abuse and is, inter alia, obtaining medical care for themselves to address physical or psychological injuries resulting from the abuse.⁸⁶

D. Anti-Discrimination and Accommodation Law for Survivors of Gender-Based Violence and Harassment

Several states have adopted laws that prohibit discrimination against and require accommodations for employees who are victims of domestic violence. These laws responded to many survivors sharing that they were fired from work when their employer learned that they were experiencing domestic violence.⁸⁷ Some of these laws also

⁸² FAMILY Act, H.R. 3481, 118th Cong. (2023), <https://www.congress.gov/118/bills/hr3481/BILLS-118hr3481ih.pdf>; FAMILY Act, S. 1714, 118th Cong. (2023), <https://www.congress.gov/118/bills/s1714/BILLS-118s1714is.pdf>.

⁸³ Williamson, *supra* note 72.

⁸⁴ COLO. REV. STAT. §§ 8-13.3-501–524 (2023); CONN. GEN. STAT. § 31-49e (2020); N.J. STAT. ANN. § 34:11B-4 (West 2023); OR. REV. STAT. § 659A.159 (2023).

⁸⁵ See CHAMBERLAIN & LEVENSON, *supra* note 27, at 3.

⁸⁶ COLO. REV. STAT. § 8-13.3-503(18)(b).

⁸⁷ See generally CHAMBERLAIN & LEVENSON, *supra* note 27 (listing California, Connecticut, Delaware, Hawaii, Illinois, New Hampshire, New York, Oregon, Puerto Rico, Vermont, U.S. Virgin Islands, Washington state, and Washington, DC as states that have anti-discrimination laws). The author has represented many survivors of domestic violence and sexual assault who were fired after they disclosed their victimization either because the employer was concerned they

require employers to provide reasonable accommodations to survivors which could be interpreted to include leave from work.⁸⁸

These laws recognize that employees who are experiencing domestic violence or seeking to remove themselves from abusive relationships may need accommodations at work to ensure their safety, including possibly relocation, a lock on a door, or a shift in hours of work. Employees cannot be retaliated against for asking for these accommodations or for taking the leave required by law to seek assistance to increase their safety. For example, in Nevada, an employer must make a reasonable accommodation for an employee who is a victim of domestic violence or whose family or household member is a victim of domestic violence.⁸⁹ Accommodations may include a transfer or reassignment, a modified schedule, a new work telephone number, or any other accommodation necessary to ensure the employee's safety, which will not create an undue hardship for the employer.⁹⁰

E. Employment Protections for Pregnant Employees

In addition to survivor-specific employment rights and protections, there are several federal and state laws that have been interpreted to provide employment protections to workers seeking or obtaining abortion care. Thirty-one states have adopted laws to affirmatively require employers to provide reasonable accommodations to pregnant employees.⁹¹ As of 2022, the federal Pregnant Worker Fairness Act requires employers covered by Title VII of the Civil Rights Act to provide “reasonable accommodations to the known limitations related to pregnancy, childbirth, and related

would miss too much time from work, they would be a lure for violence in the workplace, or because they “didn’t want to deal with it.”

⁸⁸ See *generally id.* (listing Hawaii, Illinois, Missouri, Nevada, New York, Oregon, Puerto Rico, Washington state, and Washington, DC as jurisdictions with reasonable accommodation laws for survivors).

⁸⁹ NEV. REV. STAT. § 613.222 (2021).

⁹⁰ *Id.*

⁹¹ See NAT’L WOMEN’S L. CTR., PREGNANCY ACCOMMODATIONS IN THE STATES 1–4 (2021), <https://nwlc.org/wp-content/uploads/2021/01/Pregnancy-Accommodations-in-the-States-1.14.2021-v3.pdf> (listing thirty-one states that have law requiring employers to provide reasonable accommodations to employees for pregnancy and pregnancy-related health conditions or similar medical conditions).

medical conditions” of qualified employees unless they would cause an undue hardship on the employer.⁹² These laws, known as pregnant worker fairness laws, require covered employers to provide reasonable accommodations to an employee’s known limitations related to pregnancy, childbirth, or related medical conditions.⁹³ In addition, if a pregnant person has a condition related to the pregnancy that qualifies as a disability as defined by the Americans with Disabilities Act, a covered employer may need to provide a reasonable accommodation for their pregnancy-related disability including leave from work.⁹⁴ Moreover, there are different employment protections for people who suffer a miscarriage or otherwise choose to end a pregnancy.⁹⁵ Finally, the Pregnancy Discrimination Act has been interpreted to prohibit employment discrimination including termination from employment because an employee has exercised her right to an abortion.⁹⁶ Although analysis of these laws to ensure access to abortion care for survivors of domestic and sexual violence is beyond the scope of this paper, it is critical that survivors be familiar with these laws and be able to utilize them during and after pregnancy to maximize access to abortion care.

IV. USING SAFE LEAVE TO ADDRESS THE IMPACTS OF REPRODUCTIVE COERCION AND PREGNANCY-RELATED GENDER-BASED VIOLENCE AND HARASSMENT

This section of this paper analyzes the ability of workers to use state laws that provide leave from work to survivors of domestic and sexual violence to seek reproductive health services, including abortion, and argues that they can and should be used for this purpose.⁹⁷ The first two analyses are of states in which abortion care

⁹² Pregnant Workers Fairness Act, Pub L. No. 117-328 div. II, 136 Stat. 4459, 6084 (2022).

⁹³ *Id.*

⁹⁴ *Pregnancy Discrimination and Pregnancy Related Disability Discrimination*, EEOC, <https://www.eeoc.gov/pregnancy-discrimination> (last visited Mar. 25, 2024).

⁹⁵ See generally Laura T. Kessler, *Miscarriage of Justice: Early Pregnancy Loss and the Limits of Employment Law*, 108 CORNELL L. REV. 543 (2023).

⁹⁶ See, e.g., *Doe v. C.A.R.S. Protection Plus, Inc.*, 527 F.3d 358, 364 (3d Cir.), *order clarified on other grounds*, 543 F.3d 178 (3d Cir. 2008).

⁹⁷ It is beyond the scope of this paper to argue for expansion of legal access to abortion.

is more widely available, so travel to another jurisdiction would not be necessary. The third analysis is of a state where abortion care is almost if not entirely prohibited, so travel to another state would be necessary to obtain abortion-related medical care.

A survivor living in Hawaii could have access to unpaid leave from work specifically for employees who are victims of domestic or sexual violence or have minor children who are victims of these crimes to address her pregnancy needs related to domestic violence. As long as the survivor works as an employee, defined as working for not less than six consecutive months for the employer⁹⁸ of any size in Hawaii they are entitled to unpaid leave from work under the statute—five days or thirty days per calendar year depending upon the size of her employer.⁹⁹ The survivor would need to establish that taking the leave to receive counseling regarding terminating her pregnancy and/or terminating her pregnancy and to recover from any medical procedure related to her pregnancy is seeking “medical attention for physical or psychological injury or disability caused by domestic or sexual violence” or “other actions for [her] health or safety.”¹⁰⁰ They would have a strong argument that the reasons she is taking the leave are permitted under one or both of these provisions because the definition of domestic abuse includes coercive control and she would be taking actions for her mental, emotional, and physical health. However, because the leave is unpaid, she may not be able to afford to take the leave, even if it is job protected. Also, if she works for an employer with forty-nine or fewer employees, she would only have five days per calendar year which may not be sufficient for pre- and post-abortion care and recovery.

Domestic or sexual violence is defined in Hawaii as domestic abuse, sexual assault, or stalking.¹⁰¹ Domestic abuse is defined in part as “physical harm, bodily injury, assault, or the threat of imminent physical harm, bodily injury, or assault, extreme psychological abuse, coercive control.” Coercive control is defined as a:

⁹⁸ HAW. REV. STAT. § 378-71 (2022).

⁹⁹ *Id.* § 378-72-73. The number of days depends on the size of the employer. If the employer has fifty or more employees, employees get up to thirty days of leave per calendar year, and if the employer employs forty-nine employees or fewer, employees have up to five days of leave per calendar year.

¹⁰⁰ *Id.* § 378-82.

¹⁰¹ *Id.* § 378-71.

pattern of threatening, humiliating, or intimidating actions, which may include assaults, or other abuse that is used to harm punish or frighten an individual and includes a pattern of behavior that seeks to take away the individual's liberty or freedom and strip away the individual's sense of self, including bodily integrity and human rights, whereby it is designed to make an individual dependent by isolating them from support, exploiting them, depriving them of independence and regulating their everyday behavior.¹⁰²

A survivor would have a strong argument that the reproductive coercion that she experienced that led to her pregnancy is coercive control and domestic violence. However, they may not feel comfortable seeking the leave for medical reasons because the employer may request a health care provider's documentation about how many days are necessary and approving the employee's return to work.¹⁰³

Similarly, a survivor working in California might be able to take job-guaranteed unpaid leave from work or paid sick days to seek health care services including abortion for her pregnancy caused by domestic violence. If they worked for an employer with twenty-five employees or more, they may take unpaid, job-guaranteed time off as a victim of domestic violence and sexual assault to, among other things, seek medical attention related to the abuse.¹⁰⁴ In addition, they may be eligible to use paid sick days as long as they have worked for her employer for ninety days.¹⁰⁵ However, they may only use up to twenty-four hours of paid leave each year of employment, calendar year or twelve-month period.¹⁰⁶ They would be permitted to use the paid leave as a victim of domestic violence and sexual assault "to obtain or to attempt to obtain any relief including but not limited to a temporary restraining order, restraining order, or other injunctive relief, to ensure the health and safety or welfare of the victim or their child,¹⁰⁷ and to seek medical attention for injuries caused by crime or abuse.¹⁰⁸ There are no references to definitions of domestic and sexual

¹⁰² *Id.* § 586-1.

¹⁰³ *Id.* § 378-72(c).

¹⁰⁴ CAL LAB. CODE § 230.1 (West 2022).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* § 246.

¹⁰⁷ *Id.* § 230(c).

¹⁰⁸ *Id.* § 230.1(a)(1).

violence in these statutes, so it is helpful to see how these terms are defined in criminal and family law.

In California, the crime of domestic violence is defined as “abuse committed against an adult or minor who is a spouse, former spouse, cohabitant, former cohabitant, or person with whom the suspect has had a child or is having or has had a dating or engagement relationship.”¹⁰⁹ Abuse is defined as “intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable apprehension of imminent serious bodily injury to himself or herself, or another.”¹¹⁰ If a survivor meets the relationship requirement, they might have a hard time arguing that their unintended pregnancy is an injury or illness caused by domestic violence under this definition. However, as of 2021, California allows the issuance of an *ex parte* temporary order of protection for a victim of domestic violence enjoining a person from among other things:

engaging in reproductive coercion, which consists of control over the reproductive autonomy of another through force, threat of force, or intimidation, and may include, but is not limited to, unreasonably pressuring the other party to become pregnant, deliberately interfering with contraception use or access to reproductive health information, or using coercive tactics to control, or attempt to control, pregnancy outcomes.¹¹¹

This amendment indicates that the state of California recognizes reproductive coercion as a form of abuse sufficient for obtaining a civil protection order, and therefore could be argued as sufficient for taking paid and unpaid leave from work.

If a survivor lives in Missouri, she would need to travel to another state to seek abortion care.¹¹² Under Missouri law, an employee may take unpaid leave from work to address domestic or sexual violence including to seek medical attention for, or recover from, physical or psychological injuries caused by domestic or sexual violence of the employee.¹¹³ If a survivor works for an employer with at least fifty

¹⁰⁹ CAL. PENAL CODE § 13700(b) (West 2022).

¹¹⁰ *Id.* § 13700(a).

¹¹¹ CAL. FAM. CODE § 6320(c)(5) (West 2022).

¹¹² MO. REV. STAT. § 188.017 (2023) (making it a felony to perform an abortion except in the event of a medical emergency).

¹¹³ *Id.* §§ 285.625–670.

employees she will be entitled to two work weeks of leave during any twelve-month period for this purpose. If she works for an employer with between twenty and forty-nine employees, she will be entitled to one work week of leave. If she works for an employer with fewer employees, she will have no entitlement to leave.

The next question is whether seeking unpaid leave to seek abortion-related medical care is permitted under Missouri law. The definition of domestic violence included in the unpaid leave law in Missouri is from the Domestic Relations Code of Missouri, which defines it as “abuse or stalking committed by a family or household member.”¹¹⁴ The definition of abuse includes but is not limited to, *inter alia*, coercion, which is defined as “compelling another by force or threat of force to engage in conduct from which the latter has a right to abstain or to abstain from conduct in which the person has a right to engage.”¹¹⁵ In this way, Missouri’s definition of domestic violence does include a definition of coercion which can be interpreted to include the form of reproductive coercion that survivors of domestic violence experience that leads to an unintended and sometimes dangerous pregnancy for which she may need to seek medical care.

It may be hard for a survivor to argue that her unwanted pregnancy is an “injury” caused by domestic violence for which she needs to seek medical care, but she may not need to make that argument. The unpaid leave law in Missouri states that an employer may require the employee to provide certification of their status as a victim of domestic violence and that the leave is for one of the permitted purposes under the statute.¹¹⁶ This certification may be provided by a number of people, including an attorney, a volunteer at a victim services organization, or “a medical or other professional from whom the employee . . . has sought assistance in addressing domestic violence or sexual violence and the effects of such violence.”¹¹⁷ So, a volunteer from a victim services organization could certify that a survivor is seeking medical assistance to address the effects of the domestic violence. It would depend upon how the employer interprets this language and how much additional detail the employer may seek, but a survivor would not need to disclose her need for travel or from whom she received services. If she is able to overcome all of these

¹¹⁴ *Id.* § 455.010(1)(g)(5).

¹¹⁵ *Id.* § 455.010(1)(d).

¹¹⁶ *Id.* § 625.630.5.

¹¹⁷ *Id.* § 625.630.6(1).

barriers, she would need to be able to afford unpaid leave from work or be able to obtain lost wages from another source, such as the state's crime victim compensation fund.¹¹⁸ She would also need to have sufficient funds and a way to travel to another state in order to seek the necessary medical care. So, even with access to the unpaid job guaranteed leave from work, she may not be able to obtain the medical care she needs.

V. CONCLUSION

In the last twenty-five years, states have adopted legislation intended to provide workplace rights and protections to survivors of gender-based violence to address the impact of victimization on their lives, including seeking medical care and assistance, without fear of job loss. It is time for these laws to be used as a way for survivors to address the impact of pregnancy-related domestic and sexual violence. These laws recognize that a large percentage of employees are survivors, and that there is a general public policy in support of enabling them to obtain safety and to access necessary health care without fear of losing their job and source of income, including abortion care.

¹¹⁸ States have crime victim compensation funds from which qualified victims of crime may apply for some of the costs of medical care and in some instances lost wages caused by a crime. See, e.g., *Crime Victims' Compensation*, MO. DEP'T OF PUB. SAFETY, <https://dps.mo.gov/dir/programs/cvc> (last visited Mar. 25, 2024).