Beyond the Criminal Justice System

SEXUAL ASSAULT SURVIVORS' EMPLOYMENT RIGHTS

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Sexual Assault Survivors' Employment Rights

I. INTRODUCTION[1]

Sexual assault survivors may experience major disruption in their work life following the assault. A survivor may quit or be forced to leave their job because the physical and emotional injury they sustained makes it impossible for them to return to work. The perpetrator may be a co-worker or supervisor or may know where they work and threaten them at the workplace, causing the survivor to fear for their safety at the worksite. They may be ashamed and afraid that their colleagues will find out about the sexual assault and may quit their job rather than risk having the assault become common knowledge. They may be fired for missing work (to meet with lawyers, counselors, attend court appearances, or just to take care of emotional needs) or for poor performance issues caused by the inability to focus on their job duties. Even if the survivor does not lose their job, they may face other employment consequences or require support and accommodations.

A survivor's financial stability may determine whether they recover from the assault. A survivor will need to pay for expenses related to the sexual assault including doctor visits, mental health, other healthcare costs, transportation, safety measures, and possible relocation. These expenses will be in addition to their existing financial obligations. Losing their job may mean losing their health insurance when it is needed most.

A sexual assault survivor will not necessarily identify employment-related issues as a legal problem when they meet with you. They may have more urgent needs (such as privacy concerns or questions about a criminal prosecution) or may not realize that they could be eligible for workplace

[1] Victim Rights Law Center (VRLC) thanks Robin R. Runge, Esq., Director of the American Bar Association's Commission on Domestic Violence, for the continued generous use of her material for this chapter. VRLC thanks all of the original chapter authors, Michelle Harper, Esq., Paula Finley Mangum, Esq., and Robin Runge, Esq., for their contributions, as well as the assistance of Shook, Hardy & Bacon LLP in updating the materials.

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protections or accommodations. Attorneys need to integrate employment-related questions into their intake process.

If a client has employment issues, explain their options and help them determine the best strategy for meeting their employment needs, taking into consideration:

- privacy needs, including whether the survivor wants to tell anyone at work about the assault to access workplace protections;
- personal safety, including travel to and from work, as well as at the worksite;
- work status (e.g., whether they are still employed, are about to lose, or have already lost their job);
- who the perpetrator is (e.g., whether the perpetrator is a co-worker, supervisor, visitor to the worksite);
- whether the assault occurred at the workplace;
- access to benefits, including medical and mental health insurance, retirement, disability, paid time off, and public assistance;
- employment status (e.g., at-will employee; union member; contract employee; temporary worker; independent contractor; municipal, state or federal employee; in a protected class, based on, for example, their age, sex, race, or ethnicity) and applicable employment laws;
- survivors' need and/or desire to remain employed or to return to the job;
- whether their current income meets basic needs and sustains recovery; and
- immigration status.

> [PRACTICE TIP: When providing employment advice, it is imperative that you know and understand your client's immigration status. Benefits and protections for undocumented individuals are limited, and the consequences non-citizen survivors may face for

accessing benefits can be severe. Consult an immigration attorney before providing employment-related legal assistance to an immigrant client, even if they are documented and authorized to work in the United States. For a discussion of how best to serve immigrant sexual assault survivors, see *Serving Immigrant Survivors of Sexual Assault*.]

Survivors may be entitled to protections or benefits under various employment laws. Even where there are no legal remedies available to a client, an attorney may be able to negotiate with the employer to get the accommodations needed to avoid job loss or to be reinstated if their employment was previously terminated.

II. PRACTICE CONSIDERATIONS

A. Identifying and Understanding Your Client's Employment Needs

To represent a survivor client effectively, you will need to understand their individual goals and employment needs. For example, you need to discuss a survivor's individual privacy concerns and determine what information they are comfortable disclosing, to whom, and when. The remedies available to a survivor often depend on how much information they are willing to disclose to the employer. If a survivor is not currently employed, you will want to learn whether they want to return to the workplace and what accommodations they might need to return to work for the same employer at the same or a different location, or at a new job altogether. In crafting an appropriate plan, it may help to discuss why, when, and under what circumstances the survivor wants to return to work. A survivor may need the income, structure, and support; they may be concerned that leaving their job will negatively affect career goals; and/or they may not have considered whether taking a leave from work is an appropriate or viable option under the circumstances.

In addition to understanding your client's goals and needs, you will also want to know their employment history. Determine how long the client has worked for the employer; whether they are a full, part-time, permanent or temporary employee; and whether they are a member of a union. Ask about any significant employment information, including demotions or

promotions, raises, prior leaves of absence, disciplinary history, and prior workplace complaints. Determine whether your client is an employee or an independent contractor, because the remedies available to an independent contractor may be limited.[2]

The client's personnel record is a necessary tool in evaluating a case. Often, a survivor's employment history will inform their employer's reaction to a report of sexual assault and may affect the accommodations and remedies available. Understanding the entirety of your client's employment situation, including fears, goals, concerns, and employment record, is essential to successful representation.

> [PRACTICE TIP: Obtain and review a copy of your client's personnel file to assess their documented employment history rather than relying exclusively on the client's description of their past work performance. You need to understand the *employer's* perspective of the survivor's employment history. You will need to know whether any documentation exists that could negatively impact your client's case.]
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> [CHECK YOUR LAW: In some jurisdictions, employers are legally required to grant access to personnel records upon an

[2] Title VII of the Civil Rights Act only applies to employees, and not to independent contractors. 42 U.S.C. § 2000e *et seq.* When determining if an individual is an employee under Title VII, most courts apply similar common law principles of agency, including the hiring party's right to control how a job is done; the skill required to complete a job; the method of payment; and whether the work is a regular part of the hiring party's business model. *See Alberty-Velez v. Corporación de Puerto Rico Para La Difusión Pública*, 361 F.3d 1, 7 (1st Cir. 2004); *Knight v. State University of New York at Stony Brook*, 880 F.3d. 636, 639 (2d Cir. 2018); *Mariotti v. Mariotti Bldg. Prod. Inc.*, 714 F.3d 761, 765-69 (3d Cir. 2013); *Lemon v. Myers Bigel, P.A.*, 985 F.3d 392, 396 (4th Cir. 2021); *Bryson v. Middlefield Volunteer Fire Dept., Inc.*, 656 F.3d 348, 352-53 (6th Cir. 2011); *Worth v. Tyer*, 276 F.3d 249, 263 (7th Cir. 2001); *Glascock v. Linn Cnty. Emergency Med., PC*, 698 F.3d 695, 698 (8th Cir. 2012); *Henry v. Adventist Health Castle Med. Ctr.*, 970 F.3d 1126, 1130 (9th Cir. 2020); *Al-Saffy v. Vilsack*, 827 F.3d 85, 96 (D.C. Cir. 2016). Some courts however consider additional factors outside of the traditional common law agency principles. *See, e.g.*, *Junio v. Livingston Parish Fire Dist. No. 5*, 717 F.3d 431, 434-35 (5th Cir. 2013); *Knitter v. Corvias Mil. Living, LLC*, 758 F.3d 1214, 1226-27 (10th Cir. 2014); *Cobb v. Sun Papers, Inc.*, 673 F.2d 337, 340-341 (11th Cir. 1982). Even if your client is an independent contractor, she may have remedies outside of Title VII or its state corollaries.

employee's request, and in a relatively short period of time.[3] Unless the statute defines what a "personnel" record must include, however, the employer is free to keep all the information that might be useful in this situation in a "non-personnel" file and not deliver it to the client or their attorney until the client sues and requests the information in discovery. In jurisdictions where there is no such legal requirement, an employer may still make the records available as a matter of policy. Review your law and your client's employee handbook to determine if the employer has an obligation to allow the survivor to access personnel records.]

B. At-Will Employment

Most employees in the U.S. are "at-will" employees. At-will employment is the default relationship between an employee and an employer if no other contract exists.[4] An at-will employee may be fired at any time, for any reason, or for no reason at all. The at-will employee may quit at any time, for any reason, or for no reason at all.[5] In an at-will employment relationship, no legal claim can result from either party's termination of the employment, except where the termination violates a law, such as a

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[3] *See, e.g.*, **California**: CAL. LAB. CODE § 1198.5(a) (2013) ("Every current and former employee, or his representative, has the right to inspect and receive a copy of the personnel records that the employer maintains relating to the employee's performance or to any grievance concerning the employee."); **Illinois**: 820 ILL. COMP. STAT. 40/2 (2005) ("Every employer shall, upon an employee's request which the employer may require be in writing on a form supplied by the employer, permit the employee to inspect any personnel documents which are, have been or are intended to be used in determining that employee's qualifications for employment, promotion, transfer, additional compensation, discharge or other disciplinary action . . . ."); **Maine**: ME STAT. tit 26 § 631 (2003) ("The employer shall, upon written request from an employee or former employee, provide the employee, former employee or duly authorized representative with an opportunity to review and copy the employee's personnel file if the employer has a personnel file for that employee."); **Massachusetts**: MASS. GEN. LAWS ch. 149, §52C (2004) ("An employer receiving a written request from an employee shall provide the employee with an opportunity to review such employee's personnel record within 5 business days of such request."); **Minnesota**: MINN. STAT. § 181.961 (2005) ("Upon written request by an employee, the employer shall provide the employee with an opportunity to review the employee's personnel record.").

[4] See William M. Howard, Annotation, Common-Law Retaliatory Discharge of Employee for Disclosing Unlawful Acts or Other Misconduct of Employer or Fellow Employees, 105 A.L.R.5th 351 (2003).

[5] Id. At § 2(a) .

termination based on discrimination.[6] In some limited cases, an employee may also have a legal claim if their termination was contrary to public policy.[7] In general, at-will employees have more limited recourse if they are terminated from employment.[8]

In most U.S. jurisdictions, an at-will employee may be fired just for disclosing that they are a survivor of sexual assault.[9] For example, if an employee discloses that a perpetrator who is not an employee is harassing them at work, the employer may fear they will be held liable if the perpetrator comes to the workplace and harms the survivor or their co-workers. While the survivor may have a claim of retaliation against their employer for terminating them after disclosing that the perpetrator was a co-worker or supervisor, in other circumstances the survivor may have no legal recourse. For some survivors, the possibility of being fired does not deter disclosure because if they do not get the requested accommodation (e.g., time off or a change in schedule or job), they will be forced to quit or be fired from their job anyway. Nevertheless, discuss the possible consequences of disclosure. *See* Section C., below, for additional disclosure considerations.

> [CHECK YOUR LAW: In some jurisdictions, even at-will employees who are survivors of sexual assault may be afforded additional protections. For example, employers in Illinois and New York City are prohibited from firing, sanctioning, or refusing to hire survivors of sexual assault, and are required to provide reasonable accommodations, including leave, relating to the assault.[10] Employers in these jurisdictions must keep confidential any information and documentation they receive from the survivor in support of their request for leave.[11]

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[6] See Michael A. Disabatino, Annotation, Modern Status of Rule that Employer May Discharge At-will Employee for Any Reason, 12 A.L.R. 4th 544 (1982).

[7] *See* Howard, *supra* note 11.

[8] *Id*.; Disabatino, *supra* note 13 at §2(a).

[9] Id.

[10] 820 ILL. COMP. STAT. §§ 180/1, *et seq*.; N.Y.C. CODE § 8-107.1.

[11] 820 ILL. COMP. STAT. § 180/20(d); N.Y.C. CODE § 8-107.1(3)(b).

Research the law in your jurisdiction to determine whether there are any additional protections for at-will employees. [*See* Section IV.C, below for a discussion of wrongful termination claims, which may be a remedy even for the at-will employee survivor.]

C. Disclosing an Assault to an Employer

Even if no laws provide protection, you and your client may still consider disclosing the assault to the employer. Depending on the type of business, the number of employees, the employer's policies and their understanding of sexual assault, a manager or employer may be an ally to the survivor. If the survivor wishes to request accommodations from the employer, prepare a summary of the kind of support the survivor needs to feel safe and to aid in recovery.

Some employers may be willing to discuss informally how to accommodate a survivor's needs. The key to these discussions is to follow your client's lead as to what information they want to disclose. Respect your client's feelings and needs regarding disclosure. Each circumstance is unique and only the survivor can determine what is best for them.

An employer's response to a disclosure of sexual assault and/or a request for accommodation may be difficult to anticipate. The employer may have no prior experience with sexual assault and may not know how to respond appropriately. In some cases, an employer may be unsympathetic or suspicious of a survivor's report of a sexual assault. If the perpetrator is a co-worker, the employer may be hesitant to suspend, transfer or terminate the perpetrator for fear of being sued by the accused. If the perpetrator is charged criminally, the employer may be more amenable to sanctions, but most perpetrators are never criminally charged and prosecuted. Smaller employers, who rarely have in-house counsel or on-call legal advice, may be especially reluctant to sanction the perpetrator for fear of liability. Companies with fewer employees may be hesitant to transfer the perpetrator if there is no comparable position to which they may be transferred. Finally, an employer may perceive a survivor's presence at work as a safety risk to other employees, which could in turn jeopardize the survivor's employment security. However, employers may have a legal duty

to safeguard the survivor's well-being to avoid creating a hostile work environment and to protect against a retaliation claim.

If a survivor is ready to tell someone at work about the assault, strategize with them about whom it may be best to tell. This decision will be informed by their reasons for disclosing. For example, if they need time off from work to go to court, or if they are concerned that the perpetrator is a threat to the workplace, the survivor needs to speak to their supervisor or someone else in a position of authority. A supervisor or manager will need to be informed to authorize a leave or to implement safety accommodations. If the perpetrator is a co-worker or supervisor and the survivor wishes to preserve their right to file a sexual harassment claim under Title VII (discussed in Section II, below), they will usually need to follow the employer's protocol for reporting an incident of workplace harassment. Help the survivor practice how they are going to disclose the situation, so that they are prepared for the discussion. The more clearly the survivor can describe circumstances, emotional state, and their proposal for assistance, the more likely it is that the employer will respond in a constructive manner.

> [PRACTICE TIP: Review the survivor's employee handbook and other workplace policies for applicable grievance and complaint procedures. If the perpetrator will be prosecuted in a criminal or school disciplinary case, or if the survivor may sue the perpetrator civilly, remember that any statements the survivor makes (verbally or in writing) may later be testimony at the perpetrator's hearing.]

D. Privacy

To access the benefits and legal causes of action described below, your client will have to disclose at least some information about the assault. Identifying and honoring a survivor's workplace privacy concerns is the first step in survivor-centered legal representation, even if that means forgoing an employment benefit.

Typically, the closer the link between the assault and the workplace, the more likely accommodations will be granted. You need to help the survivor balance maintaining privacy and requesting accommodations from their employer. While many employers have procedures and protocols in place

to ensure workplace confidentiality, carefully assess what information to disclose to the employer. For example, you might inform an employer that a client was the survivor of an assault or a violent crime, without disclosing that it was sexual in nature. Help your client weigh the relative benefits and burdens of disclosing or withholding specific information.

If a survivor decides to disclose the sexual assault to their employer, address their privacy concerns directly with the employer. Request that the employer keep the survivor's disclosure confidential. Although there is no guarantee that the employer will respect a survivor's confidentiality, ask. Best practice is to put a request for confidentiality in writing to prove that the request was made. However, if the perpetrator is a co-worker, supervisor, or vendor, the employer may not be able to promise absolute confidentiality but will likely promise to tell only those who have a reason or need to know about the situation. Survivors should also be aware that an employer may decide to disclose the situation to specific people to ensure the survivor's safety and a secure workplace. For example, the employer may need to inform security guards or receptionists if the perpetrator is a threat to the workplace. Where confidentiality is impossible, ask the employer to keep the survivor updated every time details about the assault must be shared. This avoids surprise and/or embarrassment if one of these people approaches the survivor and speaks to them about the threat.

E. Safety at Work

1. Safety Planning

If the perpetrator works for the same employer as the survivor, can gain access to the building (e.g., as a customer or a member of the public), or knows where the survivor works, the perpetrator may continue to pose a threat at the workplace. If safety at work is a concern for the survivor, help them develop a safety plan that includes travel to, from, and at the worksite. (*See Safety and Protection Orders* for additional safety information.) As part of this safety plan, a survivor may want to request a change to their phone number at work, a relocation of workspace to a more secure area, or a change in work schedule, work site, or work assignment. The survivor may also request that their name and telephone number be removed from automated phone directories, that work status not be disclosed to outside callers, and that calls from the perpetrator (if their

identity is known) be screened or transferred to security personnel. If the company is large enough to have a corporate security department, security officers can assist with the development of a workplace safety plan. Note that some of these steps require the survivor to disclose the assault to the employer to explain why they are requesting these changes.

> [PRACTICE TIP: Attorneys should have at least a basic understanding of safety planning for sexual assault survivors, especially because a survivor may never seek services from more than one victim service provider. If your client has safety concerns, do not ignore or minimize their fears even if you do not agree with their risk assessment. Safety is a paramount consideration, and appropriate safety planning is survivor centered and directed. Do not conclude an appointment with your client without engaging in at least some basic safety planning. At a minimum, ensure that the survivor knows how to access a local sexual assault crisis center safely.]

If your client has a protection order, help them determine whether it should include their workplace. Discuss whether to provide a copy of the order and, if available, the perpetrator's photo to the employer. If the survivor is pursuing criminal charges, encourage them to consider whether it is safe to contact the police and the prosecuting attorney about any threats at the workplace.

2. Workplace Protection Orders

Some jurisdictions have passed statutes enabling employers to obtain workplace protection orders to prevent violence, stalking, or harassment of their employees. In some jurisdictions, an employer may apply for a protection order on its own behalf.[12] In other jurisdictions, an employer may

[12] *See, e.g.*, **Arizona**: ARIZ. REV. STAT. § 12-1810 (2021) ("An employer or an authorized agent of an employer may file a written verified petition with a magistrate, justice of the peace or superior court judge for an injunction prohibiting workplace harassment."); **Georgia**: GA. CODE ANN. § 34-1-7(b) (2005) ("Any employer whose employee has suffered unlawful violence or a credible threat of violence from any individual, which can reasonably be construed to have been carried out at the employee's workplace, may seek a temporary restraining order and an injunction on behalf of the employer prohibiting further unlawful violence or threats of violence

seek an order only on behalf of the threatened employee.[13] These statutes also vary in terms of what an employer must demonstrate to obtain a workplace protection order. Some jurisdictions require only that the employer demonstrate the employee received a credible threat of violence;[14] others require evidence that the employee is in imminent danger and will suffer irreparable harm unless a protection order is issued.[15] For the employer to seek such an order, the survivor will need to disclose some information about the assault or threat of violence against

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by that individual at the employee's workplace or while the employee is acting within the course and scope of employment with the employer."); **Tennessee**: TENN. CODE ANN. § 20-14-102 (2011) ("Any employer whose employee has suffered unlawful violence or a credible threat of violence from any individual, which can reasonably be construed to have been carried out at the employee's workplace, may seek a temporary restraining order and an injunction prohibiting further unlawful violence or threats of violence by that individual, or the organization that individual is affiliated with, at the workplace.").

[13] *See, e.g.*, **California**: CAL. CIV. PROC. CODE § 527.8(a) (2016) ("Any employer, whose employee has suffered unlawful violence or a credible threat of violence from any individual, that can reasonably be construed to be carried out or to have been carried out at the workplace, may seek a temporary restraining order and an order after hearing on behalf of the employee and, at the discretion of the court, any number of other employees at the workplace, and, if appropriate, other employees at other workplaces of the employer."); **Indiana**: IND. CODE § 34-26-6-6 (2006) ("An employer may seek a temporary restraining order or injunction on behalf of an employee to prohibit further violence or threats of violence by a person if: (1) the employee has suffered unlawful violence or a credible threat of violence from the person; and (2) the unlawful violence has been carried out at the employee's place of work or the credible threat of violence can reasonably be construed to be carried out at the employee's place of work by the person."); **North Carolina**: N.C. GEN. STAT. § 95-261 (2006) ("An action for a civil no-contact order may be filed as a civil action in district court by an employer on behalf of an employee who has suffered unlawful conduct from any individual that can reasonably be construed to be carried out, or to have been carried out, at the employee's workplace.").

[14] *See, e.g.*, **Indiana**: IND. CODE § 34-26-6-6 (2006) ("An employer may seek a temporary restraining order or injunction on behalf of an employee to prohibit further violence or threats of violence by a person if: . . . the employee has suffered unlawful violence or a credible threat of violence from the person . . . .").

[15] *See, e.g.*, **California**: CAL. CIV. PROC. CODE § 527.8 (2006) ("Upon filing a petition for an injunction under this section, the plaintiff may obtain a temporary restraining order in accordance with subdivision (a) of Section 527, if the plaintiff also files an affidavit that, to the satisfaction of the court, shows reasonable proof that an employee has suffered unlawful violence or a credible threat of violence by the defendant, and that great or irreparable harm would result to an employee."); **Georgia**: GA. CODE ANN. § 34-1-7(d) (2006) ("Upon filing a petition with the court for an injunction pursuant to this Code section, the petitioner may obtain a temporary restraining order if the petitioner also files an affidavit which, to the satisfaction of the court, shows reasonable proof that an employee has suffered unlawful violence or a credible threat of violence by the respondent and that great or irreparable harm shall result to an employee if such an injunction is not granted.").

them. In addition, while some laws require that the employer consult with the survivor before seeking an order, other jurisdictions permit the employer to obtain an order without notice to or consent from the survivor.[16] If the survivor works in a jurisdiction where their consent is not required, submit a request in writing to the employer asking that the employer consult with your client before pursuing such an order. At a minimum, ask the employer to notify your client if an order is requested. If appropriate, include in the request that the survivor may be at increased risk for retribution by the perpetrator if the employer obtains a protection order, and thus prior notice is important for safety planning purposes. As a practical matter, the employer may not be able to apply for or secure an order without the survivor's cooperation, regardless of what the law requires.[17]

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[16] *See, e.g.*, **Arizona**: ARIZ. REV. STAT. § 12-1810(N) (2016) ("When the employer has knowledge that a specific person or persons are the target of harassment . . . , the employer shall make a good faith effort to provide notice to the person or persons that the employer intends to petition the court for an injunction against workplace harassment."); **Nevada**: NEV. REV. STAT. § 33.260 (2006) ("If an employer has knowledge that a specific person is the target of harassment in the workplace and the employer intends to seek a temporary or extended order for protection against such harassment, the employer shall make a good faith effort to notify the person who is the target of the harassment that the employer intends to seek such an order."); **North Carolina**: N.C. GEN. STAT. § 95-261 (2006) ("The employee that is the subject of unlawful conduct shall be consulted prior to seeking an injunction under this Article in order to determine whether any safety concerns exist in relation to the employee's participation in the process. Employees who are targets of unlawful conduct who are unwilling to participate in the process under this Article shall not face disciplinary action based on their level of participation or cooperation.").

[17] *See, e.g.*, **Georgia**: GA. CODE ANN. § 34-1-7 (2006) ("Upon filing a petition with the court for an injunction pursuant to this Code section, the petitioner may obtain a temporary restraining order if the petitioner also files an affidavit which, to the satisfaction of the court, shows reasonable proof that an employee has suffered unlawful violence or a credible threat of violence by the respondent and that great or irreparable harm shall result to an employee if such an injunction is not granted."); **Nevada**: NEV. REV. STAT. § 33.270(4)(a) (2006) ("A verified application is accompanied by an affidavit that contains specific facts which clearly show that immediate and irreparable injury, loss or damage will result to the employer, an employee of the employer while the employee performs the duties of his employment or a person who is present at the workplace of the employer before the person who allegedly committed the harassment or his attorney can be heard in opposition . . . ."); **Rhode Island**: R.I. GEN. LAWS § 28-52-2(b) (2005) ("Proof (by affidavit in an *ex parte* hearing, or by a preponderance of the evidence in any other hearing) of any action described in subsection (a) of this section shall constitute irreparable harm or damage to the employer, or employer's employee(s) or invitee(s)").

Enforcement of workplace protection orders varies from jurisdiction to jurisdiction. Generally, sanctions for a violation include a fine and/or contempt of court. Violations sometimes result in criminal charges.[18]

> [PRACTICE TIP: Explain to your client that a workplace protection order only applies to the workplace and will not keep the perpetrator away from them at any other place, such as home, general public places, and school.]

3. Sexual Assault and Workplace Policies

A growing number of employers have implemented sexual and/or domestic violence policies to address the needs of survivors of violence in the workplace. You should determine whether the survivor's employer has such a policy and, if so, what recourse and procedures exist.

> [PRACTICE TIP: Workplace policies may be found in employee handbooks, on an employer's website, postings at the job site, in a union contract, etc. If the employer's policy only addresses domestic violence, request that the employer extend the policy to survivors of sexual assault. The employer may need to be educated about why the reasons for a domestic violence policy (e.g., how violence impacts a survivor's ability to work, societal costs and harms, benefits to the employer, a survivor's need to retain their employment income and benefits) also apply to survivors of sexual assault. Collaboration with a rape crisis program may be critical to this process.]

4. Other Workplace Policies or Programs

If the assault occurred at the workplace, review with your client any materials the employer has provided to its employees regarding discrimination and harassment, including statements or publications about

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[18] *See, e.g.*, **Nevada**: NEV. REV. STAT. § 33.280 (2006) ("A temporary or extended order for protection against harassment in the workplace may: . . . Include the following statement: 'WARNING [¶] This is an official court order. If you disobey this order, you may be arrested and prosecuted for the crime of violating an order for protection against harassment in the workplace and any other crime that you may have committed in disobeying this order."); **North Carolina**: N.C. GEN. STAT. § 95-269 (2006) ("A violation of an order entered pursuant to this Article is punishable as contempt of court.").

workplace safety, codes of conduct, and workplace ethics. These policies may be in an employee handbook, in written policies provided to employees, in postings in the workplace, or on the employer's intranet. Laws require employers to provide employees with certain information about their rights to work in a safe environment that is free of discrimination, including sexual harassment (*see* discussion below).[19] Determine whether the employer failed to adhere to a particular procedure it promised to follow in response to the employee's complaint(s) of inappropriate conduct, or whether the employer failed to distribute a policy against sexual harassment in the workplace, as required by law. Such policy violations may increase your leverage when negotiating with the employer for accommodations for your client.

The survivor's employer may also offer its employees benefits beyond the leave options discussed below. For example, the employer may have an Employee Assistance Program that allows the employee to obtain free and confidential counseling, or it may offer other resources through its insurance plans or other programs that could assist your client.

F. Leave as a Benefit

A survivor and their lawyer should review the survivor's employment benefits (including any pertinent collective bargaining agreement provisions, if the survivor is a union member) to determine whether the survivor is entitled to any paid or unpaid time off work. Such benefits may include paid or unpaid sick leave, vacation days, holiday time, "personal" days, a leave bank, crime victims' leave, or short- and long-term disability leave. A survivor will need to follow the appropriate procedure to access

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[19] *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*; 29 C.F.R. § 1604.11; *Policy Guidance on Current Issues of Sexual Harassment*, EEOC Guidance No. N-915-050 (March 19, 1990) *available at* https://www.eeoc.gov/laws/guidance/policy-guidance-current-issues-sexual-harassment (last visited March 1, 2023) ("An effective preventive program should include an explicit policy against sexual harassment that is clearly and regularly communicated to employees and effectively implemented. The employer should affirmatively raise the subject with all supervisory and nonsupervisory employees, express strong disapproval, and explain the sanctions for harassment. The employer should also have a procedure for resolving sexual harassment complaints. The procedure should be designed to 'encourage victims of harassment to come forward' and should not require a survivor to complain first to the offending supervisor. It should ensure confidentiality as much as possible and provide effective remedies, including protection of victims and witnesses against retaliation." (Internal citation omitted.)).

the relevant leave time. By using these benefits, a survivor may be able to protect their job status and even receive wages while taking time off work to address the physical, emotional, and legal repercussions of an assault. Be aware, however, that employers may not be required to provide these benefits, and even if they do, a survivor may not be entitled to use them if they have not met the employer's requirements such as length of employment, position, probationary period, or hours worked.

> [PRACTICE TIP: If your client has an employee handbook, contract, or collective bargaining agreement, review it to determine whether the employer offers any benefits specifically for survivors of violence. Even if sexual assault is not specifically mentioned, these documents will provide you with valuable information about the vacation, sick time or other leave that may allow your client to attend court proceedings, heal from injuries due to the violence, relocate, or take other steps to help recover from the assault.[20]]

When an employee has been sexually assaulted by someone unaffiliated with their place of employment and the assault did not occur at the workplace, your first step is to assist the survivor to identify the accommodations they may need to help them return to or retain work, if they choose to remain employed. If the survivor was sexually assaulted at work or by a co-worker or supervisor, your first step is to advise them that they may be able to pursue remedies available under anti-discrimination law.

G. The Unionized Workplace[21]

There are three primary sources for the rules governing unions and employers in a unionized workplace: (1) Collective Bargaining Agreements;

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[20] *See, e.g.*, A.B.A. Comm'n on Domestic Violence, A Guide For Employers: Domestic Violence In The Workplace 36-38 (1999) (discussing how an employee who is a survivor of domestic violence may use sick time, flextime, and other leave options).

[21] Victim Rights Law Center thanks Prof. Michael C. Duff, J.D., Assistant Professor of Law at University of Wyoming College of Law (and former NLRB attorney), for the generous use of his materials for this section.

(2) federal labor acts; and (3) state labor acts. (Where federal and state law overlap, state laws are generally preempted.[22])

1. Collective Bargaining Agreements

Collective Bargaining Agreements (CBAs) establish the rules most frequently used in unionized workplaces. CBAs are legally binding private agreements negotiated by a union and employer. A CBA may provide greater protection for sexual assault survivors than what laws require. A CBA may not diminish employees' rights and remedies unless there is a "clear and unmistakable" waiver of the right by the party[23] and the waiver does not affront public policy.[24]

CBAs will differ from union to union and employer to employer. An employer is not specifically required to bargain issues related to sexual assault arising in the workplace. An attorney could argue, however, that if requested by the union, an employer must bargain regarding sexual assault policies because such policies impact worker safety, and safety on the job is a term and condition of employment.[25] Unfortunately, not all unions have

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[22] *See generally* U.S. CONST. art. VI; Cornell University Law School's Legal Information Institution, Collective Bargaining, https://www.law.cornell.edu/wex/collective_bargaining (last visited March 1, 2023). Preemption is unusually broad in labor relations law because the courts have found that states are also preempted from legislating in areas that Congress deliberately left unregulated, creating a broad zone of "field" preemption. *Lodge 76, Int'l Ass'n of Machinists v. Wis. Employment Relations Comm'n*, 427 U.S. 132 (1976). What this means to the practitioner in a unionized environment is that you will seldom encounter state labor relations law unless you are dealing with a public employee.

[23] *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70 (1998) (finding that union's waiver of its members' ADA *claims* must be clear and unmistakable); *General Elec. Co. v. Nat'l Labor Relations Bd.*, 414 F.2d 918, 923 (4th Cir. 1969) ("[W]e recognize the established canon that while a union may waive its statutory right to information relevant to the processing of grievances, only clear and unmistakable language will warrant a conclusion that waiver was intended."). For a summary of case law and trends in this area, *see* 20 WILLISTON ON CONTRACTS § 55:30 (4th ed. July 2004).

[24] *W.R. Grace & Co. v. Loc. Union 759*, 461 U.S. 757, 766 (1983) ("As with any contract, however, a court may not enforce a collective bargaining agreement that is contrary to public policy."); *see also* 20 WILLISTON ON CONTRACTS § 55:30 ("[A] collective bargaining agreement that would allow discrimination against persons with disabilities in contravention of the Americans with Disabilities Act or state antidiscrimination statutes is unenforceable.")

[25] *See, e.g.*, *A.K. Steel Corp.*, 324 N.L.R.B. 173, (1997); *Northside Ctr. for Child Dev.*, 310 N.L.R.B. 105 (1993).

bargained over these issues successfully, and/or not all employers have agreed to have them incorporated into a CBA.[26]

Some CBAs have extremely broad grievance provisions permitting the filing of grievances in connection with almost any workplace dispute. A grievance related to sexual assault would easily be covered by such a broad grievance policy. Other grievance provisions are more narrowly drafted and permit the filing of a grievance only in connection with a dispute that is cognizable under the CBA. If a survivor who is a union member seeks to file a grievance, the first person they need to speak with is the union steward.[27]

2. Federal Labor Acts: The NLRA and the LMRDA

The second major source of rules governing the unionized workplace is the National Labor Relations Act (NLRA).[28] The NLRA applies to most private, non-agricultural employees and employers engaged in some aspect of interstate commerce.[29] The NLRA protects employees who choose to

[26] There may be legitimate reasons for the absence of protections in a CBA, but a practitioner should be alert to the possibility that such provisions were deliberately omitted from the CBA because of a history of unlawful sexual conduct in the particular workplace. The absence of such protections may alert a bargaining unit member of the possibility of an avenue for redress. Of course, if the employer and union have bargained over these issues and, as a result, incorporated certain rights into a collective bargaining agreement, a victim may be able to file a grievance under those collective bargaining agreement provisions over any sexual assault occurring in the workplace. Further, unionized individuals who think they have been sexually harassed may file employment discrimination charges with the Equal Employment Opportunity Commission within 180 days from the alleged discriminatory act, or with a state human relations commission within the time limits established by the relevant state.

[27] *Your Rights at Work*, AFL-CIO (February 22, 2013), *available at* https://aflcio.org/reports/your-rights-work (last visited March 1, 2023).

[28] 29 U.S.C. §§ 160 *et seq.* (2005); *see also* 29 U.S.C.A. § 185 (2005) (regulating suits by and against labor organizations).

[29] NLRB's jurisdiction does not include certain individuals or employers. Under the NLRA, the term "employer" does not include the United States or any State government, or any political subdivision of either, or any Government corporation or Federal Reserve Bank, or any employer subject to the Railway Labor Act. 29 U.S.C. § 152(2). The NLRA also provides that, under the Act, the term "employee" includes any employee *except* the following: (1) agricultural laborers; (2) domestic servants; (3) any individual employed by his or her parent or spouse; (4) independent contractors; (5) supervisors; (6) individuals employed by an employer subject to the Railway Labor Act; and (7) government employees (including employees of the Federal Reserve Bank, city, town, school district, etc.).

engage in "protected concerted activity" from retaliation by their employers. The NLRA also protects bargaining unit members from arbitrary discrimination by their union in matters of workplace representation. Decisions and regulations of the National Labor Relations Board (NLRB) interpret the NLRA and are binding upon the union and the employer subject to judicial review by federal Courts of Appeal and the United States Supreme Court.[30]

Filing a grievance is different than filing a charge with the NLRB. A "charge" alleges a violation of the NLRA.[31] An employee may file a charge with the NLRB at any point within 180 days from the occurrence of an alleged unfair labor practice (and is thereafter referred to as a "charging party"). However, if a statutory charge *could* also be filed as a contractual grievance under the terms of an existing CBA, then the NLRB will "defer" the charge to the grievance-arbitration procedure set out in the CBA, even if the charging party would prefer NLRB to grievance arbitration procedures.[32] Examples of a grievance might include an employer's refusal to allow a survivor to: change their shift so they can carpool with colleagues; transfer to a work site that the perpetrator is not aware of; bring a pet to work for safety and emotional security; take a "personal" or "flex" day without advance notice; or use sick time to change their residence, meet with a lawyer, or pursue safety precautions such as changing locks or installing window barriers. Even if a charge is deferred, the NLRB will review an arbitration award, or

[30] NLRB decisions can be found in any major legal database (*e.g.*, Lexis or Westlaw). More information is *available at* https://www.nlrb.gov/cases-decisions/decisions.

[31] 29 U.S.C. § 160. In most instances the charge must allege that the actions of an employer or a union have been motivated by an employee's union or protected concerted activity. This probably will not be the typical situation you will encounter. Following the filing of a charge at an NLRB regional office, the regional director will, at the conclusion of a 6-8 week investigation, either issue a complaint or dismiss the charge. If a complaint issues, a trial-like hearing is held at the regional office which is overseen by a Federal Administrative Law Judge. There are ongoing and potentially lengthy appeal rights from the ALJ's decision. From a practitioner's perspective, this is not a good procedural route for prompt action.

[32] *United Techs. Corp.*, 268 N.L.R.B. 557 (1984) ("It is fundamental to the concept of collective bargaining that the parties . . . are bound by the terms of their contract. . . . [I]t is contrary to the basic principles of the Act [NLRA] for the Board to jump into the fray prior to an honest attempt by the parties to resolve their disputes through that machinery.")

an agreement made by the Union and the Employer prior to arbitration, if requested to do so by the charging party.[33]

If your client has an employment contract, or if they are a union member and thus governed by a CBA, review the contract and the CBA to identify possible remedies and courses of action. Recourse and remedies will vary depending on the specific terms of the CBA. Advocating for a unionized employee who is the survivor of sexual assault may be more complex if the perpetrator is also a unionized employee. The NLRB will seldom involve itself in a union's internal deliberations (e.g., whether a union should conduct a serious internal investigation or pursue a grievance when both the survivor and the perpetrator are union members). But the Labor Management Reporting and Disclosure Act of 1959 (LMRDA), administered by the Department of Labor, broadly affords union members due process rights in connection with internal union matters.[34] Importantly, the LMRDA may, in limited instances, provide attorneys' fees to prevailing parties who establish non-compliance with statutory, intra-union due process rights.[35] In contrast, under the NLRA a union has almost no financial liability for any unlawful conduct in which it engages.[36]

> [PRACTICE TIP: Even the mention of a LMRDA suit may quickly get the attention of a union that has been reluctant to act on a survivor's complaint. Review the CBA to determine the grievance procedures. Pay close attention to any time limits for filing a grievance and any sections in the CBA that might

[33] *Babcock &Wilcox Constr. Co.*, 361 NLRB 1127 (2014) (retroactive application of new deferral standard overturned in *Beneli v. Nat'l Relations Bd.*, 873 F.3d 1094 (9th Cir. 2017).

[34] One example is that union members in good standing have the right to attend union meetings, presumably including a meeting in which the internal union discipline of a member-perpetrator is under discussion. Labor Management Reporting and Disclosure Act of 1959 (LMRDA) (Griffin-Landrum Act), 29 U.S.C. §§ 411 *et seq*. (2006).

[35] 29 U.S.C. § 412 (2006); *Hall v. Cole*, 412, U.S. 1, 14 ("We therefore hold that the allowance of counsel fees to the successful plaintiff in a suit brought under § 102 of the LMRDA is consistent with both the Act and the historic equitable power of federal courts to grant relief in the interest of justice.").

[36] However, in some instances the Union may incur liability under Title VII for its inactivity in the presence of racially and sexually discriminatory conduct directed at its member by the involved employer or the employer's employees. *Maalik v. Int'l Union of Elevator Constructors, Local 2*, 437 F.3d 650 (7th Cir. 2006).

preclude attorney representation at a grievance hearing. Even if you are prohibited from representing the client in the grievance proceeding, you may still be able to offer guidance and advice behind the scenes. You should be prepared to assist the client if, after the grievance procedure is complete, the client wishes to file a charge with the NLRB or pursue a claim under anti-discrimination law.]

III. MAINTAINING THE SURVIVOR'S EMPLOYMENT

The employment rights and remedies available to a sexual assault survivor will often vary depending on where the assault occurred and who perpetrated it.

A. Remedies Specific to Assaults Committed on Work Premises or in the Course of Employment

When an assault has occurred at work or during the course of employment, specific legal remedies may be available to the survivor because of where or why the assault occurred. These remedies may include benefits authorized pursuant to anti-discrimination laws, occupational health and safety programs, and workers' compensation schemes.

1. Sexual Harassment Claims Pursuant to Anti-Discrimination Laws

Although sexual assault is not specifically mentioned in most employment anti-discrimination laws, these laws may nevertheless provide valuable protections to survivors of sexual assault. Sexual harassment is a form of sex discrimination.[37] A sexual assault committed on the job by a supervisor or co-worker may create a sufficiently severe or pervasive hostile environment to constitute sexual harassment for which an employer may be held liable.[38] A survivor sexually assaulted by another employee may be

[37] *See, e.g.*, *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

[38] *See, e.g.*, *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986) (involving a sexual assault by supervisor with whom employee had a prior social relationship); *Little v. Windermere Relocation, Inc.*, 265 F.3d 903, 911 (9th Cir. 2001), *amended and superseded*, 301 F.3d 958 (9th Cir. 2002) (involving a serial sexual assault on one occasion during business trip by a client); *Cf. Fuller v. Idaho Dep't of Corr., 694 F. App'x 590* (9th Cir. 2017) (finding that rape by a

entitled to protection by anti-discrimination laws if the survivor's employer fails to take action following an assault at work or retaliates against them for reporting it. The "work site" may include a location within the workplace, at a company building, or on any other premises controlled by the employer (such as a parking structure, exercise facility, training camp, etc.). Sexual harassment may also occur when the perpetrator is a non-employee, such as a customer or vendor, and the employer knew or should have known that the harassment involved the workplace but failed to take prompt and appropriate remedial action.[39]

> [PRACTICE TIP: Sometimes a survivor experiences harassment or discrimination at the worksite by other employees who learn that they are a sexual assault survivor. If this is the case, a survivor may wish to: (a) inform the person(s) harassing or discriminating against them that their behavior is inappropriate and unwelcome; (b) talk to a supervisor, manager, or other person in authority and advise them of the problem; (c) inform the shop steward or business agent, if they are a union member; and (d) maintain a log in which they record any incidents of harassment or discrimination. (For privacy reasons, the survivor may not want to use the log as a personal diary or journal. The log may be subpoenaed or submitted as evidence in a civil or criminal case. Entries should

co-worker outside of the workplace or related environment did not create a hostile work environment when the perpetrator was placed on leave); *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1305 (2d Cir. 1995), *abrogated by Burlington Indus.*, *supra* note 747, *and by Faragher*, *supra* note 747, *abrogation recognized by Kairam v. West Side GI, LLC*, 793 F. App'x 23 (2d. Cir. 2019); *Brock v. United States*, 64 F.3d 1421, 1423 (9th Cir. 1995) ("[E]very sexual assault committed in the employment setting is also discrimination based on the employee's sex."); *Jones v. United States Gypsum*, 81 Fair Empl. Prac. Cas. (BNA) 1695 (N.D. Iowa Jan. 21, 2000) (upholding sexual harassment claim based on assault in genital area, including discussion citing cases).

[39] *See, e.g.*, *Little*, *supra* note 47; *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1012 (8th Cir. 1988) (involving unwanted touching and offensive comments by co-workers); *Menchaca v. Rose Records, Inc.*, 67 Fair Empl. Prac. Cas. (BNA) 1334 (N.D. Ill. Apr. 3, 1995) (involving harassment by employer's customer); *Otis v. Wyse*, No. 93-2349-KHV, 1994 WL 566943 (D. Kan. Aug. 24, 1994) (involving harassment by co-worker); *Powell v. Las Vegas Hilton Corp.*, 841 F. Supp. 1024, 1025-26 (D. Nev. 1992) (involving harassment by employer's customer). *See also* 29 C.F.R. § 1604.11 (EEOC guidelines confirming employers' liability for sexual harassment by co-workers and customers).

be brief and straightforward, documenting the date, time, and location of the incident; specific statements made or actions taken; witnesses; and the survivor's response.)]

Title VII of the Civil Rights Act of 1964 (Title VII)[40] provides a statutory framework for pursuing anti-discrimination remedies (including in Title VII employment, Title IX education, and Title VIII housing sex discrimination contexts).[41] Title VII prohibits discrimination against an employee in hiring, setting terms and conditions of employment, and firing based on sex (including pregnancy), race, national origin, religion, and color by an employer with 15 or more employees.[42] As noted above, sexual harassment is a prohibited form of sex discrimination.[43]

Under Title VII, there are two kinds of sexual harassment: (1) "tangible employment action" (what used to be referred to as "*quid pro quo*") sexual harassment, where submission to, or rejection of, the sexual advance, request, or conduct is a basis for employment decisions affecting the individual; and (2) "non-tangible employment action" (previously referred to as a "hostile work environment") sexual harassment, where the unwelcome conduct of a sexual nature by co-workers or supervisors is so severe or pervasive that it creates an abusive work situation. Under either scheme, an employer may be liable under Title VII, with respect to conduct between fellow employees, if the employer failed to exercise reasonable care to prevent and correct the behavior, so long as the employee did not unreasonably fail to take advantage of corrective opportunities provided by the employer.[44]

State or local anti-discrimination laws may provide employees with broader protections than those afforded by Title VII.

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[40] 42 U.S.C.A. § 2000e *et seq.* .

[41] For example, Title IX, which prohibits sex discrimination in education draws heavily from Title VII laws and jurisprudence.

[42] 42 U.S.C.A. § 2000e-1. Certain aliens and religious entities are exempt from Title VII.

[43] *Burlington Indus.*, *supra* note 749); *Faragher*, *supra* note 46.

[44] 29 C.F.R. § 1604.11(d).

> [CHECK YOUR LAW: In some jurisdictions, an employee may pursue a claim of sexual harassment against the employer for harassment by a co-worker even if the employer neither knew nor should have known of the harassment, if the person who perpetrated it had supervisory authority.[45]]

Some jurisdictions have passed legislation specifically prohibiting discrimination against survivors of sexual assault. For example, Illinois and New York City laws specifically prohibit employers from discriminating against employees because they are survivors of domestic or sexual violence.[46] These laws allow for more straightforward claims than claims under Title VII because they do not have to rely on sex discrimination theories. Their respective laws prohibit employers from refusing to hire, discharging, or penalizing a survivor based on their actual or perceived status as a survivor of sexual assault, or because of the perpetrator's conduct.[47] An employer may ask the survivor to provide evidence to show that they are entitled to the law's protections.

> [CHECK YOUR LAW: Review legislation in your jurisdiction to determine whether there are additional employment protections for survivors of sexual assault. Also, remain current with any changes to federal law that would provide similar protections. For example, there have been several attempts to pass the Security and Financial Empowerment Act (SAFE Act) into law. If it had passed, the SAFE Act would have provided survivors of domestic violence, dating violence, sexual assault, and stalking up to 30 days of safe leave in a 12-month period to seek medical attention, obtain certain services and counsel, participate in safety planning, and take legal action. The SAFE Act would also have prohibited states from imposing additional

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[45] *See College-Town v. Mass. Comm'n Against Discrimination*, 508 N.E.2d 587 593-4 (Mass. 1987) (involving harassment by a supervisor over a subordinate where the perpetrator's participation in a subsequent investigation into the harassment coupled with the victim's exclusion therefrom was deemed by the court to be "deferential and inadequate" by the employer).

[46] 820 ILL. COMP. STAT. § 180/1-999; N.Y.C. CODE § 8-107.1.

[47] 820 ILL. COMP. STAT. § 180/30; N.Y.C. CODE § 8-107.1.

restrictions on eligibility for unemployment compensation.[48] Some states have passed similar legislation.[49]]

If your client is being sexually harassed or assaulted at work and wants the employer to address the problem, they must provide notice to the employer of the behavior. Preferably, the notice will be submitted in writing to ensure that the employer has an opportunity to rectify the situation, and that your client preserves their legal rights. Help your client craft this document, as it may be used later in a civil or criminal trial or administrative hearing.

Typically, the employee handbook will specify the person to whom a report should be submitted. Discuss the benefits and burdens of reporting the incident to the employer so that the survivor is making an informed decision about how to proceed. If the survivor decides to notify their employer, provide them with information about how to file a discrimination claim with the U.S. Equal Employment Opportunity Commission (EEOC) or the analogous state agency. A survivor may want to file an EEOC or state discrimination complaint if the employer does not respond to the survivor's complaint or terminates them in retaliation for filing it.

[PRACTICE TIP: A charge of discrimination must be filed with the EEOC within 180 calendar days of the alleged violation, or within 300 calendar days if the charge is also covered by a state or local anti-discrimination law. EEOC timelines are distinct from the statutes of limitation for state or federal claims. If the survivor is suing a government entity, additional notice or filing deadlines may apply. Review your jurisdiction's regulations concerning the time limit for filing a discrimination complaint because the time limit requirement may be tolled under certain circumstances (e.g., where the complainant filed a grievance pursuant to a collective bargaining agreement).]

[48] *See* www.govtrack.us for a summary of the proposed legislation.

[49] For example, Oregon implemented legislation requiring covered employers to allow eligible employees to take reasonable leave to seek medical care, legal assistance, counseling, victim services, and other supports. *See* Rule 839-009-0345 — Victims of Domestic Violence, Harassment, Sexual Assault or Stalking: Purposes for Taking Leave under ORS 659A.270 to 659A.285, https://secure.-sos.-state.-or.-us/oard/view.-action?ruleNumber=839-009-0345.

2. Workers' Compensation

The workers' compensation program is a state-run system of workplace insurance in which every employer is required to participate. In all states, it provides the exclusive remedy for employees who experience injuries in the course of employment. To be compensable, however, an injury must not be "personal" (i.e., directed at a particular employee for reasons unrelated to the survivor's employment).[50] An injured worker is barred from pursuing a private tort suit for injuries sustained at work if workers' compensation benefits are awarded.[51] If awarded, workers' compensation benefits may include temporary wages, wages for work missed, reimbursement for medical expenses, and protection from retaliation by the employer for filing the compensation claim. A survivor may be able to pursue a private suit even if a workers' compensation claim is denied, depending on what grounds the claim was denied.

> [PRACTICE TIP: Workers' compensation laws do not bar tort claims against third parties such as independent contractors, vendors, and customers.[52]]

Several key considerations apply to workers' compensation claims in every jurisdiction. These include: (a) timely notice; (b) continued employment; (c) documentation of the injury; and (d) injury in the course of employment.

a. Timely Notice

First, attorneys must be aware of timing and statute of limitation issues. Most jurisdictions require that the survivor give proper notice of the assault

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[50] *See* Eliot J. Katz, Annotation, *Workers' Compensation: Sexual Assaults as Compensable*, 52 A.L.R. 4th 731 (1987) (noting that compensation requires that the injury arise out of and in the course of employment; some courts have interpreted this to mean "that where the sexual assault is directed at the employee for a motive that is personal to the assailant, and not because she happens to be an employee, the assault is unrelated to and does not arise out of the employment").

[51] *See* ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 100.01 (2022).

[52] 10 LARSON, *supra* note 60, § 110 ("When compensable injury is the result of a third person's tortuous conduct, all statutes preserve a right of action against the tortfeasor, since the compensation system was not designed to extend immunity to strangers.").

and injury to the employer within a specified period of time.[53] Constructive notice is sufficient. Notice then triggers the employer's duty to provide information on workers' compensation insurance. A workers' compensation claim must then be filed within the statutory time limits.[54]

b. Continued Employment

Second, a survivor must maintain their job to be eligible for workers' compensation.[55] If the employee voluntarily leaves their employment, they will be deemed ineligible for workers' compensation benefits based on the prior assault. This requirement applies even if the employee leaves employment as a direct result of the assault or as a result of the employer's response to the complaint,

c. Adequate Documentation

Third, to continue to receive compensation on a long-term basis, a survivor will be required to provide documentation of the assault and injuries. Typically, employers require updated reports from a physician or therapist evaluating the survivor stating that treatment is still needed or the injury persists.[56] If an employer chooses to, it may discontinue compensation after a period of time. To continue receiving compensation, the survivor may have to pursue an administrative appeal process. This process is usually governed by a state Workers' Compensation Board or Department of Labor Relations.[57] The appeal process may result in long-term

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[53] *See* 11 LARSON, *supra* note 60, § 126.01 ("Notice of injury, the first step in compensation procedure is normally given to the employer. The period is comparatively short; it may be 'forthwith' or 'as soon as practicable' or a specified period of weeks or months.").

[54] *See* 11 LARSON, *supra* note 60, § 126.01 ("The compensation claim itself is normally filed with the administrative agency. The period is usually one or two years, and the purpose is the same as that of any limitations statute: to protect the employer against claims too old to be successfully investigated and defended.").

[55] *See* 99 C.J.S. *Workers Compensation* § 167 ("When the employment relationship ceases to exist, whether temporarily or permanently, the liability of the employer under the compensation act ceases to exist.").

[56] *See* 100 C.J.S. *Workers Compensation* § 993 ("A workers' compensation claimant may be required to submit to a medical examination when requested by the employer, the commission, the board or the court.")

[57] *See* 13 LARSON, *supra* note 60, § 131.01 ("In all states, some kind of provision is made for reopening and modifying awards.").

compensation payments. The documentation and evaluation necessary for the appeal will be the same as the documentation submitted in the initial claim.

d. Injured in the Course of Employment

Fourth, and finally, a survivor may have a workers' compensation claim even if the sexual assault occurred outside of the course of employment, if the survivor is unable to work due to injury from the assault that combines with or exacerbates a separate injury that occurred "in the course of" and "arising from" their employment. For example, if an injury from the sexual assault exacerbated a pre-existing work-related injury that was demonstrable in medical records (but perhaps was not severe enough to prevent them from working), and as a result of this new injury the survivor now cannot work, they may be covered by the workers' compensation program.

In most jurisdictions, as long as the work-related injury contributes to the total work incapacity in a "significant" or "substantial" manner, the survivor may be covered by workers' compensation during the period of work incapacity (so long as the work-related injury continues to contribute to the survivor's incapacity).[58] However, where the jurisdiction's eligibility standard requires that the work-related injury contributes more than a "significant" or "substantial" amount to the survivor's inability to work, recovery on this basis may be denied.[59]

> [PRACTICE TIP: Do not concede the extent to which the survivor's incapacity arises from or is due to a work-related injury or incapacity until you know all of the survivor's work injury history. Workers' compensation benefits may be the survivor's best source of financial support, and a claim should not be jeopardized without expert advice. The perpetrator may

[58] See generally Robin Cheryl Miller, Cause of Action to Recover Workers' Compensation Benefits for Injury Resulting From Aggravation or Acceleration Of, or Combination With, Pre-Existing Condition, 2 CAUSES OF ACTION 2D 251 (Nov. 2022 Update).

[59] Id.

be without resources and judgment proof but that is seldom true of the employer.]

Before agreeing to accept workers' compensation benefits, a survivor must understand all of their options for recovering lost wages and medical costs, including crime victim compensation funds and civil claims against the employer. As discussed above, workers' compensation is a complete remedy, and in most jurisdictions, recovery will bar the survivor from obtaining additional damages from the employer or funding from another source.

[CHECK YOUR LAW: Attorneys should carefully check the statutes and case law in their jurisdiction to ascertain the limitations of workers' compensation benefits. Depending on the law in your jurisdiction, it may be possible for the survivor to file a workers' compensation claim in addition to seeking tort remedies, as long as ultimately, they elect only a single remedy.[60]]

3. Occupational Safety and Health Laws and Tort Actions

When sexual assault occurs at a workplace, employers may face liability for failing to take adequate measures to keep the workplace safe. Inadequate safety measures can trigger an employer's obligations under the general duty clause of the Occupational Safety and Health Act (OSHA).[61] Obtaining a workplace protection order may be an effective way for the employer to improve the safety of the workplace and meet its duties under state and

[60] *See* 9 LARSON, *supra* note 60, § 103.02 ("Aside from the judge-made law allowing the employee choice of remedy, some compensation statutes give employees who have suffered injury as a result of the employer's intentional tort the explicit right to choose between tort and compensation remedies. In other states, the employee does not need to make such an election, but can pursue both remedies simultaneously. Among those jurisdictions, at least one allows the employee to keep both the compensation and any damages awarded, but others require that an offset be taken to avoid double recovery."). *See also* OHIO STAT. § 2745.01 (in an action against an employer by an employee from damages for an intentional tort committed during the course of employment, the employee shall not be liable unless it is proven that the tortious action was committed with the intent to injure or with the substantial certainty that injury would occur).).

[61] 29 U.S.C.A. § 651 .

federal Occupational Safety and Health Acts.[62] In addition, employers may face liability under tort law negligence theories if employees commit acts of violence in the workplace, or if the employer had reason to know an employee presented the risk of committing an act of violence and the employer failed to take prompt and effective preventive action.[63]

> [PRACTICE TIP: Attorneys receiving Legal Assistance to Victim funding through the U.S. Department of Justice's Office on Violence Against Women may not pursue tort-based remedies because of restrictions imposed by the funding source. However, all attorneys should be able to identify when to make a referral to a tort attorney and should preserve potential tort claims for their clients.]

B. Protection and Benefits That May Be Available to Any Survivor

There are a variety of employment-related remedies that may be available to a survivor of sexual assault regardless of where, or by whom, the assault was committed. These include authorized leave under family and medical leave acts, the Americans with Disabilities Act, and various jurisdiction crime victims' rights and violence against women leave laws. Additionally, civil protection orders can be a useful tool to help secure a survivor's safety at work. (See *Safety and Protection Orders*).

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[62] *See* 29 U.S.C.A. § 654 ; OSHA.gov, *see also Standard Interpretations: 12/18/2003 Elements Necessary for a Violation of the General Duty Clause,* https://www.osha.gov/laws-regs/standardinterpretations/2003-12-18-1#:~:text=Zweber%20stated%2C%20Section%205(a,to%20his%20employees...%22 (last visited Feb. 14, 2023) (OSHA guidelines state that the "General Duty Clause is used only where there is no standard that applies to the particular hazard." Four elements are needed to prove a violation of the General Duty Clause: the employer failed to keep the workplace free of a hazard to which employees of that employer were exposed; the hazard was recognized; the hazard was causing or was likely to cause death or serious physical harm; and there was a feasible and useful method to correct the hazard.).

[63] For a comprehensive discussion of potential tort claims in the context of sexual assault, please *see* Jessica E. Mindlin & Liani J.H. Reeves, *Rights and Remedies: Meeting the Civil Legal Needs of Sexual Assault Survivors* (2005), https://law.lclark.edu/live/files/6469-rights-and-remedies-meeting-the-civil-legal-needs .

1. Federal, State and Local Leave Laws

Federal, state, and local laws require some employers to provide leave to survivors of sexual assault, victims of crime, and other qualifying employees (e.g., those eligible for leave under a state or federal family medical leave act). An overview of some of these laws is provided below.

a. The Federal Family Medical Leave Act[64]

The federal Family and Medical Leave Act (FMLA) provides employees job-guaranteed leave from work.[65] Although the FMLA does not expressly mention sexual assault or sexual violence, it may offer an eligible employee job-protected leave to heal from mental or physical injuries caused by the sexual violence if the injuries rise to the level of a "serious health condition."[66]

The FMLA provides up to 12 weeks of unpaid, job-guaranteed leave every 12 months to employees who work for an employer with 50 or more employees; have worked for the employer for at least 12 months and worked at least 1,250 hours in the previous 12-month period; and require leave to heal from a "serious health condition."[67] Federal regulations define a "serious health condition" as an illness, injury, impairment or physical or mental condition that involves:

- inpatient care in a hospital, hospice, or residential medical care facility, including any period of incapacity, or any subsequent treatment in connection with such inpatient care; or

[64] 29 U.S.C.A §§ 2601); 29 C.F.R. §§ 825.100 *et seq*. .

[65] Id.

[66] *See Municipality of Anchorage v. Gregg*, 101 P.3d 181 (Alaska 2004) (finding that domestic violence victim that has established that she has a "serious health condition" may be eligible for FMLA leave).

[67] 29 U.S.C.A. §§ 2601 *et seq*. ; 29 C.F.R. § 825.100. The FMLA also allows for leave for a parent or guardian to care for his or her child, spouse, or parent who is healing from injuries. (The Act provides for other family-related leaves which are not relevant to this discussion.)

- continuing treatment by a health care provider.[68]

[68] 29 C.F.R. § 825.115 . More specifically, 29 C.F.R. 825.115 (a) states that: "A serious health condition involving continuing treatment by a health care provider includes any one or more of the following:

(a) Incapacity and treatment. A period of incapacity of more than three consecutive, full calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

(1) Treatment two or more times, within 30 days of the first day of incapacity, unless extenuating circumstances exist, by a health care provider, by a nurse under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or

(2) Treatment by a health care provider on at least one occasion, which results in a regimen of continuing treatment under the supervision of the health care provider.

(3) The requirement in paragraphs (a)(1) and (2) of this section for treatment by a health care provider means an in-person visit to a health care provider. The first (or only) in-person treatment visit must take place within seven days of the first day of incapacity.

(4) Whether additional treatment visits or a regimen of continuing treatment is necessary within the 30–day period shall be determined by the health care provider.

(5) The term extenuating circumstances in paragraph (a)(1) of this section means circumstances beyond the employee's control that prevent the follow-up visit from occurring as planned by the health care provider. Whether a given set of circumstances are extenuating depends on the facts. For example, extenuating circumstances exist if a health care provider determines that a second in-person visit is needed within the 30–day period, but the health care provider does not have any available appointments during that time period.

(b) Pregnancy or prenatal care. Any period of incapacity due to pregnancy, or for prenatal care. See also § 825.120.

(c) Chronic conditions. Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:

(1) Requires periodic visits (defined as at least twice a year) for treatment by a health care provider, or by a nurse under direct supervision of a health care provider;

(2) Continues over an extended period of time (including recurring episodes of a single underlying condition); and

(3) May cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.).

(d) Permanent or long-term conditions. A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.

An employee who qualifies for FMLA leave is entitled to:

- unpaid leave (though they may be able to use vacation, sick, or other accrued paid leave);
- continuation of health care benefits, if they received them previously;[69]
- job protection (in that they cannot be fired for taking the leave);[70] and
- restoration to the same or an equivalent position at the end of the leave.[71]

An employee who requests leave under the FMLA may be required by their employer to provide a completed Certification of Health Care Provider.[72] This certification need not include a specific reference to the sexual assault. The health care provider only needs to attest that the leave is required because the employee has a "serious health condition."[73]

(e) Conditions requiring multiple treatments. Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, for:

(1) Restorative surgery after an accident or other injury; or

(2) A condition that would likely result in a period of incapacity of more than three consecutive, full calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), or kidney disease (dialysis).

(f) Absences attributable to incapacity under paragraph (b) or (c) of this section qualify for FMLA leave even though the employee or the covered family member does not receive treatment from a health care provider during the absence, and even if the absence does not last more than three consecutive, full calendar days. For example, an employee with asthma may be unable to report for work due to the onset of an asthma attack or because the employee's health care provider has advised the employee to stay home when the pollen count exceeds a certain level. An employee who is pregnant may be unable to report to work because of severe morning sickness."

[69] 29 U.S.C.A. § 2614.

[70] 29 U.S.C.A. § 2615.

[71] 29 U.S.C.A. § 2614.

[72] The form is available to download from the US Department of Labor web site at https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/WH-380-E.pdf.

[73] 29 U.S.C.A. § 2613 (2023).

> [PRACTICE TIP: Providing a health care provider's certification is likely to implicate a survivor's privacy. For this reason, it may be in a survivor's best interest to ask a physician other than their regular treating physician for the necessary certification letter to avoid waiver of provider-patient confidentiality.]

If your client has a sexual assault-related injury, and they have missed work because they are incapacitated due to the injury, they may qualify for job-guaranteed leave under the FMLA. This may help them avoid a termination due to missing days of work.[74] However, they may not take leave to relocate, to see an attorney, or if their illness or injury does not rise to the level of a serious health condition.[75] This statute is enforced by the U.S. Department of Labor, and an employee who believes their rights under the FMLA have been violated must either file a complaint with the U.S. Department of Labor or file a complaint in federal court within three years of the violation.[76]

> [PRACTICE TIP: If a survivor anticipates the need for leave from work, help them determine if they qualify for FMLA leave. The FMLA strongly favors advance notice to an employer, so they should provide as much notice to the employer as possible. If they have already missed work, help determine whether their absence qualifies as FMLA leave and what, if anything, they need to provide to their employer to ensure coverage. If a survivor has been fired for missing work, and they want their job back, determine if their absence was FMLA eligible or protected. You might offer to help the survivor draft

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[74] *See Municipality of Anchorage*, *supra* note 75.

[75] 29 C.F.R.§ 825.200 (2023) ("An employee's FMLA leave entitlement is limited to . . . the following reasons: (1) The birth of the employee's son or daughter, and to care for the newborn child; (2) The placement with the employee of a son or daughter for adoption or foster care, and to care for the newly placed child; (3) To care for the employee's spouse, son, daughter, or parent with a serious health condition, (4) Because of a serious health condition that makes the employee unable to perform one or more of the essential functions of his or her job; and, because of any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on covered active duty status (or has been notified of an impending call or order to covered active duty.")

[76] 29 U.S.C.A. § 2617 (2023).

their demand letter or to write it yourself, if you believe the law was violated and your client consents.]

b. State Leave Laws

i. Medical Leave

If your client does not qualify for FMLA leave either because they do not have an injury or illness that qualifies as a serious health condition, or because they do not work for a covered employer or have not worked for their employer for the requisite amount of time, they may still be eligible for leave under state law. Almost half of the states have family or medical leave laws that provide unpaid, job-guaranteed time off for reasons related to illness including to heal from the employee's serious health condition.[77] Many of the state laws have less onerous eligibility requirements than the FMLA.

[CHECK YOUR LAW: If your client is not eligible for FMLA leave, determine the requirements for medical leave in your jurisdiction. Even if your client is eligible for FMLA, assess your jurisdiction's leave laws to determine whether they are entitled to more leave than that allowed under the federal law. Keep in mind that most medical leave will be unpaid. However, some jurisdictions may offer paid leave in some circumstances.[78]]

ii. Leave for Victims of Crime

Approximately one-half of states have "crime victim leave laws" that give victims of crimes, including sexual assault, time off to go to criminal court if

[77] *See* https://www.nationalpartnership.org/our-work/resources/economic-justice/paid-leave/state-paid-family-leave-laws.pdf for additional information about state leave laws.

[78] For instance, under California's State Disability Insurance program, eligible workers who suffer lost wages due to non work-related illness or injury are entitled to partial wage-replacement and short-term benefits. CAL. UNEMP. INS. CODE. §§ 3300 -3307 . *See also* **Hawaii**: Hawaii Temporary Disability Insurance Law, HAW. REV. STAT. §§ 392 *et seq.* ; **New Jersey**: Temporary Disability Benefits Law, N.J. STAT. ANN. §§ 43:21-25 *et seq.* ; **New York**: Disability Benefits Law and the Paid Family Leave Benefits Law, N.Y. WORKERS' COMP. LAW §§ 200 *et seq.* ; **Rhode Island**: Rhode Island Temporary Disability Insurance Act, R.I. GEN. LAWS §§ 28-39 *et seq.* .

subpoenaed to appear as a witness or victim of a crime.[79] An employer may be subject to a fine or commit a criminal offense by denying a survivor their statutorily required leave.[80] A few jurisdictions allow courts to impose restitution or job reinstatement as a criminal penalty for a leave violation.[81] Other statutes authorize victims to pursue a civil cause of action against an employer, including actual and punitive damage claims.[82] Finally, some

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[79] *See, e.g.*, **Alabama**: ALA. CODE § 15-23-81 (prohibiting the discharge or discipline of an employee who is a survivor for responding to a subpoena to testify in a criminal proceeding or participating in necessary preparation for a criminal proceeding); **Arkansas**: ARK. CODE ANN. § 16-90-1105 (prohibiting discharge or retaliation against an employee participating at the prosecutor's request in preparation for a criminal justice proceeding or for attendance at the proceeding); **California**: CAL. LAB. CODE §§ 230-230.1 (mandating leave for sexual assault victims to obtain protection orders or any judicial relief related to her health, safety, or welfare and prohibiting the discharge of, discrimination of, or retaliation against any employee who takes time off for medical treatment, counseling, sexual assault crisis services, safety planning, or relocation); **Colorado**: COLO. REV. STAT. § 24-34-402.7 (requiring certain employers to allow for up to three days off for sexual assault victims to obtain protection orders, obtain medical care and counseling, relocate, or seek legal assistance); **Delaware**: DEL. CODE ANN. tit. 11, § 9409 (prohibiting discharge or discipline of an employee responding to a subpoena, participating in trial preparation, or attending trial proceedings as reasonably necessary to protect victim's interests); **Illinois**: 820 ILL. COMP. STAT. § 180/20 (requiring that certain employers allow up to twelve weeks leave for sexual assault victims to seek medical assistance or counseling, obtain services from a survivor services organization, participate in safety planning and relocation, or seek legal assistance, including civil legal proceedings); **Wisconsin**: WIS. STAT. § 103.87 (requiring paid leave be granted for survivor to respond to a subpoena).

[80] *See, e.g.*, **Massachusetts**: MASS. GEN. LAWS ch. 268, § 14B (punishing violation as a misdemeanor with a fine and/or imprisonment); **Michigan**: MICH. COMP. LAWS §§ 780.762(punishing violation as a misdemeanor punishable by imprisonment for not more than 90 days or a fine or not more than $500.00, or both, and may be punished for contempt of court); **South Carolina**: S.C. CODE § 16-3-1550 (punishing willful violation as contempt of court); **Utah**: UTAH CODE § 78b-1-132 (punishing violation as criminal contempt with a fine or imprisonment); **Virginia**: VA. CODE ANN. § 18.2-465.1 (punishing violation as a misdemeanor).

[81] *See, e.g.*, **Minnesota**: MINN. STAT. § 611A.036 (punishing violation as a misdemeanor and providing for job reinstatement and payment of back wages, as appropriate); **Wisconsin**: WIS. STAT. § 103.87 (punishing violation as a misdemeanor with a fine or full restitution, including reinstatement or back pay).

[82] *See, e.g.*, **Alaska**: ALASKA STAT. § 12.61.017 (creating a civil action for a victim to recover actual damages and punitive damages of three times the actual damages against the employer); **Colorado**: COLO. REV. STAT. § 24-34-402.7 (damages or equitable relief may be sought, however, it has an obligation to mitigate their own damages); **Connecticut**: CONN. GEN. STAT. § 54-85b (reinstatement, damages, and reasonable attorney's fees); **Florida**: FLA. STAT. § 92.57 (lost wages and benefits, punitive damages, and reasonable attorney's fees); **Hawaii**: HAW. REV. STAT. § 621-10.5 (lost wages and benefits, reinstatement without loss of position,

jurisdictions may offer victims a more streamlined administrative process for pursuing complaints against an employer.[83]

> [CHECK YOUR LAW: Visit https://www.legalmomentum.org/sites/default/files/reports/employment-rights.pdf for a list of and links to the jurisdictions that have passed such laws.]

iii. Leave for Survivors of Sexual Assault

State laws may be another source of job-guaranteed leave for victims of sexual assault. Some jurisdictions have adopted laws that provide support specifically designed with a survivor's needs in mind. Some jurisdictions have laws providing unpaid, job-guaranteed leave, or leave as a reasonable accommodation specifically to victims of domestic violence and sexual assault/violence.[84] The laws vary, but generally they provide leave

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seniority or benefits, damages (not to exceed lost wages for six weeks), and reasonable attorney's fees); **Iowa**: IOWA CODE § 915.23 (actual damages, court costs, reasonable attorneys' fees, reinstatement, and cease and desist orders against employer).

[83] *See, e.g.*, **California**: CAL. LAB. CODE § 230 (allowing victim to file a complaint with Division of Labor Standards Enforcement of the Department of Industrial Relations, within one year of the occurrence of the violation, for damages, reinstatement, and reimbursement for lost wages and benefits); **Illinois**: 820 ILL COMP. STAT. § 180/35 (damages, reinstatement, equitable relief, and attorneys' fees).

[84] *See, e.g.*, **California**: CAL. LAB. CODE § 230 ("An 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."); **Colorado**: COLO. REV. STAT. § 24-34-402.7 (2004) ("Employers shall permit an employee to request or take up to three working days of leave from work in any twelve-month period, with or without pay, if the employee is the victim of domestic abuse . . . , the victim of stalking . . . , [or] the victim of sexual assault . . . ."); **Hawaii**: HAW. REV. STAT. §§ 378-72 (2004) (allowing leave for victims to, *inter alia*, "[s]eek medical attention for the employee or employee's minor child to recover from physical or psychological injury or disability caused by domestic or sexual violence . . . ."); **Illinois**: § 820 ILL. COMP. STAT. § 180/1-180/45 (2004) ("An employee who is a victim of domestic or sexual violence or has a family or household member who is a victim of domestic or sexual violence whose interests are not adverse to the employee as it relates to the domestic or sexual violence may take unpaid leave from work to . . . ."); **Maine**: ME. REV. STAT. tit. 26, § 850 ("An employer must grant reasonable and necessary leave from work, with or without pay, for an employee to: A. Prepare for and attend court proceedings; B. Receive medical treatment or

for survivors to: (1) go to civil court to obtain protection for themselves and their family; (2) seek medical attention; (3) obtain services from a sexual assault crisis program; and (4) obtain legal assistance.[85] These laws prohibit employers from discriminating against employees who are survivors of sexual assault and prohibit employers from penalizing survivors for exercising their rights to the leave. If an employer failed to provide leave under these laws, and thus illegally fired a survivor, the survivor may be entitled to reinstatement and back pay.

> [PRACTICE TIP: These laws allow the employer to require that a survivor requesting leave provide certification of the qualifying need for leave. A survivors' physician risks waiving confidentiality and privilege if they provide such certification. To avoid possible waiver, consider obtaining certification from a different doctor.]

c. Americans with Disabilities Act

The Americans with Disabilities Act (ADA) prohibits most employers from discriminating against an employee because they have a qualified disability as defined in the statute.[86] The disability must amount to "a physical or mental impairment" that "substantially limits" the ability to perform "one or more major life activities," such as caring for oneself, performing manual tasks, seeing, hearing, speaking, breathing, walking, working, or learning.[87] Yet, they still must be able to perform the essential functions of their job with or without some form of reasonable accommodation. "Reasonable accommodation" is defined as a modification or adjustment to a workplace

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attend to medical treatment for a victim who is the employee's daughter, son, parent or spouse; or C. Obtain necessary services to remedy a crisis caused by domestic violence, sexual assault or stalking.").

[85] See, generally, supra note 85.

[86] 42 U.S.C.A. § 12111. The ADA prohibits employers with 15 or more employees from discriminating against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions, and privileges of employment.

[87] 29 C.F.R. § 1630.2.

or job to enable an employee with a qualifying impairment to perform the basic duties of their job.[88]

The ADA may require an employer to take affirmative steps to provide a reasonable accommodation to an employee with a disability as long as the accommodation does not impose an "undue hardship" on the employer.[89] If an employee with a qualifying impairment works for a covered employer and performs the essential functions of their job, they may not be harassed, fired, demoted, or otherwise discriminated against in the terms and conditions of their employment based upon disability or impairment.[90]

> [CHECK YOUR LAW: Each state also has anti-discrimination statutes that prohibit discrimination based on disability, some of which provide more protection than the ADA to employees, such as covering smaller employers.]

Sometimes, as a result of a sexual assault, a survivor will have an impairment that qualifies them as disabled under the ADA or the state equivalent and entitles them to a reasonable accommodation from their employer. For example, a sexual assault survivor may have developed severe Post-Traumatic Stress Disorder (PTSD) that substantially impairs their ability to focus and work after it gets dark, because the assault occurred at night, but they are able to function without problem during the day. In such a case, a reasonable accommodation might be a work schedule modification that allows the employee to arrive at and leave from work before dark. Another type of accommodation for a sexual assault survivor might be a reasonable period of leave for a designated period of time to allow the employee to obtain psychological counseling and rest. If the leave is for a reasonable duration that will not pose an undue hardship on the employer, the employer may be obligated to provide it.[91] The determination of whether an accommodation constitutes an "undue

[88] 42 U.S.C.A. § 12111(9); 29 C.F.R. § 1630.2(o).

[89] 42 U.S.C.A. § 12111(10).

[90] 42 U.S.C.A. § 12111 ; 29 C.F.R. § 1630.

[91] 42 U.S.C.A. § 12111(10).

hardship" is fact-based and will depend on the size of the business, number of employees, nature of the workers' job, the flexibility of the employer, etc.

An employee with a disability may seek a reasonable accommodation by making their employer aware of the disability; there is no standard language for making this request.[92] Once an employee expresses a desire to be accommodated, their employer has a duty to initiate and engage in an interactive process to uncover potential accommodations even when the employee did not request a specific accommodation.[93] Confidentiality provisions protect medical information provided to an employer in the process of self-disclosing a disability or requesting an accommodation.[94] (*See Representing Sexual Assault Survivors with Disabilities* and *Protecting Sexual Assault Survivors' Privacy* for additional information regarding disability claims and privacy concerns.)

> [PRACTICE TIP: You should be aware of any pre-assault disabilities the survivor may have had, as well as any accommodations previously requested from the employer, especially any that the employer granted. Reviewing the survivor's personnel file can help with this analysis.]

IV. FINANCIAL ASSISTANCE FOR SURVIVORS WHOSE EMPLOYMENT HAS BEEN TERMINATED

An employee whose employment was wrongfully terminated may be able to be reinstated by using FMLA or anti-discrimination statutes and case law. If

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[92] See EEOC.gov, The ADA: Your Employment Rights as an Individual With a Disability: More Questions and Answers About the ADA, available at www.eeoc.gov/facts/ada18.html (last visited Feb. 14, 2023) ("If you think you will need a reasonable accommodation in order to participate in the application process or to perform essential job functions, you should inform the employer that an accommodation will be needed. Employers are required to provide reasonable accommodation only for the physical or mental limitations of a qualified individual with a disability of which they are aware. Generally, it is the responsibility of the employee to inform the employer that an accommodation is needed.").

[93] See EEOC.gov, Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, available at www.eeoc.gov/policy/docs/accommodation.html#5.

[94] See 42 U.S.C. § 12112(d); EEOC.gov, The ADA: Your Employment Rights as an Individual With a Disability: Can an Employer Require Medical Examinations or Ask Questions About a Disability?, www.eeoc.gov/facts/ada18.html (last visited Feb. 14, 2023 ("The results of all medical examinations must be kept confidential, and maintained in separate medical files.").

an employee is not reinstated, and is no longer employed, the following programs may provide financial support.

A. Unemployment Insurance Benefits

Unemployment insurance (UI) is a state-run social insurance program that provides temporary income to workers who lose their jobs through no fault of their own.[95] Unemployment insurance is funded primarily through employers' payroll tax deductions.[96] Federal law provides guidance but leaves most decisions under the control of participating states, including monetary earnings requirements, eligibility requirements for benefits, disqualification provisions and penalties, and benefit levels and duration.

State UI eligibility requirements generally require that claimants: (1) have worked for a certain period of time; (2) have earned a minimum amount of wages in the last 12 months; (3) are able and available to work; and (4) seek work while collecting unemployment insurance benefits.[97] A claimant is typically disqualified from UI benefits for: (1) leaving work voluntarily without good cause; (2) having been fired for reasons amounting to misconduct; or (3) refusing to work without good cause.[98] Benefit amounts

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[95] *See* 81 C.J.S. *Social Security and Public Welfare* § 282 (Oct. 2022 Update).

[96] *See* Federal Unemployment Tax Act, 26 U.S.C. §§ 3301-3311 (2018).

[97] *See, e.g.*, **Arizona**: ARIZ. REV. STAT. § 23-771 (2022) ("An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that the individual: 1. Has registered for work at and thereafter has continued to report at an employment office in accordance with such regulations as the department prescribes. 2. Has made a claim for benefits in accordance with § 23-772. 3. Is able to work. 4. . .[I]s available for work. 5. Has been unemployed for a waiting period of one week. . . . Has been paid wages for insured work during the individual's base period equal to at least one and one-half times the wages paid to the individual in the calendar quarter of the individual's base period in which such wages were highest, and the individual has been paid wages for insured work in one calendar quarter of the individual's base period equal to an amount that is equal to at least three hundred ninety times the minimum wage prescribed by § 23-363 that is in effect when the individual files a claim for benefits."); **California**: CAL. UNEMP. INS. CODE § 1253 (West 2021) (setting eligibility requirements as including a properly filed claim for benefits, registered and reported for work at a public employment office, able and available for work); **Illinois**: 820 ILL. COMP. STAT. ANN. 405/500 (2020) (setting eligibility requirements as including completing a claim for benefits, registering for work at an employment office, and being able and available to work.).

[98] *See, e.g.*, **Delaware**: DEL. CODE ANN. tit. 19, § 3314 (2010) (making grounds for disqualification include leaving work without a good cause, refusal to accept a suitable

vary from jurisdiction to jurisdiction, generally are capped at a certain dollar amount, and may be paid for up to two years. Benefit amounts are generally calculated using a "base period" which reflects the applicant's income from employment in the last 12 months preceding the application.[99]

> [PRACTICE TIP: In general, undocumented workers are not eligible for UI benefits because they are not considered able and available to work due to their undocumented status.[100]]

Thirty-six states and the District of Columbia have clarified that victims of domestic violence are eligible for unemployment benefits.[101] Only a

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employment opportunity, or seeking or receiving benefits under the laws of another state); **Massachusetts**: MASS. GEN. LAWS ch. 151A, § 25 (2018) (making grounds for disqualification include failing to comply with the registration and filing requirements of the commissioner, failing to apply for suitable employment when notified to do so, or participating in an unauthorized labor dispute); **New Hampshire**: N.H. REV. STAT. § 282-A:32 (2020) (making grounds for disqualification include voluntarily leaving work without good cause, being discharged for work-related misconduct, or failing to apply for "available, suitable work when so directed by the employment office or the commissioner").

[99] *See, e.g.*, **Nebraska**: NEB. REV. STAT. § 48-626 (2022) ("Any otherwise eligible individual shall be entitled during any benefit year to a total amount of benefits equal to whichever is the lesser of (a) twenty-six times his or her weekly benefit amount or (b) one-third of his or her wages in the employment of each employer per calendar quarter of his or her base period . . . ."); **Wyoming**: WYO. STAT. § 27-3-303 (2018) ("[T]he weekly benefit amount for an eligible individual is four percent (4%) of his total wages payable for insured work in that quarter of his base period in which his wages were highest computed to the next lower multiple of one dollar ($1.00).").

[100] All state statutes require that a person be *able* and *available* to work to qualify for benefits. Undocumented status acts as an automatic bar under the statutory provisions. *See, e.g.*, **Oregon**: OR. REV. STAT. § 657.184 (2022) ("Benefits shall not be paid on the basis of services performed by an alien unless such alien is an individual who was lawfully admitted to the United States for permanent residence at the time such services were performed, was lawfully present for purposes of performing such services, or was permanently residing in the United States under color of law at the time such services were performed, including an alien who was lawfully present in the United States as a result of the application of the provisions of section 212(d)(5) of the Immigration and Nationality Act."); *See also* **Connecticut**: CONN. GEN. STAT. § 31-227(f) (2017).

[101] **Arizona**: ARIZ. REV. STAT. § 23-771 (2022); **Arkansas**: ARK. CODE ANN. § 11-10-513 (2019); **California**: CAL. UNEMP. INS. CODE § 1256 (2011); **Colorado**: COLO. REV. STAT. § 8-73-107 (2022); **Connecticut**: CONN. GEN. STAT. § 31-236 (2022); **Delaware**: DEL. CODE ANN. tit. 19, § 3314 (2010); **District of Columbia**: D.C. CODE § 51-131 (2010); **Florida**: FLA. STAT. ANN. § 443.101 (2021); **Georgia**: GA. CODE ANN. § 34-8-194 (2019); **Hawaii**: HAW. REV. STAT. ANN. §

minority of jurisdictions, however, specifically include protections for victims of sexual (or stalking) violence.[102] Even if sexual assault is not covered by a separate provision in the UI code, the definition of "domestic violence" in the jurisdiction's UI code may encompass acts of sexual violence outside the intimate partner context.[103]

> [PRACTICE TIP: Even if the domestic violence law does not appear to extend to survivors of sexual assault, you may be able to argue successfully that benefits should be authorized for all such survivors because the same policy interests apply.]

In jurisdictions where the UI provisions specifically reference a survivor's eligibility, attorneys need to be familiar with what evidence, if any, the statute requires a claimant submit to prove their survivor status.[104] Several domestic violence-based unemployment insurance statutes do not provide guidance on how to establish that a claimant was fired or quit because of domestic violence. UI provisions specific to sexual assault are even more

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383-30.5 (2021); **Kansas**: KAN. STAT. § 44-706 (2021); **Illinois**: 820 ILL. COMP. STAT. § 405/601 (2015); **Indiana**: IND. CODE § 22-4-15-1 (2022); **Maine**: ME. REV. STAT. tit. 26, § 1193 (2021); **Maryland**: MD. CODE ANN., LAB. & EMPL. § 8-1001 (2015); **Massachusetts**: MASS. GEN. LAWS ch. 151A, § 25 (2018); **Michigan**: MICH. COMP. LAWS ANN. § 421.29 (2020); **Minnesota**: MINN. STAT. § 268.095 (2019); **Missouri**: MO. ANN. STAT. § 288.501 (2009); **Montana**: MONT. CODE ANN. § 39-51-2111 (2015); **Nebraska**: NEB. REV. STAT. § 48-628.13 (2021); **Nevada**: NEV. REV. STAT. ANN. § 612.3755 (2018); **New Hampshire**: N.H. REV. STAT. § 282-A:32 (2020); **New Jersey**: N.J. STAT. § 43:21-5 (2018); **New Mexico**: N.M. STAT. § 51-1-7 (2011); **New York**: N.Y. LAB. LAW § 593 (2021); **North Carolina**: N.C. GEN. STAT. § 96-14.8 (2013); **North Dakota**: N.D. CENT. CODE ANN. § 52-06-02 (2021); **Oklahoma**: OKLA. STAT. tit. 40, § 2-210 (2014); **Oregon**: OR. REV. STAT. § 657.176 (2021); **Rhode Island**: R.I. GEN. LAWS § 28-44-17.1 (West 2022); **South Carolina**: S.C. CODE ANN. § 41-35-125 (2011); **South Dakota**: S.D. CODIFIED LAWS § 61-6-9.1 (2017); **Texas**: TEX. LAB. CODE § 207.046 (2021); **Washington**: WASH. REV. CODE § 50.20.050 (2022); **Wisconsin**: WIS. STAT. § 108.04 (2022); **Wyoming**: WYO. STAT. § 27-3-311 (2018).

[102] *See, e.g.*, WASH. REV. CODE §§ 50.20.050, 50.20.100, 50.20.240, & 50.29.020 (2003). *See also* OR. REV. STAT. § 657.176 (2006).

[103] *See*, *e.g.*, Md. Code Ann., Fam. Law § 4-501 (2020) (defining "abuse" as including "rape or sexual offense").

[104] *See, e.g.*, **Montana**: MONT. CODE § 39-51-2111 (2015) (requiring an order of protection, the police record, medical documentation, or other documentation or certification of sexual assault); **New Jersey**: N.J. STAT. § 43:21-5 (2018) (requiring A restraining order, the police record, medical documentation or other certification of domestic violence); **Texas**: TEX. LAB. CODE § 207.046 (2021) (requiring a protection order documenting family violence, the police record, and a physician's statement or other medical documentation).

uncommon; a claimant may be left to navigate the UI process with little guidance.[105] At the same time, a survivor may be disqualified for benefits if they are unable to "prove" that they are a survivor of such violence.

> [PRACTICE TIP: If your client quit their job or was fired for sexual assault related reasons, you and your client will want to decide together what to provide in support of the UI claim. Documentation submitted may include a court protection order, police report, statements from colleagues, and any other "proof" of their survivor status. Because the information submitted may become part of a public record, discuss privacy issues with your client.]

If the survivor resides in a jurisdiction that does not specifically reference benefits to victims of sexual, domestic, dating, or stalking violence, UI benefits may still be available based on other, more general UI provisions. For example, an unemployed survivor may be eligible for benefits if they can demonstrate that they quit their job for good cause, "just cause," or another justifiable reason.[106]

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[105] *See, e.g.*, **Arizona**: ARIZ. REV. STAT. § 23-771 (2022) (requiring that domestic violence be documented without specifying the nature or source of the documentation required); **Colorado**: COLO. REV. STAT. § 8-73-107 (2022) (containing no guidelines on how to establish status as a victim); **New York**: N.Y. LAB. LAW § 593 (2021) (same).

[106] *See* **Alaska**: ALASKA ADMIN. CODE tit. 8, § 85.095 (West 2022) ("To determine the existence of good cause under AS 23.20.379(a)(1) for voluntarily leaving work determined to be suitable under AS 23.20.385, the department will consider only the following factors: . . . (6) leaving work in order to protect the claimant or the claimant's immediate family members from harassment or violence"); **Pennsylvania**: 43 PA. CONS. STAT. § 802(b) (2005) (requiring "necessitous and compelling nature" to show good cause); **Utah**: UTAH CODE § 35A-4-405 (2013) ("A claimant may not be denied eligibility for benefits if the claimant leaves work under circumstances where it would be contrary to equity and good conscience to impose a disqualification. . . . Using available information from employers and the claimant, the division shall consider for the purposes of this chapter the reasonableness of the claimant's actions, and the extent to which the actions evidence a genuine continuing attachment to the labor market in reaching a determination of whether the ineligibility of a claimant is contrary to equity and good conscience."); **Virginia**: *Va. Employment Comm'n v. Fitzgerald*, 452 S.E.2d 692 (Va. 1995) (interpreting the good cause requirement of VA. CODE § 60.2-618 (2006) as requiring an employee to take those steps that could be reasonably expected of a person desirous of retaining his employment before hazarding the risks of unemployment." (internal quotation marks omitted)).

In many jurisdictions, a claimant is not eligible for UI benefit payments until a claim is filed.[107] In addition, there may be a one- or two-week waiting period once eligibility is established before payments begin. Therefore, the survivor needs to file their claim as quickly as possible to ensure maximum UI benefits.

B. Social Security Disability Insurance & Supplemental Security Income

If your client suffers from a total disability as a result of the sexual assault, they may be eligible for Social Security Disability Insurance (SSDI) or Supplemental Security Income (SSI). While eligibility for these programs does not require a survivor to have left or lost their employment due to the assault, only people who cannot work due to a disability are eligible for SSI and SSDI benefits.

Both SSI and SSDI are federally administered programs that provide assistance to people with disabilities. To be eligible for either program, the survivor must demonstrate that they have a "disability," meaning an "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months."[108]

> [PRACTICE TIP: To be eligible for SSI or SSDI, a survivor must meet the very strict definition of disability. No benefits are payable for a partial or for short-term disability.]

While SSI benefits are based on the survivor's financial need, SSDI benefits are based solely on the Social Security payroll taxes someone

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[107] *See, e.g.*, **California**: CAL. UNEMP. INS. CODE § 1253 (2011) (requiring a claim for benefits in the week benefits are desired to be eligible for benefits that week); **Nebraska**: NEB. REV. STAT. § 48-629 (2018) (requiring the all claims for benefits be made in accordance with such rules and regulations as the commissioner may adopt and promulgate); **Oklahoma**: OKLA. STAT. tit. 40, § 2-203 (2005) ("An unemployed individual must file an initial claim for unemployment benefits by completing the required forms through the Internet Claims service provided by the Commission, or by completing all forms necessary to process an initial claim in a local office of the Commission or any alternate site designated by the Commission to take unemployment benefit claims.").

[108] 42 U.S.C.A. § 423

paid over their working career. To determine whether your client may be eligible for either assistance program and to apply online, access the Social Security Administration's website at www.socialsecurity.gov/. (*See Representing Sexual Assault Victims with Disabilities* for additional information about these programs.) Receipt of SSDI benefits may disqualify a survivor from unemployment, welfare, or other need-based public benefits.

C. Wrongful Termination in Violation of Public Policy

Most jurisdictions recognize an exception to at-will employment for "wrongful termination (or discharge) in violation of public policy."[109] The public policy exception to at-will employment is both narrow in scope and extraordinarily variable from jurisdiction to jurisdiction. Generally, to establish a claim for wrongful termination in violation of public policy, a plaintiff must meet the following five elements: (1) an important public policy exists; (2) employee was engaged in conduct favored by that public policy; (3) employer knew or believed the employee was engaged in a protected activity; (4) retaliation was a motivating factor in the dismissal; and (5) employee's discharge would undermine that public policy.[110]

The critical inquiry in considering the doctrine's potential applicability is identifying the precise "public policy" violated by the discharge.[111] Jurisdictions vary widely in terms of what may constitute a valid source of

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[109] The first reported case recognizing wrongful termination in violation of public policy was *Petermann v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 396*, 344 P.2d 25 (Cal. Dist. Ct. App. 1959) (involving an employee asked to perjure himself before a legislative investigative committee). Since then, most states have recognized the doctrine as a common law exception to the at-will doctrine. However, courts in a few states have declined to recognize the exception, instead leaving the issue to the legislature. *See, e.g.*, *Howard v. Wolff Broad. Corp.*, 611 So. 2d 307, 313 (Ala. 1992) (declining to recognize public policy exception at-will employment); *Blair v. Physicians Mut. Ins. Co*., 496 N.W.2d 483 (Neb. 1993) (same); *Murphy v. Am. Home Prods. Corp*., 58 N.Y.2d 293, (1983) (leaving to the legislature the job of creating public policy exception; the legislature subsequently enacted a Whistleblower Statute (N.Y. LAB. LAW § 740) in response to the opinion).

[110] 82 AM. JUR. 2d. *Wrongful Discharge* § 54. The precise elements required to state a claim for wrongful termination in violation of public policy will vary from state to state, and advocates should conduct state-specific research.

[111] *Id.* § 57.

"public policy."[112] However, most jurisdictions require the public policy to be clear, fundamental, and firmly established in statutory, constitutional, or regulatory or federal law.[113] Furthermore, even where a plaintiff can identify a statutory basis for the public policy, their wrongful termination claim may be preempted if the statute upon which it is based provides for its own remedies, and the court deems those remedies to be exclusive.[114]

Because the public policy exception to the at-will doctrine is so narrowly tailored in many jurisdictions, employees who are unfairly discharged in the aftermath of a sexual assault may have limited success with a wrongful discharge claim. Nonetheless, courts have recognized wrongful termination claims in a variety of contexts that may be applicable to terminations in the aftermath of sexual assault. For example, several jurisdictions recognize wrongful termination in violation of public policy where employees are fired for cooperating with ongoing criminal investigations or reporting crimes to

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[112] Texas, for example has one of the most narrowly tailored exceptions to the at-will doctrine, recognizing a cause of action for wrongful termination in violation of public policy only where an employee has been fired for failure to perform an illegal act. *See, e.g.*, *Sabine Pilot Serv., Inc. v. Hauck*, 687 S.W.2d 733, 735 (Tex. 1985). In contrast, the Supreme Court of Illinois articulated a broad and flexible definition of public policy: "Although there is no precise line of demarcation dividing matters that are the subject of public policies from matters purely personal, a matter must strike at the heart of a citizen's social rights, duties and responsibilities before the tort will be allowed." *Palmateer v. Int'l Harvester Co*., 421 N.E.2d 876, 878-79 (Ill. 1981). For a good discussion of the variability among states in what constitutes "public policy," *see id.* at 130-32.

[113] Many states require the "public policy" violated by the termination be embodied in the state's statutory or constitutional law. *See, e.g.*, *Schwarz v. St. Jude Med., Inc.*, 270 N.C. App. 720, 726, 842 S.E.2d 119, 125 (N.C. Ct. App. 2020), *citing*, *Imes v. City of Asheville*, 594 S.E.2d 397 (N.C. Ct. App. 2004) (requiring statutory basis for public policy); *Hennessy v. Santiago*, 708 A.2d 1269, 1273 (Pa. Super. Ct. 1998) (noting an exception to public policy only where employer requires employee to commit crime, prevents employee from complying with statutorily imposed duty, and discharges employee when specifically prohibited from doing so by statute). Other states additionally recognize public policy based on federal law. *See, e.g.*, *Peterson v. Browning*, 832 P.2d 1280, 1283 (Utah 1992).

[114] *See, e.g.*, *Watson v. Peoples Security Life Insurance Co*., 588 A.2d 760 (Md. 1991) (finding that there was no discharge in violation of public policy for hostile work environment because that claim is actionable under Title VII, which provides the exclusive remedy); ARIZ. REV. STAT. §§ 23-1501, *et seq.* (stating that if an employee is discharged in violation of state statute that provides its own civil remedy, that remedy is exclusive, and employee can't bring common law claim for discharge in violation of public policy). *See also Davis v. Lowe's HIW, Inc.,* No. CIV. 14-00385 ACK, 2015 WL 687086, at *4 (D. Haw. Feb. 17, 2015); *Walsh v. Consol. Freightways, Inc*., 563 P.2d 1205 (Or. 1977).

the proper authorities.[115] In cases where survivors are terminated for their involvement in *civil* cases arising from their assaults, general "open court" laws or public policies guaranteeing the rights of citizens to go to court may serve as established "public policy."[116] Survivors may also draw on survivor or witness protection statutes, as well as laws guaranteeing or protecting a right to physical safety.[117]

Survivors of sexual assault may also succeed in claims for wrongful termination in violation of public policy where they can ground their claims

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[115] *See Hummer v. Evans*, 923 P.2d 981 (Idaho 1996) (involving termination for compliance with court-issued subpoena); *Ludwick v. This Minute of Carolina, Inc.*, 337 S.E.2d 213, 216 (S.C. 1985) (same). *See also Cox v. County of San Diego*, 233 Cal. App. 3d 300, 311 (Ct. App. 1991)*, abrogated on other grounds by Zavala v. Arce*, 58 Cal. App. 4th 915 (Ct. App. 1997) (recognizing "strong public policy that all citizens should make themselves available as witnesses in criminal actions" but rejected claim that plaintiff was terminated in violation of public policy for participating in sexual assault trial, where the evidence showed she was terminated for different, legitimate reasons). *survivor Tramontozzi v. Massachusetts Dep't of Transp.*, 89 Mass. App. Ct. 1136, 55 N.E.3d 434 (2016) (gathering Massachusetts cases applying the public policy exception to employees cooperating with criminal laws and investigations). *But see Jersey v. John Muir Medical Center*, 97 Cal. App. 4th 814, 815 (Ct. App. 2002) (at-will employee of medical center, who was terminated by employer for bringing a personal injury action against patient who assaulted her, was not terminated in violation of public policy because "[n]one of the broad constitutional and statutory provisions plaintiff relies upon reflect a legislative determination that it is against public policy for an employer to insist that its employees not sue its customers").

[116] *Fortunato v. Off. of Silston*, 48 Conn. Supp. 636, 639, 856 A.2d 530, 533 (Super. Ct. 2004) ("It seems to this court that in the arena of constitutional/public policy interests sufficient to support a tort action for wrongful termination, one such interest is the unfettered right to legal/court redress."); *Groce v. Foster*, 880 P.2d 902 (Okla. 1994) (worker fired after refusing to withdraw negligence suit against a customer for injury suffered while working with customer); *Cf. Shero v. Grand Sav. Bank*, 2007 OK 24, ¶ 12, 161 P.3d 298, 302 (holding there was no violation of public policy sufficient to support a wrongful discharge claim where employee was fired for refusing to dismiss his Open Records Act claims against a third party).

[117] For example, in *Watson v. Peoples Security Life Insurance Co.*, 588 A.2d 760 (Md. 1991), the Maryland Court of Appeals recognized a cause of action for wrongful discharge in violation of public policy based on an employee's termination in response to seeking legal redress against a co-worker for sexual harassment that amounted to assault and battery. *See also*, *Ruffin Hotel Corp. of Maryland v. Gasper*, 418 Md. 594, 616, 17 A.3d 676, 688 (2011) (affirming *Watson*). The *Watson* Court stated, "The clear mandate of public policy which Watson's discharge could be found to have violated was the individual's interest in preserving bodily integrity and personality, reinforced by the state's interest in preventing breaches of the peace, and reinforced by statutory policies intended to assure protection from workplace sexual harassment." *Watson,* 588 A.2d at 767.

in laws that expressly protect survivors' employment rights.[118] However, to the extent these employment statutes contain their own remedial provisions, common-law wrongful termination claims may be preempted.

Another basis for bringing a wrongful termination claim is that a survivor was terminated after exercising their right to seek and obtain a protection order, victim compensation, or some other statutory benefit or protection afforded to them. Finally, anti-discrimination statutes may provide the requisite public policy basis for wrongful termination claims involving sexual harassment that resulted in assault or sexual assault.[119] However, preemption may bar bringing a wrongful termination claim based on sexual harassment or discrimination in the workplace.

V. CONCLUSION

Gainful employment can provide the financial, social, personal, and practical support a survivor needs to navigate their path to recovery. Other

[118] *See, e.g.*, CAL. LAB. CODE § 230 (2021) (prohibiting employers from discharging, discriminating, or retaliating against employee victims who take time off to obtain relief to ensure their health, safety, and/or welfare); CONN. GEN. STAT. § 54-85b (2021) (prohibiting discrimination against employee victims who must participate in court proceedings or in investigations or prosecutions); 820 ILL. COMP. STAT. 180/30 (2022) (prohibiting employers from discriminating against or terminating employees because they are victims of domestic or sexual violence); ME. REV. STAT. tit. 26, § 850 (2022) (imposing a penalty up to $1,000 on employers who refuse to grant victims of domestic violence "reasonable and necessary" leave to attend court proceedings, receive medical treatment, or obtain other necessary services); MICH. COMP. LAW § 780.762 (2022) (employer who discharges victim or victim representative who must appear in court is guilty of misdemeanor); N.Y. PENAL LAW § 215.14 (2022) (prohibiting employers from discharging victims of violent crimes for taking time off to appear in court or filing protection orders); R.I. GEN. LAWS § 12-28-10 (2022) (prohibiting discrimination against employees who obtain restraining orders).

[119] *See, e.g.*, *Rojo v. Kliger*, 801 P.2d 373 (Cal. 1990) (finding plaintiffs had cause of action for wrongful discharge in violation of public policy where they alleged they were "continually subjected to sexual harassment and demands for sexual favors by defendant, and that their refusal to tolerate that harassment or acquiesce in those demands resulted in the wrongful discharge"); *Insignia Residential Corp. v. Ashton*, 755 A.2d 1080 (Md. 2000) (recognizing abusive discharge based on claim that employee was wrongfully fired because she refused to acquiesce in a form of quid pro quo sexual harassment that would have amounted to prostitution); *Harrison v. Edison Bros. Apparel Stores, Inc.*, 924 F.2d 530 (4th Cir. 1991) (finding plaintiff stated a claim under North Carolina law for wrongful termination in violation of public policy claim where plaintiff was fired for refusing to succumb to employer's demands for sexual favors – essentially refusing to commit the crime of prostitution).

survivors need time away from work. Your role is to help a survivor identify and secure the benefits needed.

Many legal and practical resources may be available to help a survivor achieve employment remedies. Because many of the laws and employment policies that may be the basis for a survivor's claims do not reference sexual assault survivors, however, you may need to argue that justice and due process require that these protections extend to survivors of sexual assault. Case law will also inform how you and your client pursue employment remedies within the civil legal system. Even if no laws provide for leave and other employment remedies, attorneys should pursue benefits and advocate with employers to find arrangements that will meet a survivor's needs.