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USING THE NFL AS A MODEL? CONSIDERING ZERO TOLERANCE IN THE WORKPLACE FOR BATTERERS

Deseriee A. Kennedy*

ABSTRACT

“Domestic abuse is a workplace issue.”¹

The impact of domestic violence can increasingly be felt in the workplace, and it can adversely affect the safety and productivity of employees. Legislators and employers have begun to recognize the effect of domestic violence on employment, and many have adopted policies to protect the interests of domestic violence survivors. This article suggests that wider adoption of domestic violence policies are needed and these policies should be broadened to directly address batterers in the workplace. The article argues that employer based sanctions would increase batterer accountability and workplace safety. It uses the newly revised NFL Personal Conduct Policy as a starting point for addressing whether more employers should adopt zero tolerance in the workplace for batterers.

I. INTRODUCTION

In February 2014, Baltimore Ravens running back Ray Rice (Rice), was thrust into the public consciousness as a result of punching his then fiancé, Janay Palmer, in the face and rendering her unconscious in a public elevator in a casino in New Jersey.² The brutality of the attack, as well as the calm manner in which Rice dragged her body from the elevator, was caught on tape and when released, shocked the viewing public. More than just sensationalist television, the video

* Professor of Law, Touro Law Center. The author would like to thank the University of Baltimore Center for Applied Feminism for providing a space for discussions of feminist theories and their application. In addition, the author would like to thank Mercedes Matias for her excellent research assistance.

1. KIM C. LIM ET AL., ME. DEP'T OF LABOR, IMPACT OF DOMESTIC VIOLENCE OFFENDERS ON OCCUPATIONAL SAFETY & HEALTH: A PILOT STUDY 2 (2004), http://www.maine.gov/labor/labor_stats/publications/dvreports/domesticoffendersreport.pdf.
2. See, e.g., Ken Belson, *N.F.L. Continues to Face Questions Over Video of Ray Rice*, N.Y. TIMES (Sept. 9, 2014), <http://www.nytimes.com/2014/09/10/sports/football/ray-rices-wife-defends-him-and-criticizes-the-media.html>.

footage of the assault provided, for many, a rare window into intimate partner violence. Moreover, the ensuing efforts by the NFL to respond to these events has led to a public discussion about the role employers can play in responding to batterers.

Although Rice is not alone in being subject to public scrutiny for abusing his partner, the series of steps and missteps taken by the NFL in response has heightened public awareness that employers can play a role in responding to domestic violence. Although employers have begun to provide workplace protections for victims of abuse, few private employers have written domestic violence policies that address employees who are abusers. This article queries whether employer based responses to batterers who engage in domestic violence outside the workplace would be an effective tool in the arsenal against domestic violence and result in safer, more productive workplaces. It suggests that the workplace is an important arena in which to address domestic violence, and argues that employer sanctions can increase batterer accountability and increase safety. As part of this analysis, the article takes a closer look at the NFL Personal Conduct Policy as a focal point in debating whether the policy can and should serve as a model for addressing domestic violence in the workplace.

Part II examines the rate of domestic violence and how intimate partner violence affects the workplaces of the victim and the abuser.³ Although there are fewer studies on the effects of domestic violence on abusers in the workplace than there are concerning the impact on survivors, these limited studies seem to indicate a negative effect on employment. In addition, there is evidence that the current approaches to domestic violence, which are largely focused on the use of civil protection orders and reliance on the criminal justice system, have not appreciably reduced recidivism rates. As a result, this article assesses the possible effectiveness of employer based domestic violence policies. Part II also reviews current employer responses to domestic violence, and examines the efforts of employers to respond to intimate partner abusers in their employ as well as outlining some model domestic violence employment policies.⁴

Part III describes the NFL Personal Conduct Policy provisions relating to domestic violence as an example of how employers might respond to domestic abuse. Part IV addresses the legal and practical problems of adopting and enforcing an employer policy that focuses

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

4. See discussion *infra* Parts II.D–E.

on batterers, and analyzes whether such policies would be legally enforceable. It attempts to deal with concerns such as: how batterers would be identified in the workplace, what kinds of employee behavior should trigger an employer response, the types of employer responses that would be suitable, including whether employer enforced discipline that could result in termination would be appropriate. In assessing the effectiveness of expanding employer domestic violence policies to address abusers, the article compares these policies to other “personal conduct” employment policies. Part V raises concerns that zero tolerance employment based sanctions may render victims less safe and less willing to come forward. The article asks whether such policies would serve to uncover private violence that has escaped court response or drive it further underground. It explores whether more nuanced, graduated, employer based responses would be an effective tool in reducing domestic abuse and empowering women. Part V further explores how race and class may have affected the willingness of the public to voice their outrage over Rice’s behavior, and whether an employment based response would have a differential impact on workers based on race and class.⁵

II. RATES OF DOMESTIC VIOLENCE, THE IMPACT OF INTIMATE PARTNER VIOLENCE ON THE WORKPLACE, AND EMPLOYER RESPONSES

A. *Rates & Impact of Intimate Partner Violence*

Domestic violence is a significant, ongoing, and wide-ranging “public health problem” that affects more than 20% of women and 10% of men.⁶ Intimate partner violence (IPV) accounts for 15% “of all violent victimizations.”⁷ Intimate partner violence consists of a pattern of behaviors designed to exercise power and control over a victim.⁸ It can include physical acts of violence, as well as an array

5. See *infra* text accompanying notes 259–66.

6. MATTHEW J. BREIDING ET AL., NAT’L CTR. FOR INJURY PREVENTION & CONTROL, INTIMATE PARTNER VIOLENCE SURVEILLANCE: UNIFORM DEFINITIONS AND RECOMMENDED DATA ELEMENTS 1 (2015), <http://www.cdc.gov/violenceprevention/pdf/intimatepartnerviolence.pdf>.

7. JENNIFER L. TRUMAN & RACHEL E. MORGAN, U.S. DEP’T OF JUSTICE, NONFATAL DOMESTIC VIOLENCE, 2003-2012, at 1 (2014), <http://www.bjs.gov/content/pub/pdf/ndv0312.pdf>.

8. See, e.g., POWER AND CONTROL WHEEL, DOMESTIC ABUSE INTERVENTION PROJECT (n.d.), <http://www.theduluthmodel.org/pdf/PowerandControl.pdf>; *Domestic Violence*,

of emotional, psychological, verbal, sexual, economic, and other abuses.⁹ The conduct often occurs in a cycle that can increase in severity over time and is designed to intimidate, humiliate, frighten, or harm.¹⁰ Moreover, as Lenore Walker has explained, domestic violence can include periods of tension building, acute battering, contrition in increasingly short and more violent cycles.¹¹ Although men may be abused by an intimate partner, domestic violence disproportionately affects women. It is approximated that nearly 1 out of 3 women are affected by domestic violence.¹² It is widely believed, however, that domestic violence continues to be vastly underreported and that the actual incidence of violence within families is far greater.¹³ Domestic violence affects the abused as well as family members, friends, witnesses, employers, and co-workers.¹⁴ It costs the United States economy more than \$8.3 billion in medical care, mental health services, and lost work productivity.¹⁵

Although, significant strides have been made in addressing domestic violence as not just a private matter but a matter of public concern, the rates of domestic violence continue to be high. Moreover, while rates of domestic violence declined from 1994–2010, along with rates of violent crimes, from 2001–2010 the rate of

U.S. DEP'T OF JUSTICE, www.justice.gov/ovw/domestic-violence (last updated Oct. 6, 2015).

9. Domestic violence is viewed as a pattern of behaviors that is used to exercise power and control over its victim. Abusers rely on a variety of interlocking methods to maintain power and control. Behaviors can include physical and sexual violence, economic coercion, use of threats, psychological and emotional abuse, pet abuse, damage to property, stalking, electronic monitoring and spying of victims among others. See, e.g., *Domestic Violence*, *supra* note 8; BREIDING ET AL., *supra* note 6, at 14–15; LIM ET AL., *supra* note 1, at 4.
10. See TRUMAN & MORGAN, *supra* note 7, at 8 (discussing how intimate partner violence is more likely to result in serious injuries than other types of domestic violence).
11. LENORE WALKER, *THE BATTERED WOMAN* 55 (1979).
12. MICHELE C. BLACK ET AL., NAT'L CTR. FOR INJURY PREVENTION & CONTROL, *THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT* 39 (2011), http://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf ("More than one-third of women in the United States (35.6% or approximately 42.4 million) have experienced rape, physical violence, and/or stalking by an intimate partner at some point in their lifetime One in 3 women (32.9%) has experienced physical violence by an intimate partner . . .").
13. *Id.* at 85 ("Even though the National Intimate Partner and Sexual Violence Survey captures a full range of victimization experiences, the estimates reported here are likely to underestimate the prevalence of sexual violence, stalking, and intimate partner violence . . .").
14. See TRUMAN & MORGAN, *supra* note 7, at 2.
15. Wendy Max et al., *The Economic Toll of Intimate Partner Violence Against Women in the United States*, 19 *VIOLENCE & VICTIMS* 259, 259 (2004).

decline of domestic violence slowed or stabilized while the violent crime rate continued to fall.¹⁶ In the struggle to make clear that intimate partner violence is criminal behavior, efforts to reduce and respond to domestic violence have been predominantly grounded in judicial and law enforcement responses.¹⁷ Therefore, those affected by domestic violence can opt, through judicial procedures, to obtain an order of protection which, in most instances, can order the batterer to, *inter alia*, stay away from their victim and to cease engaging in acts of domestic violence.¹⁸ In addition, a violation of an order of protection can lead to arrest and in many instances the arrest is mandatory.¹⁹ The widespread adoption of warrantless arrests in domestic violence matters was largely based on a study conducted in Minneapolis in 1984.²⁰ However, the results of the Minneapolis study finding arrest deters recidivism could not be replicated.

Criminal justice responses have provided some measure of protection to domestic violence victims. However, some have begun to argue that domestic violence responses have become too mired in the criminal justice system, and calls have been made to expand efforts to combat domestic violence to include more noncriminal responses.²¹ Moreover, research suggests that, at least among some populations, a criminal justice response may not reduce recidivism; instead, it may increase chances of the abuse recurring and victims

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16. SHANNAN CATALANO, U.S. DEP'T OF JUSTICE, INTIMATE PARTNER VIOLENCE, 1993–2010, at 1 (2012) (rev. Sept. 29, 2015), www.bjs.gov/content/pub/pdf/ipv9310.pdf.
 17. See Sally F. Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship?*, 29 CARDOZO L. REV. 1487, 1489–90, 1497–98 (2008); Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2, 5–6 (2006).
 18. Ruth Colker, *Marriage Mimicry: The Law of Domestic Violence*, 47 WM. & MARY L. REV. 1841, 1854–55 (2006) (reviewing the development of domestic violence law and policy); Goldfarb, *supra* note 17, at 1488–89; Adeola Olagunji & Christine Reynolds, *Domestic Violence*, 13 GEO. J. GENDER & L. 203, 209 (2012).
 19. Laurie S. Kohn, *The Justice System & Domestic Violence: Engaging the Case but Divorcing the Victim*, 32 N.Y.U. REV. L. & SOC. CHANGE 191, 213–14 (2008) (noting that forty-nine states and the District of Columbia allow warrantless searches in domestic violence cases).
 20. Colker, *supra* note 18, at 1853; Olagunji & Reynolds, *supra* note 18, at 233–34.
 21. See, e.g., Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law, A Critical Review*, 4 BUFF. CRIM. L. REV. 801, 801 (2001); Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1869–70 (1996); Miriam H. Ruttenberg, *A Feminist Critique of Mandatory Arrest, An Analysis of Race & Gender in Domestic Violence Policy*, 2 AM. U. J. GENDER & L. 171, 182 (1994).

may be at a higher risk of serious injury or death.²² For example, some small studies have found that mandatory arrests led to a decrease in recidivism among employed batterers, but an increase in recidivism among unemployed batterers.²³ A recent follow-up to the Minneapolis mandatory arrest experiment found higher rates of death of African American victims whose batterers were arrested than those who received a warning.²⁴ Employment of the batterer seems to play a role in the level of risk to women, and unemployment seems to create a greater risk of homicide.²⁵ The call for moving beyond responses to domestic violence that heavily rely upon civil orders of protection and a criminal justice approach, along with studies critical of a mandatory arrest policy, suggest a need for a more expanded community response. Employers have begun to weigh whether they have a role to play in addressing intimate partner violence.²⁶

Although domestic violence often occurs in private, it can spill over into public life and into the workplace.²⁷ In fact, one study reveals that “9.5% of nonfatal female intimate partner victimizations in the U.S. occurred outside of the home.”²⁸ Domestic violence can

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22. Olagunji & Reynolds, *supra* note 18, at 233; see Harold G. Grasmick et al., *Changes in Perceived Threats of Shame, Embarrassment, and Legal Sanctions for Interpersonal Violence, 1982-1992*, 8 VIOLENCE AND VICTIMS, 313, 322 (1993); Anthony M. Pate & Edwin E. Hamilton, *Formal and Informal Deterrents to Domestic Violence: The Dade County Spouse Assault Experiment*, 57 AM. SOCIO. REV. 691, 691 (1992).
 23. Grasmick et al., *supra* note 22, at 322; Olagunji & Reynolds, *supra* note 18, at 233.
 24. Lawrence W. Sherman & Heather M. Harris, *Increased Death Rates of Domestic Violence Victims from Arresting vs. Warning Suspects in the Milwaukee Domestic Violence Experiment (MilDVE)*, 11 J. EXP. CRIMINOLOGY 1, 17 (2015).
 25. See Jacqueline C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 AM. J. PUBLIC HEALTH 1089, 1092 (2003); JANICE ROEHL ET AL., INTIMATE PARTNER VIOLENCE RISK ASSESSMENT VALIDATION STUDY: THE RAVE STUDY (2005), <https://www.ncjrs.gov/pdffiles1/nij/grants/209732.pdf>; Olagunji & Reynolds, *supra* note 18, at 233; LIM ET AL., *supra* note 1, at 24.
 26. The American Bar Association (ABA) suggests companies adopt domestic violence policies and encourages the training of all employees regarding these policies. The ABA further suggests the policies be designed to protect victims and hold offenders accountable. See Comm’n on Domestic & Sexual Violence, *What Employers Need to Know About DSV*, A.B.A., http://www.americanbar.org/groups/domestic_violence/policyandlegislation/model-workplace-dsv-policy/employers.html (last visited Dec. 30, 2015).
 27. Michael Selmi & Naomi Cahn, *Women in the Workplace: Which Women, Which Agenda?*, 13 DUKE J. GENDER L. & POL’Y 7, 25 (2006).
 28. MICHELE CRANWELL SCHMIDT & AUTUMN BARNETT, HOW DOES DOMESTIC VIOLENCE AFFECT THE VERMONT WORKPLACE? A SURVEY OF MALE OFFENDER ENROLLED IN

have a significant impact on a victim's workplace, and scholars and advocates have aptly noted the impact of domestic violence on a survivor's ability to work.²⁹ Abusers may try to interfere with their victims' work as a means of power and control.³⁰ A 2005 Department of Labor survey of workplace violence revealed that domestic violence represents a significant percentage of workplace violence.³¹ Another study revealed that "13,000 acts of violence are committed by intimate partners against women while at work."³² Intimate partner violence can lead to absenteeism, an inability to concentrate, and poor performance.³³ An older study found that between 1992 and 1998, 210 workers were killed at work by an intimate partner and more than 18,000 nonfatal partner assaults occurred at work annually.³⁴ Victims reported lost jobs, missed time at work, harassment on the job, and difficulty staying productive as a result of the violence.³⁵ Abusers may call the victim while she is at work or appear at her workplace to continue the harassment.³⁶

BATTERER INTERVENTION PROGRAMS IN VERMONT 8 (2011), http://www.uvm.edu/crs/reports/2012/VTDV_WorkplaceStudy2012.pdf.

29. See Jennifer Moyer Gaines, *Employer Liability for Domestic Violence in the Workplace: Are Employers Walking a Tightrope Without a Safety Net?*, 31 TEX. TECH. L. REV. 139, 143 (2000); Margaret C. Hobday, *Protecting Economic Stability: The Washington Supreme Court Breathes New Life in the Public Policy Exception to At-Will Employment for Domestic Violence Victims*, 17 WM. & MARY J. WOMEN & L. 87, 91 (2010); Jennifer E. Swanberg & T.K. Logan, *Domestic Violence & Employment: A Qualitative Study*, 10 J. OCCUP. HEALTH PSYCH. 3, 6 (2005); ELLEN RIDLEY ET AL., DOMESTIC VIOLENCE SURVIVORS AT WORK: HOW PERPETRATORS IMPACT EMPLOYMENT 10 (2005), https://www1.maine.gov/labor/labor_stats/publications/dvreports/survivorstudy.pdf.
30. See Nicole Buonocore Porter, *Victimizing the Abused?: Is Termination the Solution When Domestic Violence Comes to Work?*, 12 MICH. J. GENDER & L. 275, 287 (2006).
31. U.S. BUREAU OF LABOR STATISTICS, SURVEY OF WORKPLACE VIOLENCE PREVENTION 2005, at 1 (2006), <http://www.bls.gov/iif/oshwc/osh0033.pdf>.
32. Hope M. Tiesman et al., *Workplace Homicides Among U.S. Women: The Role of Intimate Partner Violence*, 22 ANNALS OF EPIDEMIOLOGY 277, 277 (2012).
33. See Ileana Arias & Phaedra Corso, *Average Cost Per Person Victimized by an Intimate Partner of the Opposite Gender: A Comparison of Men & Women*, 20 VIOLENCE & VICTIMS 379, 385 (2005); Marcy L. Karin, *Changing Federal Statutory Proposals to Address Domestic Violence at Work: Creating a Societal Response by Making Businesses Part of the Solution*, 74 BROOK. L. REV. 377, 378 (2009); Porter, *supra* note 30, at 287; RIDLEY ET AL., *supra* note 29, at 6.
34. Emily F. Rothman & Melissa J. Perry, *Intimate Partner Abuse Perpetrated by Employees*, 9 J. OCCUP. HEALTH PSYCHOL. 238, 238 (2004).
35. Deborah A. Widiss, *Domestic Violence and the Workplace: The Explosion of State Legislation and the Need for a Comprehensive Strategy*, 35 FLA. ST. U. L. REV. 668, 676-77 (2008).
36. Porter, *supra* note 30, at 287.

Victims often receive harassing phone calls while at work, and are prevented from getting to work on time or at all due to domestic violence.³⁷ In some cases, batterers may carry out harassing and violent attacks in the workplace.³⁸ Domestic violence can, and frequently does, result in death; the United States Department of Labor Census revealed that in 2013 “[t]he most frequent type of assailant in work-related homicides involving women was a relative or domestic partner.”³⁹ These behaviors create a level of potential risk to everyone with whom the victim works and raise workplace health and safety concerns.⁴⁰

Although much of the focus on employment has been its effect on victims of domestic violence, there is some evidence that intimate partner violence may also impact the batterer’s workplace, resulting in missed work, lateness, and poor performance.⁴¹ In addition, abusers may be acting out their abuse during work time and may be using company resources, such as telephones and computers, to carry out their abuse.⁴² A small study of 29 employed men attending a Massachusetts batterer intervention program found negative effects on the abusers’ employment such as increased absenteeism, reduced productivity, and preoccupation.⁴³ The Massachusetts study revealed that employed abusers were frequently late or missed work as a result of perpetrating violence or attending to activities that were the consequence of their abusive behavior. These consequences include

37. LIM ET AL., *supra* note 1, at 5–6.

38. Porter, *supra* note 30, at 277–78; SCHMIDT & BARNETT, *supra* note 28, at 8–9.

39. U.S. BUREAU OF LABOR STATISTICS, CENSUS OF FATAL OCCUPATIONAL INJURIES CHARTS, 1992–2014 (2015), www.bls.gov/iif/oshwc/foi/cfch0013.pdf; *see also* SURVEY OF WORKPLACE VIOLENCE PREVENTION 2005, *supra* note 31 (revealing that private companies with workplace violence policies generally address co-worker and client violence but not domestic violence, while state government policies address domestic violence more frequently than other forms of violence).

40. Porter, *supra* note 30, at 288. *See generally* *New Workplace Toolkit*, WORKPLACES RESPOND TO DOMESTIC & SEXUAL VIOLENCE, <http://www.workplacesrespond.org> (last visited Dec. 30, 2015) (suggesting ways in which workplaces respond to domestic and sexual violence to address workplace health and safety concerns).

41. Meg Hobday, *Domestic Violence Comes to Work the Need for a Work-Related Response*, BENCH & B. MINN., Mar. 2010, at 20, 21 (noting that there are two small studies); *see also* Emily F. Rothman & Phaedra S. Corso, *Propensity for Intimate Partner Abuse & Workplace Productivity: Why Employers Should Care*, 14 VIOLENCE AGAINST WOMEN 1054, 1063 (2008); Rothman & Perry, *supra* note 34, at 238; LIM ET AL., *supra* note 1, at 19; SCHMIDT & BARNETT, *supra* note 28, at 5.

42. Hobday, *supra* note 41, at 21; Rothman & Perry, *supra* note 34, at 244; LIM, ET AL., *supra* note 1, at 13 (surveying 152 male domestic abuse offenders attending batterer intervention programs in Maine).

43. Rothman & Perry, *supra* note 34, at 241.

attending batterer counseling sessions, attending court, being incarcerated, or meeting with probation officers.⁴⁴ The study participants further reported that their preoccupation with the abuse made it difficult for them to concentrate, which sometimes led to workplace errors.⁴⁵ The study included descriptions of errors such as delaying construction on a house due to attending court, making errors while repairing a car, and failing to follow safety procedures that almost caused a critical injury of a co-worker.⁴⁶ The study quotes one participant as stating, “Maybe like four years, I was like . . . operating on three cylinders every day. You know if I had been in a healthy relationship or in a healthy place I would have been working twice as fast.”⁴⁷ The Massachusetts study participants remarked that they use work time to “monitor” their victims using work phones, private cell phones, email, and even company vehicles.⁴⁸ In 2003, the Maine Department of Labor conducted a survey of batterers that had similar results. It revealed that 78% of those surveyed used workplace resources as part of their cyclical interactions with their victims.⁴⁹ Forty-eight percent of the batterers surveyed in the Maine study reported having difficulty concentrating.⁵⁰ They explained that work created a loss of control over their victim making it difficult for them to focus on their work.⁵¹ The Maine survey further revealed that 73% of supervisors were aware of the domestic abuser’s arrest, but only 15% reminded the employee that domestic violence is a crime.⁵² The studies seem to bolster the claim that businesses suffer significant financial losses as a result of the impact of domestic abuse on the survivors’ and the abusers’ workplaces.⁵³

44. *Id.*

45. *Id.*

46. *Id.* at 242.

47. *Id.* at 241.

48. *Id.*

49. LIM ET AL., *supra* note 1, at 1; JULIE GOLDSCHIED & ROBIN RUNGE, EMPLOYMENT LAW AND DOMESTIC VIOLENCE: A PRACTITIONER’S GUIDE 4 (2009), http://www.americanbar.org/content/dam/aba/migrated/domesticviolence/PublicDocuments/ABA_CDV_Employ.authcheckdam.pdf.

50. LIM ET AL., *supra* note 1, at 8.

51. *Id.* at 9.

52. *Id.* at 14–15.

53. Rothman & Perry, *supra* note 34, at 238 (citing a 2003 National Center for Injury Prevention and Control statistic that intimate partner violence costs are estimated at \$727.8 million each year).

Intimate partner violence and its influence on the workplace have a significant economic impact on the American economy.⁵⁴ The U.S. Department of Labor estimates that 50% of firms with more than 1,000 employees have had an experience with workplace violence.⁵⁵ According to the Bureau of Labor Statistics, 1.7 million employees are victims of workplace violence annually.⁵⁶ More specifically, an estimated 21% of employed adults surveyed reported being victims of domestic violence.⁵⁷ It's estimated that "[i]n an average year, employees experiencing IPV lose more than 8 million workdays and approximately \$18 million in annual earnings" due to job loss or absenteeism.⁵⁸ The Center for Disease Control and Prevention (CDC), estimates that domestic violence results in "\$0.9 billion in lost productivity from paid work and household chores for victims of nonfatal IPV and \$0.9 billion in lifetime earnings lost by victims of IPV homicide."⁵⁹ While, "[t]he US Department of Justice estimates that domestic violence costs employers between \$3 billion and \$5 billion annually."⁶⁰

At its extreme, domestic violence can lead to more than lost productivity and economic losses—it can result in fatalities in the workplace.⁶¹ Women are disproportionately affected by domestic violence fatalities. In fact, "homicide is the leading cause of occupational injury death for U.S. women."⁶² A recent review of data from the Census of Fatal Occupational Injuries revealed that between 2003 and 2008, the overall workplace homicide rate among U.S. women was 1.63 per 1,000,000.⁶³ Of these fatalities, 33% involved a personal relationship, 80% of whom were intimate partners.⁶⁴ As a result, according to the researchers, "[m]ore U.S. women died on the job as the result of domestic violence than at the hands of a client such as a student, patient, or prisoner or by a current or former co-

54. Karin, *supra* note 33, at 378; Rothman & Perry, *supra* note 34, at 238.

55. SURVEY OF WORKPLACE VIOLENCE PREVENTION 2005, *supra* note 31, at 2.

56. *Workplace Statistics*, CORP. ALLIANCE TO END PARTNER VIOLENCE, http://www.caepv.org/getinfo/facts_stats.php?factsec=3 (last visited Dec. 30, 2015).

57. *Id.*

58. Tiesman et al., *supra* note 32, at 277.

59. DEP'T OF HEALTH AND HUMAN SERVS., COSTS OF INTIMATE PARTNER VIOLENCE AGAINST WOMEN IN THE UNITED STATES 2 (2003), <http://www.cdc.gov/violenceprevention/pdf/IPVBook-a.pdf>.

60. CCH HUMAN RES. COMPLIANCE LIBRARY, IS DOMESTIC VIOLENCE A WORKPLACE CONCERN? ¶76,507 (2012) WL 5934565 (2013).

61. Tiesman et al., *supra* note 32, at 277.

62. *Id.* at 280.

63. *Id.* at 279.

64. *Id.*

worker.”⁶⁵ The study further found that “[w]orkplace homicide rates among women, [including those attributable to domestic violence,] were significantly higher in private than in federal, state, or local workplaces.”⁶⁶ Moreover, these killings tended to occur “during normal business hours.”⁶⁷

Recognizing the impact that domestic violence can have on the workplace for victims and their co-workers, advocates and scholars have called for greater employer involvement in domestic violence responses.⁶⁸ Highlighting the role employers should play, one strongly worded article stated, “Employer-initiated prevention efforts are the front-line in this fight [against domestic and workplace violence], and employers ignore this problem at their own peril.”⁶⁹ Much of the focus on domestic violence in the workplace has been on ensuring that employers assist victims of domestic violence, and her co-workers are able to work safely without interference from the batterer.⁷⁰ Thus, states, the federal government, and some private employers have adopted a number of measures to address domestic violence and its effect on the workplace.

B. State Legislation Addressing Domestic Violence in the Workplace

Beginning in the 1990s some states responded to the problem of domestic violence related workplace violence by enacting legislation designed to protect a domestic violence victim’s right to work and increase her safety in the workplace.⁷¹ In fact, Professor Deborah

65. *Id.* at 280.

66. *Id.* at 279.

67. *Id.* at 280.

68. Karin, *supra* note 33, at 382–83; Katherine Soledad Martinez, *Not Just Domestic Violence: The Role of the Workplace in Mitigating Abuses*, 15 U. MD. L. J. RACE, RELIGION, GENDER & CLASS, 170, 185–89 (2015).

69. Karin, *supra* note 33, at 381 (alteration in original) (quoting Bonnie Campbell & Marcy L. Karin, *Beyond “Going Postal”: Responding to Everyday Violence in the Workplace*, 7 WORKPLACE VIOLENCE PREVENTION REP. 1, 1 (2001)).

70. Gaines, *supra* note 29, at 143.

71. Karin, *supra* note 33 at 386 (reporting that “[a]t least twenty-five states have cases finding an employer liable for firing an employee as a result of ‘factors arising out of domestic violence’”) (quoting Margaret Graham Tebo, *When Home Comes to Work*, 91 A.B.A. J. 42, 42 (2005)); *See, e.g.*, CAL. LAB. CODE §§ 230, 230.1 (West 2011 & Supp. 2015); CONN. GEN. STAT. ANN. §54-85b (West 2009); HAW. REV. STAT. §§ 378-2, 378-72, 378-81 (Lexis Nexis 2010 & Supp. 2014); 820 ILL. COMP. STAT. 180/30 (West 2011); N.Y.C., N.Y. CODE § 8-107 (2014); OR. REV. STAT. ANN. §§ 659A.290, 659A.885 (West 2013); 12 R.I. GEN. LAWS § 12-28-10 (2002).

Widiss estimates that more than two-thirds of states have legislation addressing domestic violence and employment.⁷² Marcy Karin identifies three trends in these state laws, “(1) access to leave from work; (2) access to unemployment compensation; and (3) protection from adverse employment actions via anti-discrimination laws.”⁷³ Professor Widiss notes that states’ efforts also include workplace modifications or individual accommodations, workplace restraining orders, and legislation encouraging the development of workplace policies.⁷⁴

The provision of workplace leave is critical for employees who must take time off from work to seek counseling, attend court dates, or seek medical treatment related to domestic violence. The advent of leave policies in some states has been a significant advancement for domestic violence survivors, and the trend of adding these policies continues on the state level. For example, New Jersey recently passed the Security and Financial Empowerment Act, (Safe Act) which mandates employment leave for domestic violence victims.⁷⁵ Under the New Jersey Safe Act, a victim of domestic violence is entitled to unpaid leave of no more than 20 days in one 12-month period in order to seek medical attention, obtain services from a victim services organization, obtain counseling, engage in safety planning, seek legal assistance, and participate in court proceedings.⁷⁶

The availability of unemployment compensation and the use of private litigation have provided further help to domestic violence victims. Starting with Maine in 1991, states began providing protections for domestic violence survivors who were forced to leave

72. Widiss, *supra*, note 35, at 670–71 (asserting that when Maine passed domestic violence employment legislation in 1996 it was the first state to do so); see LEGAL MOMENTUM, DOMESTIC AND SEXUAL VIOLENCE WORKPLACE POLICIES (2014), <https://www.legalmomentum.org/resources/state-law-guide-domestic-and-sexual-violence-workplace-policies>.

73. Karin, *supra* note 33, at 392–95 (citing a 2005 Legal Momentum survey finding “thirty-two states grant crime victims some form of time off to participate in court proceedings,” noting a trend to define domestic violence to be a “good cause” for leaving employment and maintaining eligibility for unemployment benefits, and several jurisdictions that prohibit employment discrimination against victims of domestic violence); see also Timothy John Durbin, *Accommodating Employers’ Interests into the Discussion of Employment Protections for Victims of Domestic Violence*, 22 J. L. & POL’Y 845, 846 (2014) (identifying the three state law trends in employment protections for domestic violence victims as (1) providing leave; (2) preventing discrimination; and (3) reasonable accommodation).

74. Widiss, *supra* note 35, at 709, 714, 716.

75. N.J. STAT. ANN. § 34:11C-1 (West Supp. 2015); see Durbin, *supra* note 73, at 845–46.

76. N.J. STAT. ANN. § 34:11C-3 (West 2015).

their jobs due to domestic violence.⁷⁷ Today, most states offer unemployment insurance for domestic violence victims forced out of their jobs because of the violence, in part because of the American Recovery and Reinvestment Act of 2009.⁷⁸

Another set of state based provisions includes anti-discrimination provisions that prohibit discrimination against domestic violence survivors. Under these laws, employees have a cause of action against an employer for taking an adverse employment action against a victim of domestic violence.⁷⁹ Thus, states such as New York, California, Rhode Island, Maine, Colorado, Hawaii, and Illinois, have enacted laws that protect employees affected by domestic abuse from discrimination.⁸⁰ New York human rights law, for example, prevents an employer from firing or refusing to hire an individual based on their status as a victim of domestic violence, and prevents discrimination in compensation or in the terms, conditions, or privileges of employment.⁸¹ Similarly, California prohibits employers of 25 or more employees from discriminating against domestic violence victims who take time off from work to seek medical attention, obtain services or counseling, or participate in safety planning related to the violence.⁸² Employers are not only

77. Lisalyn R. Jacobs & Maya Raghu, *The Need for a Uniform Federal Response to Workplace Impact of Interpersonal Violence*, 11 GEO. J. GENDER & L. 593, 601 n.43 (2010).

78. LEGAL MOMENTUM, *supra* note 72. A number of state laws provide for the provision of unemployment compensation for domestic violence survivors. *See, e.g.*, CAL. UNEMP. INS. CODE §§ 1030, 1032, 1256 (West 2013 & Supp. 2015); COLO. REV. STAT. ANN. § 8-73-108 (West 2009); CONN. GEN. STAT. § 31-236 (West 2011); DEL. CODE ANN. tit. 19, § 3315 (West 2013); 820 ILL. COMP. STAT. 405/601 (West 2011); ME. REV. STAT. ANN. tit. 26, § 1043 (West 2007); MASS. GEN. LAW ANN. ch 151A, § 25 (West 2013 & Supp. 2015); N.H. REV. STAT. ANN. § 282-A:32 (LexisNexis 2008 & Supp. 2014); N.J. STAT. ANN. § 43:21-5(j) (West 2015); N.Y. LAB. CODE § 593 (McKinney 2015); 28 R.I. GEN. LAWS § 28-44-17.1 (2003); TEX. LAB. CODE ANN. §§ 204.045, 207.046 (West 2015).

79. Karin, *supra* note 33, at 386–87; John E. Matejkovic, *Which Suit Would You Like? The Employer's Dilemma in Dealing with Domestic Violence*, 33 CAP. U. L. REV. 309, 312 (2004).

80. CAL. LAB. CODE § 230.1; COLO. REV. STAT. ANN. § 8-73-108; HAW. REV. STAT. § 378-2; 820 ILL. COMP. STAT. ANN. 180/30; ME. REV. STAT. ANN. tit. 26, § 1043; N.Y. EXEC. LAW § 296 (McKinney 2010 & Supp. 2010); 12 R.I. GEN. LAWS § 12-28-10.

81. N.Y. EXEC. LAW § 296 (McKinney 2015) (limited on preemption grounds by *Bantum v. American Stock Exchange, LLC*, 7 A.D.3d 551, 777 N.Y.S.2d 137, 140 (N.Y. App. Div. 2004) (providing that the Securities Exchange Act preempted broker's action under city and state Human Rights Law against national securities exchange)).

82. CAL. LAB. CODE § 230.1. A number of other states provide similar protections against discrimination for domestic violence victims. *See, e.g.*, 820 ILL. COMP. STAT. ANN.

subject to anti-discrimination laws, but they may also face tort liability by the abused or other employees if harmed as a result of violence occurring in the workplace.⁸³

In addition to the provision of leaves of absence, access to unemployment compensation, and antidiscrimination laws, some states have encouraged employers to develop broader workplace domestic violence policies. Maine, Colorado, Delaware, Florida, and New York are among the states mandating state agencies develop domestic violence policies.⁸⁴ Other states, such as Illinois, Louisiana, and New York also mandate the development of domestic violence policies designed to serve as models or “best practices” for private

180/30 (prohibiting discrimination in employment on the ground that an individual is or is perceived to be a victim of domestic violence); N.H. REV. STAT. ANN. § 275:71 (2015) (LexisNexis 2008) (stating that it is an “unlawful employment practice” for an employer to refuse to hire, discharge, demote, or in any manner discriminate against an otherwise qualified individual because the individual is a victim of domestic violence); N.C. GEN. STAT. ANN. § 50B-5.5 (2014) (“No employer shall discharge, demote, deny a promotion, or discipline an employee because the employee took reasonable time off from work to obtain or attempt to obtain relief under this [Domestic Violence] Chapter”); OR. REV. STAT. ANN. § 659A.277 (stating that it is an “unlawful employment practice for a covered employer to deny leave to an eligible employee or to discharge, threaten to discharge, demote, suspend or in any manner discriminate or retaliate against an employee . . . because the employee takes leave” for themselves or their child as a result of being abused); OR. REV. STAT. ANN. § 659A.290 (“It is an unlawful employment practice for an employer to . . . [r]efuse to hire an otherwise qualified individual because the individual is a victim of domestic violence . . . [d]ischarge, threaten to discharge, demote, suspend or in any manner discriminate or retaliate . . . [or] [r]efuse to make a reasonable safety accommodation requested by an individual who is a victim of domestic violence.”). In addition, some cities have extended employment protections to victims of domestic violence. See, e.g., N.Y. CITY COMP. CODES & REGS. § 8-101 (2008).

83. GOLDSHEID & RUNGE, *supra* note 49, at 10 (citing Stephanie L. Perin, *Employers May Have to Pay When Domestic Violence Goes to Work*, 18 REV. LITIG. 365, 371 (1999)); Matejkovic, *supra* note 79, at 313–15.
84. See COLO. REV. STAT. ANN. § 24-34-402.7 (West 2009); N.Y. EXEC. LAW § 575 (McKinney 2015); N.Y. LAB. LAW § 27-b (McKinney 2015); Colo. Exec. Order No. D 02309 (2009), <https://www.msudenver.edu/media/content/humanresources/resources/workplaceViolenceExOrder.pdf>; Del. Exec. Order No. 12 (2009), http://www.governor.delaware.gov/orders/exec_order_12.shtml; Me. Exec. Order No. 16 (2011), http://www.maine.gov/tools/whatsnew/index.php?topic=Gov_Executive_Orders&id=300270&v=article2011; Me. Exec. Order No. 25 (2004), <http://www.gpo.gov/fdsys/pkg/CHRG-110shrg34939/html/CHRG-110shrg34939.htm>; N.Y. Exec. Order 19 (2001), <http://www.opdv.ny.gov/professionals/workplace/execorder19.html>; Fla. Governor and Cabinet Resolution on Workplace Violence (1996), <http://www.caepv.org/about/Bus%20At%20Its%20Best%20Docs/Robin%20H.%20Thompson.doc>.

businesses.⁸⁵ Additionally, there have been some efforts to promulgate federal legislation to provide employment protections and access to benefits for victims of domestic violence, although those bills have been unsuccessful.⁸⁶

C. The Federal Government's Efforts to Address the Effect of Domestic Violence on Employment

The federal government has been less active than states in passing legislation addressing domestic violence in the workplace. The federal government has faced criticism that there is insufficient legislation addressing this issue. There are limited protections available to domestic violence survivors under federal law. The current federal approach is a patchwork of statutes that do not directly address the impact of domestic violence on the workplace. In 2012, the Equal Employment Opportunity Commission (EEOC) issued a fact sheet that recognized the lack of federal legislation directly addressing domestic violence. The fact sheet underlines that this may result in discrimination and retaliation against employees experiencing domestic violence that “may be overlooked,”⁸⁷ and explains that Title VII and the American with Disabilities Act can apply to employees or applicants who experience domestic violence related discrimination.⁸⁸ Thus, the EEOC explains that adverse treatment of employees or applicants affected by domestic violence

85. See 20 ILL. COMP. STAT. ANN. 605/605-550 (West 2015); LA DEP'T OF JUSTICE, GUIDELINES FOR PROVIDING ASSISTANCE IN MANAGING DOMESTIC VIOLENCE IN THE WORKPLACE (2001), <http://www.ag.state.la.us/Shared/ViewDoc.aspx?Type=3&Doc=23>; NYS OFFICE FOR THE PREVENTION OF DOMESTIC VIOLENCE, NEW YORK STATE DOMESTIC VIOLENCE AND WORKPLACE MODEL POLICY FOR PRIVATE BUSINESS (2014), <http://www.opdv.ny.gov/professionals/workplace/privatepolicy.html>.

86. Karin, *supra* note 33 at 396–98, nn.102–07 & 110 (discussing the need to “reframe” the proposed bills to focus on “a social response to the problem of domestic violence in a way that recognizes the impact on, role of, and responsibility of the business community” and citing the Survivors' Empowerment and Economic Security Act (SEES Act), the Security and Financial Empowerment Act (SAFE Act), the Job Protection for Survivors Act, the Unemployment Insurance for Survivors Act, the Employment Protection for Battered Women of the Family and Medical Leave Expansion Act, the Healthy Families Act, and the Unemployment Insurance Modernization Act).

87. U.S. Equal Emp't Opportunity Comm'n, *Questions and Answers: The Application of Title VII and the ADA to Applicants or Employees Who Experience Domestic or Dating Violence, Sexual Assault, or Stalking*, EEOC.GOV, http://www.eeoc.gov/eeoc/publications/qa_domestic_violence.cfm (last visited Dec. 30, 2015).

88. *Id.*

can be a violation of Title VII.⁸⁹ The EEOC provides the following examples as potentially discriminatory behavior, “[a]n employer terminates an employee after learning she has been subjected to domestic violence, saying he fears the potential ‘drama battered women bring to the workplace.’”⁹⁰ Another example of conduct that could potentially violate Title VII states, “[a] hiring manager, believing that only women can be true victims of domestic violence because men should be able to protect themselves, does not select a male applicant when he learns that the applicant obtained a restraining order against a male domestic partner.”⁹¹ Similarly, an employer who allows male employees time off to make a court appearance, but penalizes female employees who need to attend domestic violence proceedings, would also violate Title VII.⁹² The Americans with Disabilities Act (ADA), which prohibits discrimination based on an actual or perceived disability, may also provide some protections to employees affected by domestic violence and can include impairments or treatment as a result from domestic violence.⁹³ Thus, a domestic violence survivor who is being treated for depression or who fears working with her abuser may be protected under the ADA and entitled to a “reasonable accommodation.”⁹⁴

Thus, although survivors of domestic violence who face adverse work consequences may be able to articulate a claim of gender based discrimination under Title VII, a failure to accommodate under the ADA, or violations of the Federal Medical Leave Act, the absence of federal laws more directly addressing the effect of domestic violence on the workplace has left a significant gap in domestic violence legislation.⁹⁵ In fact, on more than one occasion, Congress has debated legislation to protect domestic violence survivors without concrete results.⁹⁶ Although Congress has yet to act, the proposed

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. See Family Medical Leave Act, 29 U.S.C. § 2611 (2012); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1964); Americans with Disabilities Act, 42 U.S.C. § 12101; see also Nina W. Tarr, *Employment & Economic Security for Victims of Domestic Abuse*, 16 S. CAL. REV. L. & SOC. JUST. 371, 391 (2007).

96. See, e.g., Healthy Families Act, H.R. 932, 114th Cong. (2015) (a House of Representatives bill to allow workers to earn paid sick time and address needs of women, in particular, to take time off due to domestic violence so they can address health concerns, “find solutions, such as obtaining a restraining order or finding

bills illustrate the importance of instituting employment based actions to address domestic violence. For example, House Bill 932, the Healthy Families Act, notes that women are disproportionately affected by domestic violence and addresses the importance of employer-provided paid sick days to allow women to address the effects of domestic violence providing that “these victims are in grave danger of losing their jobs.”⁹⁷ The Act notes “[o]ne survey found that 96 percent of employed domestic violence victims experienced problems at work related to the violence. The Government Accountability Office similarly found that 24 to 52 percent of victims report losing a job due, at least in part to domestic violence.”⁹⁸ The proposed Act prohibits discriminating against employees for exercising their rights under the Act, and provides civil actions for damages by employees for violations of the Act.⁹⁹ Previous attempts by the House of Representatives to address domestic violence in the workplace have also been unsuccessful. In 1999–2000, the House proposed amending the Family Medical Leave Act of 1993 by adding The Battered Women’s Protection Act, which sought to ensure that survivors of domestic violence could collect unemployment compensation when their unemployment was a direct result of domestic violence, and allow employees to use the temporary leave section of the Family Medical Leave Act to seek a leave in order to pursue medical, legal, or other assistance in relation to domestic violence.¹⁰⁰ The Workplace Violence Prevention Tax Credit Act of 1996 (Workplace Violence Prevention Act) was another unsuccessful attempt by Congress to address the employment impact of domestic violence.¹⁰¹ The Workplace Violence Prevention Act sought to amend the Internal Revenue Code in order to provide a tax credit to employers for a percentage of the costs incurred by the employer to address domestic violence costs.¹⁰² According to the

housing, to avoid or prevent physical or sexual abuse”); Battered Women’s Protection Act, H.R. 5262, 106th Cong. (2000); Workplace Violence Prevention Tax Credit Act of 1996, H.R. 3584, 104th Cong. (1996). *See also* Karin, *supra* note 33, at 396; Scott A. Moss et al., *Reviving Employee Rights? Recent & Upcoming Employment Discrimination Legislation: Proceedings of the 2010 Annual Meeting of the Association of American Law Schools Section on Employment Discrimination Law*, 14 EMP. RTS. & EMP. POL’Y J. 355, 373 (2010).

97. H.R. 932, §§ 1, 2(11)–(12).

98. *Id.* § 2(12).

99. *Id.* §§ 7(a)(1), 8(a)(3).

100. H.R. 5262.

101. H.R. 3884.

102. *Id.* § 45C(a).

Act, covered costs include providing employees counseling, legal or medical services, education, implementing human resource policies, hiring new security personnel, creating escort systems, installing new security equipment, establishing a hotline, retaining an attorney, medical services, retaining a financial expert to provide counseling to employees seeking to escape from violent crimes, as well as implementing leave, transfer, and flexible work policies to address domestic violence.¹⁰³ In support of these measures, the Act's findings include noting that, "there is an increasing awareness by the business community and the country as a whole regarding the serious problem of workplace violence against women."¹⁰⁴ The findings also state that "there is an increased recognition that workplace violence against women has severe implications for the health, safety, and economic well-being of women, as well as the efficiency and profitability of American companies."¹⁰⁵ It recounts crime statistics which reveal the threat of violence against women in the workplace, particularly from their current or former intimate partners, as well as surveys revealing executives' beliefs that domestic violence negatively impacts employee productivity, attendance, and health care costs.¹⁰⁶ The findings conclude with stating the need for Congress to "play a role in encouraging companies to promulgate workplace education and safety programs to combat violence against women."¹⁰⁷ Yet, even these provisions lack any comprehensive response to the needs of domestic violence survivors and fail to address the role employers may play in responding to batterers. Given Congress' inaction on the issue of the impact of domestic violence on the workplace, there remains a need for Congress to play a role in helping to effectuate positive change. The lack of any sweeping responses that would impact private businesses on the federal level has left the issue to the states and private employers.

Despite its inability to pass legislation directly addressing domestic violence in employment, the federal government has adopted domestic violence employment policies for federal employees. In order to help to create economic security for victims of domestic violence, the Violence Against Women Act reauthorization in 2005 created the National Resource Center on Workplace Responses to

103. *Id.* § 45C(a)–(b).

104. *Id.* § 2(1).

105. *Id.* § 2(2).

106. *Id.* § 2(3)–(10).

107. *Id.* § 2(12).

assist victims of domestic and sexual violence.¹⁰⁸ In 2012, President Barack Obama issued a Memorandum to the Heads of Executive Departments and Agencies on the subject of establishing policies for addressing domestic violence within the federal workforce.¹⁰⁹ Stating that, “As the Nation’s largest employer, the Federal Government should act as a model in responding to the effects of domestic violence on its workforce” the Memorandum identifies enhancing security, providing employee assistance and requiring the promulgation of additional policies to prevent domestic violence and address its effect on the workplace.¹¹⁰ In February 2013, the Office of Personnel Management (OPM) issued its Guide for Agency-Specific Domestic Violence, Sexual Assault, and Stalking Policies.¹¹¹ The guide requires agencies to develop education and training, create reporting mechanisms, engage in safety and security assessments, assist with safety planning, provide referrals, and institute incident response teams.¹¹² In addition, it states that agency policies should provide for workplace flexibilities that can include leaves, telework, flexible work schedules and time off.¹¹³ The Guide prohibits discrimination against victims of domestic violence.¹¹⁴ The OPM Guide doesn’t stop with providing assistance to victims of domestic violence and addresses abusers as employees and allows for “disciplinary action proportionate to the offense, to the extent that there is a nexus between the conduct and the ‘efficiency of the service.’”¹¹⁵ The OPM Guide further states, “To take adverse action against employees who commit off-duty misconduct, there must be a

108. Violence Against Women Act and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960, 3052, sec. 701, 1103, § 41501(a) (codified as amended 42 U.S.C. § 14043f (2005)) (although enacted in 2005 it was not funded until 2008).

109. Memorandum Establishing Policies for Addressing Domestic Violence in the Federal Workforce, 2012 DAILY COMP. PRES. DOC. 1 (Apr. 18, 2012) [hereinafter Presidential Memorandum]; see also Durbin, *supra* note 73, at 858–59.

110. Presidential Memorandum, *supra* note 109; see also DURBIN, *supra* note 73, at 859.

111. U.S. OFFICE OF PERS. MGT., GUIDE FOR AGENCY-SPECIFIC DOMESTIC VIOLENCE, SEXUAL ASSAULT, AND STALKING POLICIES 8 (2013), <https://www.opm.gov/policy-data-oversight/worklife/reference-materials/guidance-for-agency-specific-dvsas-policies.pdf> [hereinafter OPM GUIDE]. Under the OPM GUIDE, federal agencies were required to develop or modify “agency-specific policies for addressing the effects of domestic violence” consistent with the guidelines and to submit those guidelines to the OPM for approval. *Id.* at 8; see also Durbin, *supra* note 73, at 859.

112. OPM GUIDE, *supra* note 111, at 10, 19–23.

113. *Id.* at 11–14.

114. *Id.* at 17.

115. *Id.* at 15.

proven ‘nexus’ between the specific misconduct of the employee and the employee’s ability to perform his or her duties.”¹¹⁶ According to the Guide, an agency can show a nexus by showing the misconduct affects the employee’s or his co-worker’s job performance or the agency’s mission.¹¹⁷ In addition, the Guide notes that a rebuttable presumption of a nexus may exist if the conduct is egregious.¹¹⁸ It also contemplates a disciplinary scheme that could result in a suspension if the “agency has reasonable cause to believe the employee has committed a crime for which the employee could be imprisoned.”¹¹⁹

D. Private Employers & Workplace Related Domestic Abuse

In the absence of federal leadership and apart from state legislative protections, some private employers have voluntarily developed workplace policies designed to address domestic violence although there are no clear numbers as to how many private employers currently have domestic violence policies that address abusers’ conduct. Private employers experience domestic violence related workplace violence at a lower rate than other government employers and few private employers have comprehensive domestic violence policies.¹²⁰ State governments are more likely to have formal workplace violence programs or policies than private employers and larger private employers are more likely to have a policy or program than smaller employers.¹²¹ Similarly, state governments are far more likely to address domestic violence in their workplace violence employees than either local government or private industry, and one estimate is that only slightly more than 10% of private firms have policies or programs in place that address domestic violence.¹²²

Too few employers address domestic violence. A 2005 survey of employers by the Department of Labor found that a majority of private employers did not have domestic violence policies and most did not have a process for identifying employees with a history of violence. The United States Department of Labor Bureau of Labor Statistics’ survey of employers reported that 42% of businesses surveyed had a process or method for identifying employees with a

116. *Id.*

117. *Id.* at 16.

118. *Id.*

119. *Id.*

120. SURVEY OF WORKPLACE VIOLENCE PREVENTION 2005, *supra* note 31, at 4, 14.

121. *Id.* at 14–15.

122. *Id.* at 16.

history of violence.¹²³ However, 70% of workplaces did not have a program or policy that addressed workplace violence.¹²⁴ Moreover, of those entities that had a workplace policy or program in place only 44% of those policies addressed domestic violence.¹²⁵ In addition, only 4% of all the businesses surveyed trained staff on domestic violence and its impact on the workplace.¹²⁶ Yet, large employers of 1,000 or more workers, reported that, in the year prior, more than 20% of workers had reported domestic violence incidents.¹²⁷ This failure to address workplace violence continued in private firms even after a violent incident had occurred on employer property.¹²⁸ The survey reports that 5% of private employers experienced workplace violence in the prior year, yet most did not adopt a policy or program to address violence.¹²⁹ Although the rate of reported incidents of domestic violence events is lower in smaller employers, and 5% overall, the failure to address the issue can have productivity and safety related consequences for the employer and its employees, and some private employers have begun working together to better understand and address the problem.¹³⁰

In 2007, the Corporate Alliance to End Domestic Violence partnered with Safe Horizon, a domestic violence agency, and Liz Claiborne to conduct a survey on the workplace and domestic violence.¹³¹ Two hundred corporate executives and 503 employees from Fortune 1500 companies were surveyed.¹³² The survey found

123. *Id.* at 13.

124. *Id.* at 14.

125. *Id.* at 16.

126. *Id.* at 17.

127. *Id.* at 5.

128. Hobday, *supra* note 41, at 20, 22 n.23.

129. SURVEY OF WORKPLACE VIOLENCE PREVENTION 2005, *supra* note 31, at 2.

130. *Id.* at 6.

131. CORP. ALL. TO END PARTNER VIOLENCE, CORPORATE LEADERS AND AMERICA'S WORK FORCE ON DOMESTIC VIOLENCE 2 (2007), http://www.ncdsv.org/images/Corporate%20Leaders%20and%20America's%20Workforce%20on%20DV%20Summary_9-25-07.pdf. The Corporate Alliance to End Domestic Violence is a national organization comprised of business and agencies. Its mission is to help prevent domestic violence. According to their website, they see reducing domestic violence as a means of increasing corporate profits by reducing costs associated with intimate partner violence. See *Our Purpose*, CORP. ALLIANCE TO END DOMESTIC VIOLENCE, <http://www.caepv.org/about/purpose.php> (last visited Dec. 30, 2015). Other employer groups which have formed to address domestic abuse as a workplace issue include the Family Violence Prevention Fund, Workplaces Respond, and Employers Against Domestic Violence.

132. CORP. ALL. TO END DOMESTIC VIOLENCE, *supra* note 131, at 2.

that one out of four women reported being a victim or survivor of domestic violence.¹³³ Of those surveyed, 58% of CEOs and 41% of employees reported being aware of employees or co-workers who were impacted by domestic violence.¹³⁴ Forty-three percent of the executives and 91% of the employees believed that domestic violence affected the workplace by affecting attendance, productivity, safety, insurance costs, and by creating turnover.¹³⁵ While a clear majority of the employees surveyed believed that employers should address domestic violence, only 13% of the executives felt that companies had a major role to play in responding to domestic violence.¹³⁶ Yet, the surveyors felt that executives' views on this issue were changing and trending toward recognizing a role for employers to play in responding to domestic violence.¹³⁷ There remains some uncertainty as to the number of workplace domestic violence policies as well as the extent to which employees are cognizant of these policies. Seventy percent of the business leaders who participated in the survey reported having a domestic violence program that provided referrals, employee benefits, counseling services, and donations to community organizations.¹³⁸ In contrast, only 47% of employees reported being aware of any domestic violence programs offered by their employers.¹³⁹

E. Workplace Domestic Violence Policies Addressing Batterers

The limited range of domestic violence and employment policies and legislation is focused primarily on protecting and aiding domestic violence survivors. However, there is a need for a more comprehensive approach to addressing domestic violence in the workplace.¹⁴⁰ In addition to providing protections for victims of domestic violence, employer domestic violence policies should include greater measures to respond to the perpetrators of domestic

133. *Id.* at 16.

134. *Id.* at 6.

135. *Id.* at 7.

136. *Id.* at 10.

137. *Id.* at 10–11.

138. *Id.* at 12.

139. *Id.*; see also Rothman & Perry, *supra* note 34, at 238 (“During a recent survey of Fortune 1,000 senior executives, 41% indicated that they believe domestic violence substantially affects profits”) (citing CORP. ALL. TO END DOMESTIC VIOLENCE, CORPORATE LEADERS ON DOMESTIC VIOLENCE: AWARENESS OF THE PROBLEM, HOW IT’S AFFECTING THEIR BUSINESS, AND WHAT THEY’RE DOING TO ADDRESS IT 8 (2002), [http://www.caepv.org/membercenter/files/Liz%20Claiborne%20Corporate%20Leader%20Survey%20\(10-02\).doc](http://www.caepv.org/membercenter/files/Liz%20Claiborne%20Corporate%20Leader%20Survey%20(10-02).doc)).

140. RIDLEY ET AL., *supra* note 29, at 2; see also SCHMIDT & BARNETT, *supra* note 28, at 5.

violence. In workplace legislation and policies designed to address the effects of domestic violence on the workplace, less attention has been placed on policies designed to deter and penalize battering through workplace measures. Although 26 states have some sort of domestic violence workplace policy not all states address the perpetrator.¹⁴¹ Policies addressing perpetrators can be vague and lack sufficient specificity to be effective. For example, while Legal Momentum, the Women's Legal Defense and Education Fund, State Law Guide to Domestic and Sexual Violence Workplace Policies recommends employers adopt policies that include "[d]isciplining, up to and including discharge, employees who threaten or abuse others on work time or used work resources and consider sanctioning those who perpetrate unlawful violence outside the workplace"¹⁴² the recommendation lacks any detail about scope, application, and implementation.

A few states, including Colorado, Indiana, Massachusetts, New Hampshire, South Carolina, and Utah have adopted zero-tolerance policies for domestic violence abusers.¹⁴³ Some states, including Delaware, Florida, Kentucky, Maine, Maryland, New Hampshire, New York, Ohio, Utah, and Vermont have created employment policies to respond to domestic violence perpetrators that include

141. See LEGAL MOMENTUM, *supra* note 72, at 2.

142. *Id.* at 1.

143. COLO. DEP'T OF HUMAN SERVS., WORKPLACE VIOLENCE & DOMESTIC VIOLENCE AFFECTING THE WORKPLACE POLICY No. 3.5 (2000), <https://www.colorado.gov/pacific/sites/default/files/Workforce%20and%20Domestic%20Violence%20Affecting%20the%20Workplace.pdf>; Indiana Prevention of Workplace Violence Policy, Exec. Order No. 99-6 (Aug. 1, 1999); Mass. Exec. Order No. 442 (Oct. 30, 2002), <http://www.mass.gov/courts/docs/lawlib/eo400-499/eo442.txt>; Mass. Exec. Order No. 491 (Oct. 31, 2007), <http://www.mass.gov/courts/docs/lawlib/eo400-499/eo491.pdf>; N.H. Exec. Order No. 2000-10 (Oct. 4, 2000), <http://www.gencourt.state.nh.us/ruleS/register/2001/February-2-01.pdf>; S.C. CODE ANN. § 1-1-1410 (2005); S.C. Exec. Order No. 2002-30 (Oct. 8, 2002), <http://www.scstatehouse.gov/Archives/ExecutiveOrders/exor0230.htm>; Utah Exec. Order 2005/0006 (Apr. 28, 2005), <http://www.rules.utah.gov/execdoks/2005/ExecDoc97589.htm>; UTAH OFFICE OF THE GOVERNOR, DOMESTIC VIOLENCE PREVENTION GUIDELINES FOR STATE EMPLOYEES (2006), governor.utah.gov/violence/StateDVEmployeeHandbook.pdf. See generally LEGAL MOMENTUM, *supra* note 72, at 2-3, 5, 7-8, and 11-12. Note that COOK COUNTY BUREAU OF HUMAN RESOURCES, DOMESTIC & SEXUAL VIOLENCE WORKPLACE POLICY at 4 (2006), <http://www.cookcountyil.gov/womens-issues-commission-on/>, provided that employees who perpetrate domestic violence on county premises during work hours, at a county sponsored event, or who are convicted of a crime as a result of domestic violence where it affects their work performance, may be subject to disciplinary actions.

referrals to resources, discipline, or both.¹⁴⁴ Massachusetts provides that acts of violence, regardless of where they occur, can result in discipline: convictions for domestic violence, sexual assault, or stalking up to five years old may be used as a factor in hiring.¹⁴⁵

Policies are particularly on point where it is clear that abuser employers have used employer resources to engage in domestic violence or where their behavior occurred on company property or during company time.¹⁴⁶ However, to be truly effective, employer

144. See LEGAL MOMENTUM, *supra* note 72, at 3–10, 12; see also THE DELAWARE CORP. CITIZEN INITIATIVE, MODEL POLICY ON DOMESTIC VIOLENCE IN THE WORKPLACE (2001), <http://dvcc.delaware.gov/documents/workplace.pdf> (noting that perpetrators may get referral and resource assistance). According to Legal Momentum's State Guide, the Florida Governor & Cabinet Resolution on Workplace Violence provides that employees who commit violent acts are to complete counseling, and that serious violence can result in termination. LEGAL MOMENTUM, *supra* note 72, at 4. A 2001 Kentucky Executive Order allows for disciplining employees who are arrested or convicted of domestic violence crimes or sex offenses or subjected to orders of protection where such action has a direct connection to the employee's duties. *Id.* at 5–6. Under the Maine policy, employees who commit domestic violence, sexual assault, or stalking may be disciplined by their agency when the behavior occurs off-duty, as long as a nexus between the behavior and their employment with the state is established. MAINE OFFICE OF THE ATTORNEY GENERAL, DOMESTIC VIOLENCE WORKPLACE POLICY (2003; Revised & Reissued 2012), http://www.maine.gov/ag/about/domestic_violence_policy.html. Further, perpetrators must disclose valid orders of protection, conditions of bail or probation that might interfere with the person's ability to perform their job duties. *Id.* In Maryland, perpetrators must contact the State's Employee Assistance Program for consultation and resources and get in touch with an abuser's intervention program. MARYLAND PERSONNEL POLICY ON DOMESTIC VIOLENCE AND THE WORKPLACE (1999), <http://www.dbm.maryland.gov/employees/Pages/DomesticViolencePolicy.aspx>. Under New Hampshire Executive Order No. 2000-10, *supra* note 143, state agencies may take corrective or disciplinary action against employees who perpetrate domestic violence or harassment in the workplace. The current New York Model Domestic Violence and the Workplace Policy provides for accountability for employees who are perpetrators of abuse. NEW YORK OFFICE FOR THE PREVENTION OF DOMESTIC VIOLENCE, MODEL DOMESTIC VIOLENCE AND THE WORKPLACE POLICY (2009), <http://www.opdv.ny.gov/professionals/workplace/statepolicy.html>. Under Ohio Executive Order Nos. 2008-08S (Apr. 16, 2008) and 2011-04K (Jan. 21, 2011) employers may take corrective action against perpetrators. Furthermore, under the OHIO BARBARA WARNER WORKPLACE DOMESTIC VIOLENCE POLICY 5 (2008), <http://www.healthy.ohio.gov/sadv/dviolence/workplace.aspx>, employees who are authorized to carry a firearm must notify their employer if they are convicted of a domestic violence related crime or if they have been served with an order of protection. The Utah Guidelines encourage perpetrators to seek assistance and agencies must report violations of orders of protection in the workplace, adjust work schedule to allow a perpetrator to attend perpetrator treatment programs. UTAH OFFICE OF THE GOVERNOR, *supra* note 143, at 5–6.

145. See LEGAL MOMENTUM, *supra* note 72, at 7–8.

146. GOLDSCHIED & RUNGE, *supra* note 49, at 5.

policies should specifically address domestic violence and include acts that occur even outside of the workplace. Employment based sanctioning of batterers would more decisively condemn acts of domestic violence than would relying primarily on civil protection orders and the criminal justice system. The NFL's response to the Rice domestic violence case presents an opportunity to consider a greater focus on employer domestic violence policies that directly address the perpetrator and his conduct.

III. EMPLOYER RESPONSES TO IPV—IS THE NFL A MODEL? DOMESTIC VIOLENCE IN THE NFL

The NFL is no stranger to allegations of violence and misconduct against its players and it has publicly revised and strengthened its Personal Conduct Policy (PCP) on more than one occasion.¹⁴⁷ The NFL has a high rate of domestic violence among its players, although it is not clear whether it is higher than that of the general population.¹⁴⁸

In 2007, the NFL revised its PCP after a series of high-profile incidents involving violence against women committed by NFL

147. See, e.g., Suzanne Janusz, *The NFL's Strict Enforcement of its Personal Conduct Policy for Crimes Against Women: A Useful Tool for Combating Violence or an Attempt to Punish Morality*, 22 SETON HALL J. SPORTS & ENT. L. 93, 112–17 (2012); Bethany P. Withers, *The Integrity of the Game: Professional Athletes and Domestic Violence*, 1 HARV. J. SPORTS & ENT. L. 145, 170–71 (2010). For a discussion of professional athletes and “off-court misbehavior” see Janine Young Kim & Matthew J. Parlow, *Off-Court Misbehavior: Sports Leagues and Private Punishment*, 99 J. CRIM. LAW & CRIMINOLOGY 573, 577–78 (2009).

148. It is not clear whether professional athletes commit violence against women at higher rates than the general population, and there is little conclusive data on the rates of NFL players and violence. See, e.g., *NFL Arrests Database*, San Diego Union-Tribune, <http://www.utsandiego.com/nfl/arrests-database/> (last visited Dec. 30, 2015). The San Diego Union-Tribune maintains a non-scientific database of NFL players' arrests and citations more serious than a speeding ticket culled from news reports and public records. *Id.* For example, from January 2015 to May 2015, the database lists 21 entries, 6 of which involved a domestic incident and one involved aggravated animal cruelty involving a girlfriend's dog. *Id.*; Janusz, *supra* note 147, at 100 (noting that in 2010 the Union-Tribune reported that “domestic violence charges accounted for fifteen percent of all arrests and citations in the database—the third most common offense after driving under the influence and the category combining fighting, disorderly conduct, and resisting arrest.”); Withers, *supra* note 147, 148–49; see also Ellen E. Dabbs, *Intentional Fouls: Athletes and Violence Against Women*, 31 COLUM. J.L. & SOC. PROBS. 167, 169 (1998); Carrie A. Moser, *Penalties, Fouls, and Errors: Professional Athletes and Violence Against Women*, 11 SPORTS L. J. 69, 70–71 (2004).

players.¹⁴⁹ The 2007 Policy required players to “avoid ‘conduct detrimental to the integrity of and public confidence in the National Football League.’”¹⁵⁰ The 2007 PCP prohibited engaging in violent or criminal activity and gave as examples, *inter alia*, crimes of physical violence, or violent or threatening conduct, using a deadly weapon in the commission of a crime, hate crimes or crimes of domestic violence, sex offenses, property crimes, and fraud.¹⁵¹ The policy required those charged with a crime to undergo a “consultation and additional counseling as directed.”¹⁵² Conviction could result in discipline, which could include fines, suspension, or banishment from the NFL.¹⁵³ However, the 2007 PCP was not limited to actions that resulted in a criminal conviction, and included acts of domestic violence.¹⁵⁴ Those covered by the policy had a duty to report prohibited conduct.¹⁵⁵ Despite the 2007 policy, NFL players continued to be involved in perpetrating domestic violence at a significant rate, and the NFL continued to be criticized for its inconsistent and inadequate responses.¹⁵⁶ One review of NFL

149. See *Goodell Strengthens NFL Personal Conduct Policy*, USA TODAY (Apr. 11, 2007, 8:28 AM), http://usatoday30.usatoday.com/sports/football/nfl/2007-04-10-new-conduct-policy_N.htm. Professional player behavior is governed by league constitutions and bylaws, collective bargaining agreements, and player contracts. See Robert Ambrose, Note, *The NFL Makes It Rain: Through Strict Enforcement of Its Conduct Policy, the NFL Protects Its Integrity, Wealth, and Popularity*, 34 WM. MITCHELL L. REV. 1069, 1093–94 (2008); Janusz, *supra* note 147, at 94; Kim & Parlow, *supra* note 147, at 575–76; Brant Webb, *Unsportsmanlike Conduct: Curbing the Trend of Domestic Violence in the National Football League and Major League Baseball*, 20 AM. U.J. GENDER SOC. POL’Y & L. 741, 743 (2012).

150. Kim & Parlow, *supra* note 147, at 578 (quoting the 2007 NFL Players Ass’n Personal Conduct Policy and noting that this policy replaced the NFL’s Violent Crime Policy). The Violent Crime Policy did not permit the League to discipline players unless their actions resulted in a criminal conviction. *Id.* at 577 n. 26; Casinova O. Henderson, *How Much Discretion Is Too Much for the NFL Commissioner to Have Over the Players’ Off-the-Field Conduct?*, 17 SPORTS LAW. J. 167, 194 (2010) (arguing that the Commissioner’s power under the PCP is too broad).

151. *NFL Personal Conduct Policy*, ESPN (Mar. 2, 2009), <http://sports.espn.go.com/nfl/news/story?id=2798214>.

152. *Id.*

153. *Id.*

154. Kim & Parlow, *supra* note 147, at 578; Webb, *supra* note 149, at 751. A key factor distinguishing the 2007 PCP from the prior policy was the power it granted the Commissioner to penalize acts that were not criminally charged. Janusz, *supra* note 147, at 115–16. Furthermore, the prior policy was rarely used to respond to domestic violence. *Id.*

155. *NFL Personal Conduct Policy*, *supra* note 151.

156. See Benjamin Morris, *The Rate of Domestic Violence Arrests Among NFL Players*, FIVETHIRTYEIGHT (July 31, 2014, 12:50 PM) <http://fivethirtyeight.com/datalab/the->

suspensions revealed that players were disciplined more severely for driving under the influence, weapon possession, or marijuana charges than for domestic violence.¹⁵⁷ A number of cases received significant media coverage. In 2011, Erik Walden, a player for the Green Bay Packers was suspended for one game for assaulting his girlfriend.¹⁵⁸ News outlets compared Walden's penalty with that of a Bengals player who was suspended for three games for possession of marijuana.¹⁵⁹ The NFL continued to draw attention to the high rate of domestic violence among its players when in 2012, Jovan Belcher, a player for the Kansas City Chiefs, shot his girlfriend to death before killing himself.¹⁶⁰ However, it was not until after the Ray Rice case became public in one of the most recent and graphic illustration of the ongoing problem of players involved domestic violence, that the NFL again revised its employee policies.¹⁶¹ In February 2014, when a videotape of Baltimore Raven Ray Rice punching his then fiancé in the face became public, the NFL was forced to make a more serious attempt to address domestic violence by its players.¹⁶² In the aftermath of the incident, the NFL announced changes to its PCP,

rate-of-domestic-violence-arrests-among-nfl-players/ (finding that NFL players' rate of domestic violence was lower than the national average but much higher than expected given income levels of the players); *NFL Player Arrests*, USA TODAY, <http://www.usatoday.com/sports/nfl/arrests/> (last visited Dec. 30, 2015); Bill Pennington & Steve Eder, *In Domestic Violence Cases, N.F.L. Has a History of Lenience*, N.Y. TIMES (Sept. 19, 2014), http://www.nytimes.com/2014/09/20/sports/football/in-domestic-violence-cases-nfl-has-a-history-of-lenience.html?_r=0 (noting that 50 NFL players had been arrested in the season prior to the 2007 revision of the personal conduct policy).

157. Kim & Parlow, *supra* note 147, at 596 (noting the greater attention paid to Michael Vick's prosecution for dogfighting than to domestic abuse incidents); Janusz, *supra* note 147, at 111; Pennington & Eder, *supra* note 156.
158. *Packers' Erik Walden Docked 1 Game*, ESPN (July 31, 2012), http://espn.go.com/nfl/trainingcamp12/story/_/id/8219797/erik-walden-green-bay-packers-suspended-1-game.
159. Pennington & Eder, *supra* note 156.
160. Justin Peters, *One Lesson of the Jovan Belcher Murder/Suicide: The NFL Has a Serious Domestic Violence Problem*, SLATE (Dec. 3, 2012, 10:25 AM), http://www.slate.com/blogs/crime/2012/12/03/jovan_belcher_murder_suicide_the_nfl_has_a_serious_domestic_violence_problem.html.
161. Aaron Wilson, *NFL Passes Revised Personal Conduct Policy, Ravens' Chris Canty 'Disappointed' in Process*, BALT. SUN (Dec. 10, 2014, 8:35 PM), <http://www.baltimoresun.com/sports/ravens/ravens-insider/bal-nfl-unanimously-passes-revised-personal-conduct-policy-at-owners-meetings-20141210-story.html>.
162. Don Banks, *Punch Seen 'Round the World: How the NFL Has Changed Since Ray Rice Video*, SPORTS ILLUSTRATED (Sept. 8, 2015), <http://www.si.com/nfl/2015/09/08/ray-rice-elevator-video-domestic-violence>.

asserting that it would more effectively respond to domestic violence and batterers in the League.¹⁶³

After significant public backlash for the initial handling of the Ray Rice case, the NFL responded by instituting some changes in their policies and approaches to domestic violence.¹⁶⁴ The most public aspects of their response were probably the marketing and anti-violence campaigns run by the NFL shortly after the Rice-Palmer incident. The January 2015 Super Bowl anti-violence public service announcement is one example of these efforts.¹⁶⁵ In addition, to the advertising campaign, the NFL announced a number of internal policies designed to deal with domestic violence in the League. In the aftermath of the Rice case, the NFL first held a domestic violence education session that was mandatory for all NFL personnel, including owners, coaches, and players.¹⁶⁶ According to the League, there are plans to hold regular training and education sessions.¹⁶⁷ The NFL asserts that it is also establishing "Critical Response Teams"¹⁶⁸ which will have special training "to provide immediate and confidential crisis assistance—safety, medical, social services, and legal—to anyone in the NFL family, including spouses, significant others, or other family members who experience abuse."¹⁶⁹ The PCP includes counseling and services for families experiencing domestic violence, paid leave, and identifies what conduct will subject an employee to possible sanctions under the policy.¹⁷⁰ The updated policy further provides for "[a] baseline suspension of six games without pay for violations involving assault, battery, domestic violence, dating violence, child abuse, other forms of family

163. Eric Brady, *NFL's Domestic Violence Policy Could Undergo Numerous Changes*, USA TODAY (Oct. 9, 2014, 2:02 PM), <http://www.usatoday.com/story/sports/nfl/2014/10/08/domestic-violence-policy-changes/16950271/>.

164. See, e.g., Morris, *supra* note 156; Pennington & Eder, *supra* note 156; Peters, *supra* note 160.

165. See John Hockenberry, *Domestic Violence: Has the NFL Really Changed?*, TAKE AWAY WITH JOHN HOCKENBERRY (Jan. 29, 2015), <http://www.thetakeaway.org/story/domestic-violence-has-nfl-really-changed/>; Ben Popken, *NFL Debuts Chilling Anti-Domestic Violence Super Bowl PSA*, TODAY (Jan. 28, 2015), <http://www.today.com/money/nfl-debuts-chilling-anti-domestic-violence-super-bowl-psa-2D80453385>.

166. *The NFL's Response to Domestic Violence and Sexual Assault*, NAT'L FOOTBALL LEAGUE (Dec. 5, 2014, 10:57 PM), <http://www.nfl.com/news/story/0ap3000000439286/article/the-nfls-response-to-domestic-violence-and-sexual-assault>; see NAT'L FOOTBALL LEAGUE, PERSONAL CONDUCT POLICY 1, 6 (2014), <http://static.nfl.com/static/content/public/photo/2014/12/10/0ap3000000441637.pdf>.

167. *The NFL's Response to Domestic Violence and Sexual Assault*, *supra* note 166.

168. *Id.*

169. *Id.*

170. *Id.*

violence, or sexual assault, with consideration given to possible mitigating or aggravating circumstances.”¹⁷¹ According to the League, the policy creates a new Conduct Committee and the conduct policy is to be reviewed annually.¹⁷² The League has repeated its position that it will lean on outside experts for advice in developing and implementing its policy which includes “[a]n expert group of outside advisors to review and evaluate potential violations and consult on other elements of the policy,”¹⁷³

The updated NFL PCP provides that League members “refrain from ‘conduct detrimental to the integrity of and public confidence in’ the NFL.”¹⁷⁴ The policy is broad and applies to owners, players, and employees of the League.¹⁷⁵ Moreover, violating the policy is grounds for terminating business relationships with consultants and independent contractors who work with the League.¹⁷⁶ Prohibited conduct is subject to discipline without regard to whether the wrongdoer has been subject to a criminal conviction.¹⁷⁷ Prohibited conduct under the policy includes:

Actual or threatened physical violence against another person, including dating violence, domestic violence, child abuse, and other forms of family violence; [a]ssault and/or battery, including sexual assault or other sex offenses; [v]iolent or threatening behavior toward another employee or a third party in any workplace setting; [s]talking, harassment, or similar forms of intimidation; [i]llegal possession of a gun or other weapon . . . or possession of a gun or other weapon in any workplace setting; [i]llegal possession, use, or distribution of alcohol or drugs; [p]ossession, use, or distribution of steroids or other performance enhancing substances; [c]rimes involving cruelty to animals as defined by state or federal law; [c]rimes of dishonesty such as blackmail, extortion, fraud, money laundering, or racketeering; [t]heft-related crimes such as burglary, robbery, or larceny; disorderly conduct; [c]rimes against law enforcement, such as obstruction,

171. *Id.*

172. *Id.*

173. *Id.*

174. PERSONAL CONDUCT POLICY, *supra* note 166, at 1.

175. *Id.*

176. *Id.*

177. *Id.* at 2.

resisting arrest, or harming a police officer or other law enforcement officer; [c]onduct that poses a genuine danger to the safety and well-being of another person; and [c]onduct that undermines or puts at risk the integrity of the NFL, NFL clubs, or NFL personnel.¹⁷⁸

The policy also provides that retaliation and threats to retaliate are violations of the Conduct Policy, stating, prohibited conduct includes “threats, intimidation, harassment, any other adverse action threatened, expressly or impliedly, or taken against anyone who reports a violation or suspected violation of this Policy or who participates in an investigation of a complaint.”¹⁷⁹

The League offers a clinical evaluation with follow-up education, counseling, or treatment programs at no cost to a member who is arrested or charged with violating the policy.¹⁸⁰ The willingness to participate in this process is considered when determining a disciplinary response to the conduct.¹⁸¹ In addition, the League has pledged to assist the victims and families of domestic violence, as well as the employee, by providing services and counseling, if desired.¹⁸²

According to the policy, “[t]hese resources will be provided through specialized Critical Response Teams” and these teams will be acting on “standard protocols” of “appropriate and constructive responses” to domestic violence incidents.¹⁸³ Members of the League are required to cooperate with investigations into alleged violations of the policy and compelled to comply with an investigation even if the member is also subject to a criminal investigation.¹⁸⁴ Those criminally charged with a crime of violence or, based upon an investigation, are believed by the Commissioner to have violated the updated policy may be placed on paid leave pending resolution of the matter.¹⁸⁵

The PCP provides for a system of discipline that may be imposed if a member is found in violation of the policy by “credible evidence.”¹⁸⁶ An employee may also be disciplined if subject to a

178. *Id.*

179. *Id.* at 3–4.

180. *Id.* at 3.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.* at 4.

185. *Id.* at 4–5.

186. *Id.* at 5.

disposition of a criminal proceeding, which includes, an “adjudication of guilt or admission to a criminal violation; a plea to a lesser included offense; a plea of *nolo contendere* or no contest; or the disposition of the proceeding through a diversionary program, deferred adjudication, disposition of supervision, conditional dismissal, or similar arrangements.”¹⁸⁷

Roundly criticized for its lack of a clear and transparent response to the Rice case, the League stated that it will create the position of “Special Counsel for Investigations and Conduct,” a position to be held by someone with a background in criminal justice.¹⁸⁸ According to the League, the “Special Counsel” will be responsible for investigation procedures and determining discipline.¹⁸⁹ Employees are entitled to notice of the alleged violation, copies of the records and reports relied upon by the investigator or disciplinary officer in reaching a determination, and are entitled to submit information and respond to the report.¹⁹⁰ The policy further requires the disciplinary officer to issue a written decision that includes the rationale for the decision as well as the discipline.¹⁹¹ According to the policy, the discipline can include fines, suspensions, community service, or “banishment” from the League.¹⁹² Disciplined players may be required to seek counseling, treatment, or therapy.¹⁹³ It contemplates enhanced or expedited discipline for repeat offenders.¹⁹⁴ The policy expressly provides that in cases of family or intimate partner violence “a first offense will subject the offender to a baseline suspension without pay of six games, with consideration given to any aggravating or mitigating factors.”¹⁹⁵ It further states that:

[p]ossible aggravating factors include, but are not limited to, a prior violation of the Personal Conduct Policy, similar misconduct before joining the NFL, violence involving a weapon, choking, repeated striking, or when an act is committed against a particularly vulnerable person, such as

187. *Id.* at 2, 8.

188. *NFL Owners Endorse New Personal Conduct Policy*, NFL.COM (Dec. 10, 2014, 1:40 PM), <http://www.nfl.com/news/story/0ap3000000441758/article/nfl-owners-endorse-new-personal-conduct-policy>.

189. *The NFL's Response to Domestic Violence and Sexual Assault*, *supra* note 166.

190. PERSONAL CONDUCT POLICY, *supra* note 166, at 5–6.

191. *Id.* at 6.

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

a child, a pregnant woman, or an elderly person, or where the act is committed in the presence of a child.¹⁹⁶

According to the policy, “[a] second offense will result in permanent banishment from the NFL. An individual who has been banished may petition for reinstatement after one year, but there is no presumption or assurance that the petition will be granted.”¹⁹⁷

The policy creates a bystander duty by providing that clubs or employees who fail to report suspected violations may be in violation of the policy because of their failure to do so.¹⁹⁸ The policy states, “[t]his obligation to report is broader than simply reporting an arrest; it requires reporting to the League any incident that comes to the club’s attention which, if the allegations were true, would constitute a violation of the Personal Conduct Policy.”¹⁹⁹

The updated 2014 NFL PCP expands the list of prohibited behaviors and provides greater detail about the range of behaviors which might constitute domestic or family violence set forth in earlier versions.²⁰⁰ More importantly, the policy provides for a process of education, training, and intervention where appropriate to address domestic violence.²⁰¹ The more detailed disciplinary process and inclusion of experts and dedicated teams provides more and clearer direction about the effect of the policy. The NFL PCP provides a model of a graduated approach to addressing employee related intimate partner abuse by allowing for education, training, counseling, and other interventions as well as consequences for noncompliance.²⁰² This type of policy provides a means for

196. *Id.*

197. *Id.* at 6–7. The Personal Conduct Policy provides an appeal process, stating, “[a]ppeals of any disciplinary decision will be processed pursuant to Article 46 of the Collective Bargaining Agreement for players or pursuant to the applicable league procedures for nonplayers.” *Id.* at 7.

198. *Id.*

199. *Id.*

200. *Compare NFL Personal Conduct Policy, supra* note 151 (listing prohibited activities under the Policy including “any crime involving the use or threat of physical violence to a person or persons; . . . involvement in ‘hate crimes’ or crimes of domestic violence; . . . sex offenses; . . . and violent or threatening conduct.”), *with* PERSONAL CONDUCT POLICY, *supra* note 166, at 2 (expanding all forms of prohibited conduct, especially conduct including “[a]ctual or threatened physical violence against another person, including dating violence, domestic violence, child abuse, and other forms of family violence . . .”).

201. PERSONAL CONDUCT POLICY, *supra* note 166, at 3.

202. *See, e.g.,* Rothman & Perry, *supra* note 34, at 245 (discussing a “graduated” approach in adopting workplace domestic abuse policies); *see also* PERSONAL CONDUCT POLICY, *supra* note 166, at 3–6.

employers to play a role in responding to domestic violence, addressing batterer behavior, and developing measures for greater accountability for their actions.

The NFL PCP is certainly not the only example of an employer domestic violence policy that addresses batterers; however, it may be unique in its scope and the levels of responses. For example, Employers Against Domestic Violence, a Massachusetts nonprofit, has a model domestic violence policy that:

requires any Employee who has been convicted of having violated a temporary restraining order issued pursuant to applicable state law within the past five years, where any of the facts forming the basis of such violation arose from Acts of Domestic Violence, or who has been convicted of a felony arising from Acts of Domestic Violence, to report such violation or conviction to the Company.²⁰³

The policy further encourages bystander reporting; however, the policy does not mandate an employer response. It encourages investigation and suggests referring the abuser-employee for assistance, but takes no position on whether the employer should discipline the employee.²⁰⁴ Given the breadth and strong language about employer response to batterers, the NFL PCP may provide a model for employers in adopting employee domestic violence policies that include addressing perpetrator behavior.

IV. ADOPTABILITY & ENFORCEABILITY OF EMPLOYER DV POLICIES

Employers are becoming increasingly aware of the importance of adopting policies to address domestic violence.²⁰⁵ Large numbers of employees are affected by domestic abuse and its existence can and does impact the workplace creating security and liability concerns, affecting performance and productivity, and possibly leading to higher health care related costs. The NFL PCP provides an important point of departure for drafting model employer domestic violence policies. Workplace domestic abuse policies should, at a minimum,

203. *Model Policy*, EMPLOYERS AGAINST DOMESTIC VIOLENCE, <http://employersagainstdomesticviolence.org/model-policy/> (last visited Dec. 30, 2015).

204. *Id.* The EADV Model Policy leaves any discipline of the perpetrator up to the individual employer stating, “[t]he Company, however, retains the sole discretion to determine the level of discipline (if any) imposed on such perpetrators.” *Id.*

205. Rothman & Perry, *supra* note 34, at 238.

include leaves from work for survivors to attend court, seek counseling, and address other issues related to the abuse, access to unemployment compensation, and anti-discrimination provisions that protect domestic violence survivors from adverse job actions related to the domestic violence and unrelated to job performance. However, employer domestic violence policies must go beyond these provisions; in order to be effective, a model policy should employ a graduated response that includes assistance as well as consequences for the batterer. Workplace domestic violence policies must define domestic violence broadly and have it apply to employees, independent contractors, and consultants. The policy should define domestic violence to include not only physical violence and sexual assault, but should include threats, intimidation, property damage, identity theft, stalking, and other behaviors designed to exercise power and control over a victim without regard to whether there has been a criminal conviction. In addition, it should ensure confidential reporting, a trained and experienced contact person for investigating and responding to allegations involving domestic violence, and regular and consistent education and training for all employees about domestic violence and how best to respond. An effective workplace policy should provide opportunities for counseling, treatment and referrals to community and agency resources for perpetrators and victims. Many employers maintain Employee Assistance Programs (EAPs) that provide assistance to employees affected by a range of issues including alcohol and drug problems.²⁰⁶ These programs should include domestic violence assistance to victims and batterers. It should encourage cooperation, reporting, bystander action, and should allow for graduated responses that rely on punishment and termination as a last resort for repeat behavior or continued failure to comply with employer policies.

In order to maintain workplace safety, an employer domestic violence policy should also require regular reviews of safety measures in order to ensure ongoing improvements to safety at work and the surrounding location. One study found that workplace fatalities were more likely to occur during work hours and occupations that are open to the public, and therefore, workplaces with poorly secured access are at greater risk.²⁰⁷ These studies further found that women are at an increased risk of workplace domestic

206. See Tiesman et al., *supra* note 32, at 282 (noting the researchers “only found nine articles discussing the role of EAPs in addressing IPV and the vast majority of these articles were descriptive To date, the role of EAPs in reducing and preventing IPV remains an uncertain resource.”).

207. *Id.* at 281–82.

violence fatalities when walking to and from work in parking lots, garages, and public buildings.²⁰⁸ Safety reviews and improvements designed to enhance security in and around a workplace should be mandated. In addition, any employment based domestic violence policy should likely also include provisions on responding to perpetrators that might include some form of batterer's intervention or education and should include consequences for noncompliance and discipline such as suspensions or leave without pay and termination, depending upon the circumstances of the case.²⁰⁹

Education and training personnel is a key component of an effective employer domestic abuse policy. A small Massachusetts survey of employed batterers suggests that abusers might benefit from education, and the manner in which an employer responds to employees who batter can have the potential to influence their behavior.²¹⁰ Survey participants noted that "watching scenarios of intimate partner violence role-played by others made it much easier for them to recognize the behaviors in themselves."²¹¹ The survey author goes on to state, "[m]any participants said they recognized they were 'having trouble' in their intimate partnerships well before they were arrested and would have volunteered to be screened for a special counseling program had one been made available."²¹² However, workplace policies cannot stop with educating and counseling the perpetrator. Training the entire staff to recognize the signs of and respond to domestic abuse is an important part of an employer response. The survey noted that, in the majority of instances, not only were their supervisors aware of the abuse, but they showed sympathy and concern for the batterer.²¹³ In fact, according to the author of the study of 29 employed batterers, "[o]nly 1 participant was able to recall any comments made by supervisors that expressed support for his abuse victim Some employers blamed or expressed antipathy toward victims."²¹⁴ The reported supervisors' statements are particularly telling and make a compelling case for implementing across the board workplace

208. *Id.* at 282.

209. See GOLDSCHIED & RUNGE, *supra* note 49, at 5–6; LEGAL MOMENTUM, *supra* note 72; PERSONAL CONDUCT POLICY, *supra* note 166, at 3–4, 6; *Workplace Statistics*, *supra* note 56.

210. Rothman & Perry, *supra* note 34, at 244–45.

211. *Id.* at 244.

212. *Id.*

213. See *id.* at 244–45.

214. *Id.* at 243.

domestic abuse education. The study quotes the participants as follows:

My boss knew what was going on [that I was being violent] and you know he'd be like, "alright, well you know, if I was you I would be aggravated with her too."

Everyone knew in my life [that I was being violent]. The whole restaurant wanted to support me. They pretty much got me out of it [criminal charges]. They said she probably got what she deserved. That was the consensus from everybody, and I pretty much believed that in the beginning.

I told [my supervisors] what happened and they were more concerned about me losing my driving license and not having a driver for their company. They didn't care much about, you know, the abuse.²¹⁵

The study's author goes on to state, "Employers of men in this sample posted bail, testified as character witnesses, offered reassurance that they too would be aggravated at the victims in question, and guaranteed job security for their employees who battered. Some employers responded only to substance abuse perpetrated by their employees but wholly ignored their criminal violence."²¹⁶ These kinds of responses can only serve to reinforce an abusers' behavior and embolden him. The study's author goes on to aptly assert that the result is to "facilitate" continued abuse and "may be perceived by batterers as tacit endorsement."²¹⁷ Incorporating frequent and ongoing training about intimate partner violence for all staff members can be an effective way of sending a clear and consistent message about harms associated with abuse.

Employment based sanctions for engaging in domestic violence broadens the scope of societal responses to domestic violence beyond civil protection orders and a criminal justice response and creates an additional layer of batterer accountability. Employment can help to create economic security for batterers and their families and therefore, employers have leverage to positively influence employee behavior. In addition, employment can be a means of gaining status in one's family and community. As a result, batterers may be sensitive to assistance from their employers and sanctions that affect employment which, in turn, might lead to a reduction in violence. In addition, this broader employment based approach may help make

215. *Id.*

216. *Id.* at 245.

217. *Id.*

societal disapproval of domestic violence more concrete and, perhaps, raise awareness that this behavior can have an array of societal consequences. This in turn, may serve to deter abusive behavior, and the added intervention into abusive relationships may serve to reduce acceptance of violent behavior. However, creating an employer response to domestic violence that includes batterers raises a number of challenges including determining how batterers are to be identified in the workplace, the kinds of behaviors that should trigger an employer response, whether and under what circumstances employers should regulate private behavior, and what kinds of responses that would be appropriate and within legal bounds. In addition to these very real practical problems the question of whether workplace responses to domestic violence may create potential risks for victims of domestic violence must be addressed.

Resolving to draft an employment policy that addresses domestic violence is only the beginning and its implementation process raises its own difficulties. The issue of how to identify workers who may have violated the policy by engaging in domestic violence can be difficult. Although some batterers may self-identify as a means of seeking out employer resources such as counseling and support, it is likely that many will not willingly come forward. Conceivably, employment applications, could, as a matter of course, inquire about the existence of current or prior orders of protection or acts of domestic violence. This approach would be similar to employment applications which ask applicants to reveal prior convictions and arrests. In addition, many employers already include background checks which include criminal convictions and arrests as part of their hiring process of potential employees.²¹⁸ Identifying batterers can occur through searches of public records such as court filings and protection order databases and registries. Providing some limited access to employers to protection order databases and registries might provide another means of identifying batterers who might otherwise remain unreported. Inquiries about the criminal background of applicants and employees are not, however, without controversy. The EEOC has recently warned employers that making employment

218. U.S. EQUAL EMP. OPPORTUNITY COMM'N, CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, at 9 (2012), http://www.eeoc.gov/laws/guidance/arrest_convicti.on.cfm (citing one survey that found 92% of respondent employers conducted background criminal checks on some or all of their applicants citing concerns about theft, fraud, workplace violence, negligent hiring liability, or to satisfy legal requirements with regard to hiring).

decisions based upon an applicant's convictions or arrests on an application may have a disparate effect on people of color and result in unlawful discrimination under Title VII, if not "job related and consistent with business necessity."²¹⁹ The Guidance states:

As a best practice, and consistent with applicable laws, the Commission recommends that employers not ask about convictions on job applications and that, if and when they make such inquiries, the inquiries be limited to convictions for which exclusion would be job related for the position in question and consistent with business necessity.²²⁰

According to the EEOC, absent a social science study validating a screening technique, factors developed by the Eighth Circuit in *Green v. Missouri Pacific Railroad Company*,²²¹ provide a basis for analyzing whether criminal conduct is relevant to employment.²²² The following factors are relevant for determining whether a policy is job related and consistent with business necessity: the nature and gravity of the offense or conduct, the time passed since the offense, and the nature of the job held or sought should not be found in violation of Title VII.²²³ In addition, several states and cities have passed "ban the box" legislation prohibiting employers from screening out potential employers based on arrests or convictions.²²⁴

219. *Id.* at 10–11, 14. The updated Agency's Guidance notes the EEOC's history of issuing policies on employment and criminal histories noting the current Guidance supersedes the prior policies statements. *Id.* at 3.

220. *Id.* at 13–14.

221. 549 F.2d 1158, 1160 (8th Cir. 1977).

222. U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 218, at 15.

223. *Id.* at 11, 15–18 (discussing the "*Green*" factors and citing *Green v. Mo. Pac. R.R.*, 523 F.2d 1290, 1294–95 (8th Cir. 1975), *aff'd*, 549 F.2d 1158 (8th Cir. 1977).

224. *Id.* at 13; *see, e.g.*, ALASKA STAT. § 12.62.160(b)(8) (2014); ARK. CODE ANN. § 12-12-1009(c) (2009); CAL. LAB. CODE § 432.7(a) (West 2011); CONN. GEN. STAT. ANN. § 46a-80(e) (West. 2014); 775 ILL. COMP. STAT. ANN. § 5/2-103(A) (West 2011) (dealing with arrest records that have been ordered expunged, sealed, or impounded); MASS. GEN. LAWS ANN. ch. 151B, § 4(9) (West 2013); MICH. COMP. LAWS ANN. § 37.2205a(1) (West 2013) (applying to misdemeanor arrests only); NEB. REV. STAT. § 29-3523(2) (2008) (ordering no dissemination of arrest records under certain conditions and specified time periods)); N.Y. EXEC. LAW § 296(16) (McKinney 2010); N.D. CENT. CODE § 12-60-16.6(2) (2012); 18 PA. CONS. STAT. § 9121(b)(2) (West 2000); 28 R.I. GEN. LAWS § 28-5-7(7) (2014); WIS. STAT. ANN. §§ 111.321, 111.335(1)(a) (West 2002); *see also* CONN. GEN. STAT. ANN. § 46a-80(b) (West 2014) ("[N]o employer . . . shall inquire about a prospective employee's past convictions until such prospective employee has been deemed otherwise qualified for the position."); HAW. REV. STAT. ANN. § 378-2.5(b) (LexisNexis 2010) (an employer may withdraw an offer of employment if the prospective employee's conviction is

The focus in these provisions is on exclusion and policies that adopt tailored policies that do not automatically disqualify applicants based on arrests or convictions, and include individualized assessments of employees' conduct should not be found to be in violation of the letter or spirit of the EEOC Guidance or the state ban the box provisions.²²⁵ As a result, carefully drafted policies that screen for domestic violence arrests, convictions, or orders of protection, that allow employers to consider these facts as one factor among many in making employment decisions, and are not used as a blanket exclusion tool, should be found to be consistent with EEOC Guidelines.

Employee handbooks and personnel policies could include self-reporting requirements. Employer policies could encourage self-reporting by creating a tiered response: a first-time self-report could result in referrals to counselors and therapy, and subsequent incidents and failure to self-report could result in more punitive responses such as suspensions, a leave of absence, or even termination. However, even with such policies, it is not likely that the majority of abusers will self-identify.

Absent criminal background checks and self-identification, other means of identifying batterers must be put into place. Employers can develop clear and confidential procedures to allow any employee to report domestic violence and abusers. Employees may choose to report having been a victim of domestic violence in order to obtain assistance or protection from their employer. In addition, they may choose to report in order to help their employer maintain a safe workplace.²²⁶ Domestic violence survivors may also choose to "out"

related to the position); MINN. STAT. ANN. § 364.021(a) (West 2012) ("A public employer may not inquire into or consider the criminal record or criminal history of an applicant for public employment until the applicant has been selected for an interview by the employer.").

225. The EEOC Guidance, for example, provides that "automatic, across-the-board exclusion from all employment opportunities because of any criminal conduct is inconsistent with the *Green* factors because it does not focus on the dangers of particular crimes and the risks in particular positions." U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 218, at 16. The Guidance further states that "an employer may be able to justify a targeted criminal records screen . . . the use of individualized assessments can help employers avoid Title VII liability by allowing them to consider more complete information on individual applicants or employees, as part of a policy that is job related and consistent with business necessity." *Id.* at 18.

226. See Tiesman et al., *supra* note 32, at 282 ("Instituting policies that permit women to freely discuss matters of IPV would be advantageous. If employees were to divulge IPV to workplace management and provide information when stalking or

their batterer to his employer. Survivors may see reporting their batterer to his employer as a means of achieving safety or as an additional method of trying to stop the abuse. It is likely that the survivors who will be most comfortable with reporting their batterer to their employer are likely to be those who are not dependent upon the batterer or his income. Many survivors may be unwilling to come forward to make a report. Given the generally accepted view that domestic violence is vastly under-reported, in large part due to a reluctance to come forward, it is likely that many domestic violence survivors will not report the incidents to an employer.²²⁷ It is possible that third-parties, who are neither the abuser nor the survivor, will have sufficient knowledge of the abuse to report relevant incidents to an employer; however, given the tendency to commit acts of domestic violence in private, it is unlikely that third parties will be the source of much, if any reporting. Notably, some state agencies' domestic violence policies require employees to report domestic violence involving other employees.²²⁸ Although, this employee third-party reporting may lead to some reports, it is not likely that it will lead to uncovering many incidents of abuse.

The lack of a guarantee of a source of reporting should not, however, argue against the adoption a domestic violence policy that includes batterers. In fact, the Rothman study found that most of the participants' employers learned of their employees' abuser status from their employee, some revealed the information voluntarily, others as a means of obtaining leave or some other concession in order to deal with the consequences of their behavior.²²⁹ However, no reporting system is likely to surface all instances of abuse. Yet, policies serve a range of other purposes other than identification of a wrongdoer and a response. Employer domestic violence policies send a message of societal censure of domestic violence and expands the tools available to combat the problem. It lets batterers know that their behavior is unacceptable, that it should be addressed, and provides them with resources for assistance.

Batterers engage in a range of behaviors designed to exercise power and control. What behaviors should trigger the policy can be a difficult question. The NFL policy is not limited to criminal

estrangement occurs, interventions could be utilized to protect the employee and the organization from intimate partner homicide.").

227. *Id.* ("[M]andating reporting of IPV is complicated [M]any barriers exist including victim's fear of retaliation by the employer (e.g., dismissal) and a lack of training on the part of most workplace management for dealing with IPV.").

228. LEGAL MOMENTUM, *supra* note 72, at 2, 4, 7, 11.

229. Rothman & Perry, *supra* note 34, at 242.

convictions and includes acts of violence, threats and harassment.²³⁰ Given the frequency with which victims recant, developing employer policies that are limited to convictions may be too narrowly drawn to be effective. Instead, broader policies that include acts of violence, stalking, threats, harassment, and other domestic violence behavior regardless of a criminal conviction would have a greater effect on domestic violence. Abusers do not only rely on violence, threats, and harassment to maintain their control over their victim, yet it is unclear whether employer policies can address behaviors that are neither criminal nor include violence, threats, or harassment.

Once identified, employer policies could include a range of graduated responses. As noted above, policies can include mandatory participation in batterer intervention groups as a means of helping abusers “unlearn” the behavior. However, there is significant uncertainty about the effectiveness of batterers programs.²³¹ Programs could include referral for assistance with treatment for substance abuse or other issues that might be exacerbating the problem. For employees who repeatedly fail to comply with employer policies or who engage in repeated domestic violence behaviors, employee discipline and sanctions could be imposed that might include suspensions or leave without pay and, if necessary, termination. In addition, employers could consider weighing domestic violence in making promotion or salary determinations, if such conduct would be relevant to position or job performance.

Once developed, employer domestic violence policies might still raise questions about the legality of employers regulating employee private behavior. Although at-will employment, with some exceptions, is the rule in nearly all states, one criticism of suggesting employers discipline employees who have engaged in domestic violence may be grounded in the premise that employers should be restricted from regulating an employee’s off-duty conduct.²³² This

230. See Kim & Parlow, *supra* note 147, at 578.

231. See JOHN ASHCROFT ET AL., U.S. DEP’T OF JUSTICE, DO BATTERERS INTERVENTION PROGRAMS WORK? TWO STUDIES 1, 3 (2003), <https://www.ncjrs.gov/pdffiles1/nij/200331.pdf>; Julia C. Babcock, Charles E. Green & Chet Robie, *Does Batterers’ Treatment Work? A Meta-Analytical Review of Domestic Violence Treatment*, 23 CLINICAL PSYCH. REV. 1023, 1024 (2004); EMILY F. ROTHMAN ET AL., WORLD HEALTH ORGANIZATION, INTERVENING WITH PERPETRATORS OF INTIMATE PARTNER VIOLENCE: A GLOBAL PERSPECTIVE 3 (2003), <https://extranet.who.int/iris/restricted/bitstream/10665/42647/1/9241590491.pdf>.

232. See RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 3.01, cmt. a (2015); Kenneth G. Dau-Schmidt & Timothy A. Haley, *Governance of the Workplace: The Contemporary Regime of Individual Contract*, 28 COMP. LAB. L. & POL’Y J. 313, 337 (2007).

perspective is based on the view that conduct that does not bear directly on the workplace is quite simply outside the authority of the employer. Adherents to this perspective would likely take the view that short of engaging in criminal conduct that bears some relation to the nature of the job being performed, the employer has “no jurisdiction” over the behavior. Thus, there seems to be some agreement that employers may regulate even lawful private behavior of their employees, particularly if their conduct would have an adverse effect on business. Under this approach, employers have the right to terminate an employee as a result of lawful activity that occurs offsite during nonworking hours if the restriction relates to a “bona fide” occupational requirement or is rationally or reasonably related to employment activities.²³³ The NFL PCP is one widely known example of employer regulated private behavior based on the view that athlete misbehavior off the field can adversely affect the NFL’s valuable brand.²³⁴ Other examples include behavior that calls into question employee integrity may be relevant to positions of trust.²³⁵ A number of cases have found that employers may regulate off-duty behavior if the conduct may affect the businesses reputation or it is acting to protect the business, other employees, or the public from the employee’s wrongdoing.²³⁶ Moreover, employers can regulate conduct that relates to or affects the workplace. An ABA employer guide to domestic violence analogizes employer domestic violence policies to mandating a drug-free workforce, both types of policies affect conduct that largely takes place outside the workplace.²³⁷

Employers may have an interest in developing policies that pertain to domestic violence that occurs outside of the workplace since the domestic violence has the potential to “spill” over into the workplace in multiple ways. The workplaces of the victim and the batterer may

233. *Coats v. Dish Network, L.L.C.*, 303 P.3d 147, 151 (Colo. App. 2013) (citing COLO. REV. STAT. § 24-34-402.5 (1)(a)(2012)).

234. See Kim & Parlow, *supra* note 147, at 586, 591 (analyzing the power of professional athletic leagues to regulate private behavior and assessing whether it is an example of private or public punishment).

235. U.S. EQUAL EMP. OPPORTUNITY COMM’N, *supra* note 218, at 14 (noting that individuals with specific convictions may be lawfully excluded from employment in certain positions such as working as a security screener, in law enforcement, as a child care worker in federal facilities, as a bank employee); see Kim & Parlow, *supra* note 147, at 591.

236. See, e.g., *Nelson v. Dep’t of Emp’t Sec.*, 98 Wash. 2d 370, 374–75 (1982); *O’Neal v. Emp’t Sec. Agency*, 89 Idaho 313, 317 (1965); *Ostrosky v. Md. Emp’t Sec. Board*, 147 A.2d 741, 742–43 (Md. 1959).

237. GOLDSHEID & RUNGE, *supra* note 49, at 5.

suffer as a result of the domestic violence. Victims of domestic violence may suffer absenteeism, tardiness, and loss of productivity. Batterers too may be less productive and may rely on company resources to engage in their behavior. Batterers who continue their control of their victim by making phone calls to their victim during work hours or who use their computers to “track” the victims’ activities are using employer resources in a way that does not benefit the employer. Furthermore, there is the possibility that the violence can occur in the workplace.

An employer’s regulation of off-duty behavior can be controversial and has raised concerns about overreaching.²³⁸ Some employees have sought relief from employer action based on off-duty conduct by suing on the grounds of invasion of privacy and intentional infliction of emotional distress.²³⁹ There is no consistent approach to these claims and they are subject to varying state and federal provisions. Employment actions that affect job-related behaviors are most likely to be upheld.²⁴⁰ As a result, public employees whose conduct is alleged to reflect negatively on their positions have largely been unsuccessful in challenging employer sanctions based on off duty behavior.²⁴¹ Analogous cases have also involved employees, like teachers, being disciplined for off-duty conduct but suffering adverse employment actions for engaging in behaviors prior to becoming teachers. For example, in 2013, a California middle school science teacher was fired for having previously appeared in pornographic films.²⁴² In 2010, a New York City elementary school teacher felt forced to resign from her teaching position once it became public that she had once worked as a prostitute.²⁴³ There are multiple examples of teachers being fired for having a past their employers found unsuitable for their jobs, for having been strippers or pornography stars prior to teaching.²⁴⁴ However, adverse employment actions for

238. Stephen D. Sugarman, “Lifestyle” Discrimination in Employment, 24 BERKELEY J. EMP. & LAB. L. 377, 407 (2003).

239. *Id.* at 426–27.

240. *See id.* at 425.

241. *See id.* at 409.

242. *California Teacher Who Appeared in Porn Loses Appeal to Get Job Back*, FOX NEWS (Jan. 16, 2013), <http://www.foxnews.com/us/2013/01/16/california-teacher-who-appeared-in-porn-loses-appeal-to-get-job-back/>.

243. Melissa Petro, *I Lost My Job as a Teacher Because I Was Once a Call Girl*, THE GUARDIAN (Mar. 28, 2012, 4:05 PM), <http://www.theguardian.com/lifeandstyle/2012/mar/28/lost-job-teacher-call-girl>.

244. Susan Brennan, *Stripper-Turned-Teacher, Sues West Ottawa Public Schools Over Firing*, HUFFPOST EDUCATION (Aug. 30, 2012, 3:37 PM), <http://www.huffingtonpost.c>

off duty behavior have not been limited to teachers. In 2012, a Texas journalist was fired for moonlighting as a stripper.²⁴⁵ A football coach was fired for partying with strippers.²⁴⁶ In 2007, the Ninth Circuit affirmed a grant of summary judgment for the Chandler, Arizona Police Department, which had been sued for having fired one of its police officers for hosting a sexually explicit website featuring his wife.²⁴⁷ The court in *Dible* rejected the plaintiff's invasion of privacy argument since the couple's behavior was on public display.²⁴⁸ Without debating the legitimacy of the employment actions in these particular cases, the illustrations make clear that there already is some expectation that personal behavior can affect the workplace in ways in which employers feel compelled or at least justified to act.

Employees have also sought relief from employer regulations of off duty behavior by filing claims for intentional infliction of emotional distress. Typically, courts have been unwilling to find that employee discipline rises to the level of the outrageous behavior needed to sustain such a claim. The *Dible* court rejected the intentional infliction of emotional distress claim, noting that firing Mr. Dible was not outrageous and that terminating an employee is the type of every day event that is not a breach of modern business etiquette.²⁴⁹

Public employees have sought to assert First Amendment Rights when disciplined for off duty conduct. In *City of San Diego v. Roe*, a San Diego police officer was terminated for selling homemade sex tapes.²⁵⁰ The Supreme Court rejected the argument that the officer was engaged in speech of a public concern, and therefore, was not entitled to be subjected to a test that balanced the employee's right to speech against the public employer's right to "promot[e] the efficiency of the public services."²⁵¹ The Court, therefore, found that

om/2012/08/30/susan-brennan-stripper-tu_n_1843417.html; *Teacher Fired Just Because She Was A Stripper Gets \$45,000 Settlement*, YAHOO! NEWS (June 26, 2013, 8:36 AM), <http://news.yahoo.com/teacher-fired-just-because-she-stripper-gets-45-123621866.html>.

245. *Journalist Sarah Tressler Fired By Houston Chronicle For Stripping*, ABC NEWS (Mar. 30, 2012), <http://abcnews.go.com/blogs/headlines/2012/03/journalistsarah-tressler-fired-by-houston-chronicle-for-stripping/>; see also Sugarman, *supra* note 238.

246. Sugarman, *supra* note 238, at 248.

247. *Dible v. City of Chandler*, 515 F.3d 918, 931 (9th Cir. 2008) ("Dible may have the constitutional right to run his sex oriented business, but he has no constitutional right to be a policeman for the City at the same time.").

248. *Id.* at 929–30.

249. *Id.* at 931.

250. *City of San Diego v. Roe*, 543 U.S. 77, 78–79 (2004).

251. *Id.* at 82, 84.

“[t]he speech in question was detrimental to the mission and functions of the employer.”²⁵² Although termination alone may frequently be insufficient to allow a claim for emotional distress to move forward, the termination coupled with other wrongdoing by the employer may give rise to a claim.

Employer policies regulating off duty behavior do not appear to raise concerns regarding serious invasions of privacy, intentional infliction of emotional distress, or First Amendment claims. Policies that purport to address domestic violence seem to stand on more solid ground than in previous cases. The acts of domestic violence that these policies address are more likely to be directed at behaviors that states have already determined to be unlawful. As a result, the policies are addressing not private, lawful behavior, but behavior that could result in criminal penalties. In addition, employees have legitimate workplace safety concerns that are linked to domestic violence.²⁵³ There is some evidence that domestic violence that occurs outside of the workplace can still impact the batterer’s workplace in terms of lost productivity, wasted resources, and in some instances, violence.²⁵⁴ Arguably there is a connection between the domestic violence and the workplace that would shield such policies from a successful legal challenge.

Finally, employers who fail to develop workplace policies that address domestic abuse may be liable for damages that result from violence that occurs on the job. Under intentional tort theories, employers have been found liable for workplace violence when the employer fails to prevent a threat about which they were aware.²⁵⁵

V. CONTINUING CONCERNS & CRITICISMS

Even if employment policies that addressed the batterer’s role in domestic violence were found to be enforceable and not unlawful, there remains the question as to whether such employer policies would help reduce domestic violence or make victims safer. Some may be concerned that employer based policies might make the

252. *Id.* at 84.

253. *See* Tiesman et al., *supra* note 32, at 282 (noting that employer domestic violence policies have not been scientifically evaluated to assess effectiveness and safety).

254. *See id.*; *see also* Gino Galvez, *Work-Related Intimate Partner Violence: The Role of Acculturation Among Employed Latinos in Batterer Intervention Programs* (2011) (unpublished Ph.D. dissertation, Portland State University) (on file with PDXScholar) (explaining types of workplace disruption that develops from domestic violence that occurs outside of the workplace).

255. *See, e.g.,* Perin, *supra* note 83, at 371.

victims of domestic violence less safe.²⁵⁶ It is arguable that a batterer who is penalized at work for his abusive behavior might respond with greater violence against his victim. In fact, according to a focus group of 29 abusers conducted in 2001 by Employers Against Domestic Violence, a Massachusetts nonprofit, and John Hancock Financial Services “‘zero-tolerance’ policies can endanger victims of domestic violence because many abusers would blame and punish the victim for the company’s action.”²⁵⁷ In addition, it is possible that employer policies may increase the chance of recidivism, particularly with batterers who have lost their employment as a result of an employer anti-domestic violence policy. In fact, some studies show that batterers who are unemployed or do not have a connection to a community may be more likely to repeat behavior and increases the risk to his victim.²⁵⁸ An additional concern is that the fear of employment based responses or sanctions might discourage victims from coming forward. Opponents of such policies might assert that employer policies would drive domestic violence even further underground by encouraging a greater silence around its occurrence for fear of employment related repercussions. However, a key component of any employer policy should be confidentiality. Assuring victims of the confidential nature of the process might help allay fears about safety. It is unclear whether employment based policies would create greater empowerment for women or whether it would take away her power by increasing outside interventions in the relationship between the parties and removing choice. The result of these uncertainties should not be to avoid the dilemma but to call for careful evaluation and study of the employer domestic violence policies.

256. Tiesman et al., *supra* note 32, at 282.

257. *Batterers and the Workplace*, EMPLOYERS AGAINST DOMESTIC VIOLENCE, <http://employersagainstdomesticviolence.org/effects-on-workplace/batterers-and-the-workplace/> (last visited Dec. 30, 2015).

258. See, e.g., Oto Cadsku, Karl R. Hanson, Michael Crawford & Coralie Lalonde, *Attrition from a Male Batterer Treatment Program: Client-Treatment Congruence & Lifestyle Instability*, 11 VIOLENCE & VICTIMS 51, 52 (1996) (noting the relationship between unemployment and batterer intervention program attrition); Campbell et al., *supra* note 25, at 1092; Daniel G. Saunders, *Group Interventions for Men Who Batter: A Summary of Program Descriptions & Research*, 23 VIOLENCE & VICTIMS 156, 158 (2008) (noting unemployment and dropping out of batterer intervention programs); Donald L. Yates, Vijayan K. Pillai & Phyllis E. Berry, *Mediation Verses Arrest Approaches to Domestic Assault: Policy Implications for Addressing Domestic Abuse Among Under-Educated and Jobless Offenders*, 33 AM. J. CRIM. JUST. 282, 286, 288, 293 (2008) (noting the correlation between unemployment and the risk of recidivism).

A further concern of adopting domestic violence employment policies is whether there may be some differentiated impact based on race and class. Domestic violence transcends race and socioeconomic class. Domestic violence affects all races and classes. However, it is important to query whether the public outcry and NFL response to the Ray Rice video was, at least in part, related to race and class. Did Ray Rice's race, African-American, and presumed upper-middle-class status, play a role in the willingness of both the public and the NFL to respond quickly and with indignation to the violence against Janay Palmer? Although the outrage may have been colored by race, the result, the raising of public awareness of domestic violence, is positive, overall.

It is important to acknowledge the impact of race on such policies and how they are applied. Race and socioeconomic class might also impact the fairness of an employment based response. It is arguable that an employment based domestic violence policy will have a disparate impact on people of color. First, it might be used more frequently against workers of color and employers may be more willing to believe and respond to allegations of violence involving people of color. Some argue that while law enforcement is more willing to intervene in families of color and make arrests, violence against women of color is not taken as seriously as violence against white women.²⁵⁹ In fact, immediately after Palmer's assault by Rice, both parties were arrested by the Atlantic City police and charged with simple assault. The prosecutor offered Rice pretrial intervention on the ground that he attend counseling.²⁶⁰ Second, an employment based response to domestic violence might have a greater disparate economic impact on people of color given statistically higher rates of low wage work and unemployment for African-Americans and Latinos.²⁶¹ In addition, families undergoing financial stresses report greater rates of domestic violence.²⁶² There is some evidence that

259. See, e.g., Lisa M. Martinson, *An Analysis of Racism and Resources for African-American Female Victims of Domestic Violence in Wisconsin*, 16 WIS. WOMEN'S L.J. 259, 268–269 (2001); Charles D. Ellison, *We Don't Take Violence Against Black Women Seriously—So Why Should the NFL?*, THE ROOT (July 29, 2014, 11:45 AM), http://www.theroot.com/articles/culture/2014/07/why_ray_rice_s_domestic_violence_suspension_was_so_light.html.

260. See Dan Duggan, *Former Rutgers RB Ray Rice and His Fiancée, Janay Palmer, Arrested After Incident in Atlantic City*, NJ.COM (Feb. 16, 2014, 8:42 PM), http://www.nj.com/rutgersfootball/index.ssf/2014/02/report_former_rutgers_star_ray_rice_arrested_after_incident_in_atlantic_city.html.

261. See U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 218, at 6–7.

262. Selmi & Cahn, *supra* note 27, at 25.

there are differing effects of domestic violence and domestic violence responses based on race and class.²⁶³ As noted above, some studies reveal that warrantless arrest policies may have different impacts depending upon race as well as employment status.²⁶⁴ Another recent study of workplace fatalities found that "Hispanic women had significantly higher work-related IPV fatality rates" even though their intimate partner violence fatality rates for the same or lower than other groups.²⁶⁵ How race, ethnicity, and socio-economic class intersect to affect rates of domestic violence is not entirely understood and requires more research. Employer domestic violence policies need to be as objective as possible so as to guard against the undue influence of racial stereotypes and privilege. In fact, workplace education and training programs should take a cross-cultural, multi-racial perspective so as to lessen the negative racial effects of such workplace policies.

VI. CONCLUSION

The Janay Palmer and Ray Rice incident focused the nation's attention on domestic violence, and the NFL's response raised public awareness of the role employers can play in addressing it. Despite data suggesting that domestic violence spills into the workplace and can present significant safety, productivity, and financial costs to employers, most private employers, and the federal government have been slow to address the link between employment and domestic violence head on. While a number of employers and states have developed employment policies providing leave, unemployment compensation, and prohibiting discrimination against domestic violence survivors, all employers, states, and the federal government should do so. Moreover, too few employers and legislators have explored the ways in which employers can round out their domestic violence employment policies by including a protocol for responding

263. See, e.g., Linda L. Ammons, *Mules, Madonnas, Babies, Bathwater, Racial Imagery and Stereotypes: The African American Woman and the Battered Woman Syndrome*, 1995 Wis. L. Rev. 1003, 1023 (1995); Adele M. Morrison, *Changing the Domestic Violence (Dis)course: Moving from White Victim to Multi-Cultural Survivor*, 39 U.C. DAVIS L. REV. 1061, 1065 (2006); Jenny Rivera, *The Violence Against Women Act and the Construction of Multiple Consciousness in the Civil Rights and Feminist Movements*, 4 J.L. & POL'Y 463, 492 (1996); Leti Volpp, (Mis)Identifying Culture: Asian Women and the Cultural Defense, 17 HARV. WOMEN'S L.J. 57, 100-01 (1994); Jenny Rivera, *Domestic Violence Against Latinas by Latino Males: An Analysis of Race, National Origin and Gender Differentials*, 14 B.C. THIRD WORLD L.J. 231, 234-35 (1994).

264. See, e.g., Olagunji & Reynolds, *supra* note 18, at 208-09.

265. Tiesman et al., *supra* note 32, at 281.

to and dealing with batterers in the workplace. As researchers of workplace domestic violence fatalities aptly noted, “Given that many IPV victims are employed and spend a great deal of time at work, the workplace is an important area for intervention and protection.”²⁶⁶

266. *Id.* at 283.

