Expanded Domestic Violence Protections in Employment

~Changing Domestic Violence Legal Landscape~
STATEWIDE DOMESTIC VIOLENCE TASK FORCE

SUMMER WEBINAR BRIEFING SERIES

PART 3

AUGUST 13, 2019

Presented by:

Amy Schwartz-Wallace, Esq.

Empire Justice Center
Existing Employment-Domestic Violence Protections in State Law

- **Employment Discrimination**: Executive Law §292, 296*

- **Unemployment Benefits if Leave Job Due to DV**: Labor Law §593(1)(a)

- **Domestic Violence Employee and Awareness Assistance**: Labor Law §10-b

- **Workplace Leave to Participate in Criminal Prosecution and Obtain an Order of Protection**: Penal Law §215.14
The 2019 Bill

- Around since 2009
- Version passed in 2010 and was vetoed (Veto #6759), and has not passed since then

- A.5618/S.1040
  - Passed both houses on 5/14/19 and awaiting further action
  - If signed into law, will be effective 90 days after signing
Why Amend the 2009 Human Rights Law?

- Could benefit from more practical provisions and statutory guidance around paid and unpaid leave
  - Creates entire new subdivision of HRL to attend more practically to the workplace needs of victims, rather than only include in the enumerated list of protected classes
  - More squarely addresses ability to obtain a leave from employment
    - “Reasonable accommodation” and “undue hardship” legal framework for addressing access to leave (adapted from disability law)
    - Notice of need for leave
- Broaden access by using new definition of “victim of domestic violence” and relief to parents also addressing child protection matters
- Explicit confidentiality protections
- Enforcement still at NYS Division of Human Rights or in state court
“Victim of Domestic Violence” in Executive Law § 292

- Social Services §459-a broader than Family Court Act §812 definition because a longer list of potential offenses
  - Enumerates list of penal offenses more encompassing than the enumerated family offenses—potentially includes ALL penal offenses
  - Has actual physical or emotional injury or risk of harm element
  - Victim can be adult, teen, or minor child
- Same definition to access variety of DV-related rights and services (i.e. DV residential and non-residential services, NY’s Address Confidentiality Program, spousal support, and more)
- Loose people-first type language: from “domestic violence victim status” to “status as a victim of domestic violence”
New Subdivision 22 of Executive Law § 296

- Discriminatory for employer or licensing agency to:
  - Refuse to hire, employ or license
  - Bar or discharge from employment
  - Discriminate in compensation or its terms/conditions/privileges of employment

- Cannot print or circulate any statements, ads, publication, applications for employment which indicate any limitation, specification, or discrimination on the basis of DV victim status for prospective employment
  - Does not prohibit employer from inquiring about DV status for the purpose of providing assistance to or a reasonable accommodation under this law
Reasonable Accommodation Must Be Granted When Employee Needs Absence

- Unlawful discrimination to refuse to provide a **reasonable accommodation** to employee who is **known** to employer as DV victim when they **must be absent** from work for a reasonable time.

- Accommodations are limited to those circumstances laid out in statute’s §296(22)(c)(2).

- Leave must be granted to EE in following specific circumstances when they need to:
  - Seek medical attention for injuries caused by DV (including injury to EE’s child—unless EE is the perpetrator)
  - Obtain DV or rape crisis program services
  - Obtain psychological counseling (including for EE’s child—unless EE is the perpetrator)
  - Engage in safety planning or taking other actions to increase safety, including relocation
  - Obtaining legal services, assisting prosecution, or appearing in court
Factors to Determine if Granting Reasonable Accommodation for Leave is “Undue Hardship” for Employer

- If absence would cause the employer “undue hardship” as defined in §296 (22)(c)(3), employer can legally refuse to provide accommodation

- Determination of undue hardship **shall** include factors such as:
  - Overall size of business (number of employees, number/type of facilities, and size of budget)
  - Type of business operation and work engaged in, including composition and structure of the workforce

* NO SPECIFIC LIMIT ON SIZE OF EMPLOYER, LIKE OTHER HRL PROVISIONS*
Notice of Need for Leave

- An EE who must be absent from work **must** provide employer with **reasonable advance notice** of their absence
  - “Reasonable advance” is not defined term

- If **reasonable advance notice is not possible or feasible**, within a reasonable time after the absence, EE **must** provide their employer with “certification” of the DV **where certification is requested**

- Certification must be in the form of:
  - Police report indicating EE/their child was DV victim
  - Court order protecting/separating EE or their child from perpetrator
  - Evidence from court or prosecutor that EE appeared in court
  - Various service provider documentation that EE was undergoing counseling/treatment for physical or mental health injuries/abuse caused by DV

- **CERTIFICATION NOT REQUIRED WHEN REASONABLE ADVANCE NOTICE GIVEN**
Available Paid and Unpaid Leave Time

- Employer can require EE to charge leave time off against *paid leave time already ordinarily granted*, where available
  - Unless prohibited by rules of existing employee handbook/policy or collective bargaining agreement

- Absence that cannot be charged against paid leave time *may be treated as unpaid leave*

- During paid or unpaid leave time, EE shall be entitled to continuation of their health insurance coverage if they are entitled to a reasonable accommodation
  - SO....if employer wrongly refuses a reasonable accommodation and does not provide EE health insurance benefits, could incur large costs down the road
Disability Caused by Domestic Violence

- Where employee has physical/mental health disability caused by DV, employer must treat them same as EE with any other disability

- However employer is...
  - Still subject to prohibitions against DV victim status discrimination
  - Still subject to reasonable accommodation mandates
Employer’s Duty to Maintain Worker’s Confidentiality

- To extent allowed by law, employer must:
  - Maintain the confidentiality of any information regarding an employee’s status as a victim of domestic violence
NYS Division of Human Rights

- State court action for violations

- DHR has jurisdiction to entertain violations
  - To file complaint: [https://dhr.ny.gov/complaint](https://dhr.ny.gov/complaint)
  - Rules of Practice: [https://dhr.ny.gov/rules-practice](https://dhr.ny.gov/rules-practice)
  - Regional Office locations: [https://dhr.ny.gov/contact-us](https://dhr.ny.gov/contact-us)
Contact:

Amy Schwartz-Wallace, Esq.

aschwartz@empirejustice.org

Empire Justice Center