

Employees Who are Victims of Domestic or Sexual Violence Get New Rights in Illinois

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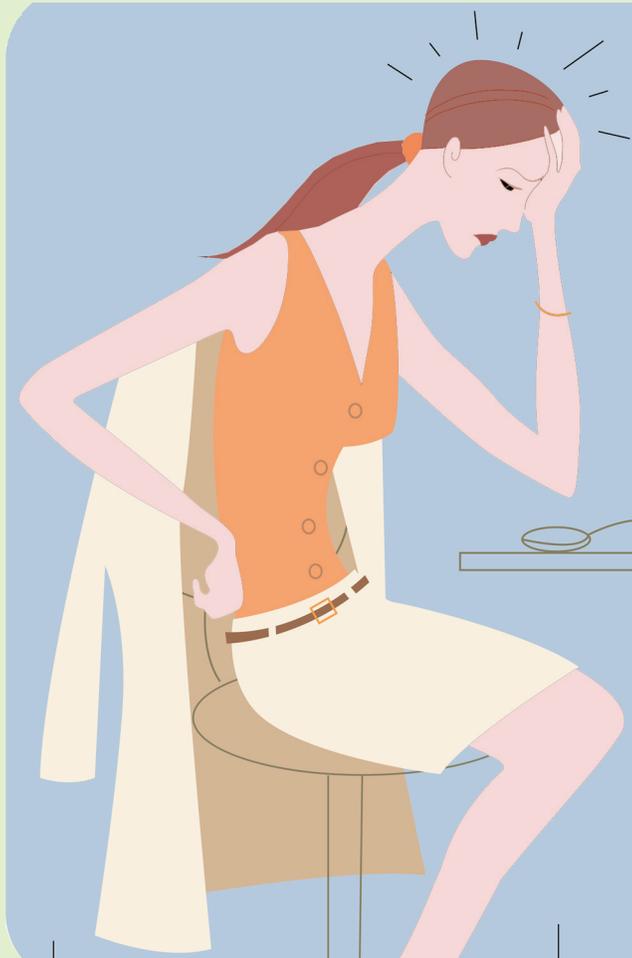
The State of Illinois recently enacted groundbreaking legislation creating significant new rights for employees. Incorporating elements of the Family and Medical Leave Act of 1993 (the “FMLA”) and the Americans with Disabilities Act of 1990 (the “ADA”), the Victims’ Economic Security and Safety Act (the “VESSA”) requires Illinois employers to provide up to 12 weeks of unpaid leave and reasonable accommodations to victims of domestic or sexual violence, and also bars discrimination against them. The stated purpose of the VESSA, which became effective on August 25, 2003, is to entitle victims to seek medical help, legal assistance, counseling, safety planning and other assistance without penalty from their employers. Sec. 15(3). This article offers an introduction to the VESSA and provides recommendations for employers seeking compliance with the new statute’s requirements.

Does the VESSA Apply to Your Business?

The VESSA applies to the State of Illinois, any unit of local government or school district, and any “individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons” that has 50 or more employees. Sec. 10(10) & (15). Unlike the FMLA – which applies only to individuals employed at a worksite within 75 miles of at least 49 other employees – there is no requirement under the VESSA that these 50 employees be employed within a defined geographic area. Therefore, although the FMLA may not apply to a company’s satellite office in Illinois, the VESSA applies to that office if the employer has at least 50 employees.

What Employees Are Eligible?

All Illinois employees of a covered employer are entitled to VESSA leave, regardless of



whether they work full-time or part-time. Sec. 10(9). Moreover, unlike the FMLA, an employee need not work a specific number of months or hours to be eligible for leave.

What Sort of Leave Requests Trigger the VESSA?

Section 20(a) of the VESSA, entitles an employee to leave if the individual is a victim of domestic or sexual violence or has a family or household member who is such a victim (and whose interests are not adverse to the employee as it relates to the domestic or sexual violence) *and* the leave is for one or more of the following reasons:

- (i) seeking medical attention for, or recovering from, physical or psychological injuries caused by domestic or sexual violence to the employee or the employee’s family or household member;
- (ii) obtaining services from a victim services organization for the employee or

the employee’s family or household member;

- (iii) obtaining psychological or other counseling for the employee or the employee’s family or household member;

- (iv) participating in safety planning, temporarily or permanently relocating, or taking other actions to increase the safety of the employee or the employee’s family or household member from future domestic or sexual violence or ensure economic security; or

- (v) seeking legal assistance or remedies to ensure the health and safety of the employee or the employee’s family or household member, including preparing for or participating in any civil or criminal legal proceeding related to or derived from domestic or sexual violence.

Who is a “family or household member”?

For purposes of the VESSA, a “family or household member” is a spouse, parent, son daughter, or any person jointly residing in the same household. Sec. 10(12). Meanwhile, the term “parent” is further defined to include not only a biological parent, but also an individual who stood in loco parentis to an employee when the employee was a child. “Son or daughter” in turn, is defined as “a biological, adopted, or foster child, a legal ward, or a child of a person standing in loco parentis, who is under 18 years of age, or is 18 years of age or older and incapable of self-care because of a mental or physical disability.” Sec. 10(13).

How Does the VESSA Define “Domestic” or “Sexual Violence”?

The statute’s definitions of the terms “domestic” and “sexual” violence are vague. The VESSA defines “domestic” or “sexual violence” as “domestic violence, sexual assault, or stalking.” Sec. 10(5). “Domestic violence” is further defined as including “acts or threats of violence, not including acts of self defense,

. . . , sexual assault, or death to the person, or the person's family or household member, if the conduct causes the specific person to have such distress or fear." Sec. 10(6). Additionally, "sexual assault," "domestic violence," and "stalking" are further defined by reference to specific sections of the Illinois Domestic Violence Act of 1986 and the Criminal Code of 1961. Sec. 10(6), (20) & (21). The criminal code definitions of these terms are intricate. For example, "stalking" is defined in part as when an individual "knowingly and without lawful justification, on at least 2 separate occasions follows another person or places the person under surveillance or any combination thereof and . . . places that person in reasonable apprehension of immediate or future bodily harm, sexual assault, confinement or restraint, or . . ." 720 Ill. Comp. Stat. § 5/12-7.3(a). Accordingly, employers should probably institute a VESSA policy that is over inclusive, rather than attempting to draft a policy that is confined to the letter of the law.

Structuring the Period of Leave

An eligible employee is entitled to up to 12 workweeks of unpaid leave during any 12-month period. Sec. 20(a)(2). This leave may be taken either on an intermittent or a reduced work schedule basis. Sec. 20(a)(3). The VESSA specifies that it does not create a right to take unpaid leave that exceeds the unpaid leave time permitted by the FMLA. Sec. 20(a)(2). One might reason that this provision renders the VESSA inapplicable to employees who are ineligible for leave under the FMLA, but such an argument would render the VESSA's definitions of "employee" and "employer" meaningless.

Although VESSA leave is unpaid, "[a]n employee who is entitled to take paid or unpaid leave (including family, medical, sick, annual, personal, or similar leave) from employment, pursuant to federal, State, or local law, a collective bargaining agreement, or an employment benefits program or plan, may elect to substitute any period of such leave for an equivalent period of leave provided under [the VESSA]." Sec. 25.

How Much Notice Must an Employee Give?

If practicable, the employee is required to give his or her employer at least 48 hours' advance notice of the employee's intention to take leave. Sec. 20(b). Unlike the FMLA, however, more notice is not

required where the need for such leave is foreseeable in advance. An employer may require an employee on VESSA leave to report periodically on the status and intention of the employee to return to work. Sec. 20(e)(1)(D).

What Sort of Certification May an Employer Require?

An employer may require that the employee provide certification both that the employee or the employee's family or household member is a victim of domestic or sexual violence *and* that the leave is for one of the VESSA's enumerated purposes describe above. Sec. 20(c)(1). Certification must be provided within a "reasonable period" after the employer requests certification. Sec. 20(c)(1)(B). Even if an employee is unable to provide 48 hours' advance notice of the leave, the employer may not take any action (*e.g.*, a suspension of termination) against the employee if the employee provides certification within a reasonable period after the absence. Sec. 20(b).

An employee may satisfy the certification requirement by providing to the employer a sworn statement of the employee and, when received by the employer, other corroborating evidence such as a police or court record or documentation from a victim services organization, an attorney, a member of the clergy, or a medical or other professional from whom the employee or the employee's family or household member has sought assistance regarding domestic or sexual violence. Sec. 20(c)(2).

Confidentiality

All information provided to an employer pursuant to the notice and certification requirements, and the fact that the employee has requested or obtained VESSA leave, "shall be retained in the strictest confidence by the employer," except to the extent that disclosure is requested or consented to in writing by the employee, or otherwise required by applicable federal or state law. Sec. 20(d).

Returning from VESSA Leave

An employee on VESSA leave is entitled to return to the same or an equivalent position (meaning equivalent in pay, benefits and other terms and conditions of employment). Sec. 20(e)(1). VESSA leave cannot result in the loss of any employment benefit that accrued prior to the start of an employee's leave. Sec. 20(e)(1)(B). However, the VESSA does not

create an entitlement to the accrual of seniority or other "employment benefits" (*e.g.*, sick leave or educational benefits) while on leave, or any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken leave. Sec. 20(e)(1)(C). In the FMLA context, courts have concluded that similar language does not protect an employee from dismissal while on leave if the employer would have terminated the employee even if the employee had not been away on leave. *Kohls v. Beverly Enterprises Wisconsin, Inc.*, 259 F.3d 799 (7th Cir. 2001) (no violation of FMLA where employer discovered disciplinary violation while employee on leave and terminated employee for that disciplinary violation).

Maintenance of Health Benefits

Employers must maintain health-care coverage for employees on VESSA leave at the level and under the conditions the coverage would have been provided had the employee not gone on leave. Sec. 20(e)(2)(A). If an employee fails to return from leave, the employer may recover any premiums paid to maintain coverage for the employee and the employee's family during the period of leave unless the employee's failure to return to work is due to (a) the continuation, recurrence, or onset of domestic or sexual violence that entitles the employee to VESSA leave, or (b) other circumstances beyond the control of the employee. Sec. 20(e)(2)(B). An employer may require an employee to provide certification that the employee is not able to return to work because of one of these reasons. Sec. 20(e)(2)(C).

Reasonable Accommodations Required

Similar to the reasonable accommodation requirement of the ADA, the VESSA requires employers to make "reasonable accommodation to the known limitations resulting from circumstances relating to being a victim of domestic or sexual violence or a family or household member being a victim of domestic or sexual violence of an otherwise qualified individual . . . unless the employer or public agency can demonstrate that the accommodation would impose an undue hardship on the operation of the employer or public agency." Sec. 30(b)(1).

Who May Request an Accommodation?

An employer is required to provide a reasonable accommodation to a qualified individual

who is an employee or applicant and who is a victim of domestic or sexual violence or has a family or household member who is a victim of domestic or sexual violence whose interests are not adverse to the victim as it relates to the domestic or sexual violence. Sec. 30(b)(1). Similar to the ADA, the VESSA defines a “qualified individual” as an applicant or employee who, but for being a victim of domestic or sexual violence or with a family or household member who is a victim of domestic or sexual violence, can perform the essential functions of the job. Sec. 30(b)(2).

What is a “Reasonable Accommodation”?

A “reasonable accommodation” may include an adjustment to a job structure, workplace facility, or work requirement, including a transfer, reassignment, or modified schedule, leave, a changed telephone number or seating assignment, installation of a lock, or implementation of a safety procedure, in response to actual or threatened domestic or sexual violence.” Sec. 30(b)(3).

What Qualifies as an “Undue Hardship”?

An “undue hardship” means an action requiring significant difficulty or expense, when considered in light of the following factors: the nature and cost of the reasonable accommodation needed, the overall financial resources of the employer and of the facility involved, the number of persons employed at such facility and the overall size of the employer’s business, the effect on expenses and resources, or the impact otherwise of such accommodation on the operation of the facility, the type of operation of the employer, including the composition, structure, and functions of the workforce, the geographic separateness of the facility from the employer, and the administrative or fiscal relationship of the facility to the employer. Sec. 30(b)(4).

Discrimination Prohibited

An employer may not discriminate against an individual because: (i) the individual is or is perceived to be a victim of domestic or sexual violence; (ii) the individual requested to participate in or participated in/prepared for a criminal or civil court proceeding relating to an incident of domestic or sexual violence of which the individual or a family or household member of the individual was a victim; (iii) the individual requested an accommodation

in response to actual or threatened domestic or sexual violence, regardless of whether the request was granted; or (iv) the workplace is disrupted or threatened by the action of a person whom the individual states has committed or threatened to commit domestic or sexual violence against the individual or the individual’s family or household member. Sec. 30(a).

Retaliation Prohibited

In addition to a general ban on retaliation for exercising rights under the VESSA, Sec. 20(f)(1), the VESSA specifically prohibits employers from taking any adverse employment actions against employees who have filed a VESSA charge; who have given information in connection with a VESSA inquiry or proceeding; or who have, or are about to testify in any VESSA inquiry or proceeding. Sec. 20(f)(2).

Employer’s Duty to Post Notice

Covered employers must post a notice prepared and approved by the Illinois Department of Labor (the “IDOL”), summarizing both the requirements of the VESSA and information pertaining to the filing of a charge. Sec. 40. The notice must be posted in a conspicuous place where notices to employees are customarily posted. Sec. 40.

Remedy for Alleged Breach

Individuals who believe that their VESSA rights have been violated have only one avenue of relief: they may file a complaint with the IDOL within three years of the alleged violation. Sec. 35(a)(1). The Director of the IDOL will investigate the complaint and will issue a decision stating its findings. The IDOL may award the following relief: back pay plus interest; equitable relief such as hiring, reinstatement, promotion and reasonable accommodations; and reasonable attorney’s fees and costs. Sec. 35(a)(1). An employer who has been ordered to pay damages and who fails to do so within 30 days may be ordered to pay a penalty of 1% per day for each day of delay. Sec. 35(b).

The VESSA does not authorize private civil actions for any alleged violations.

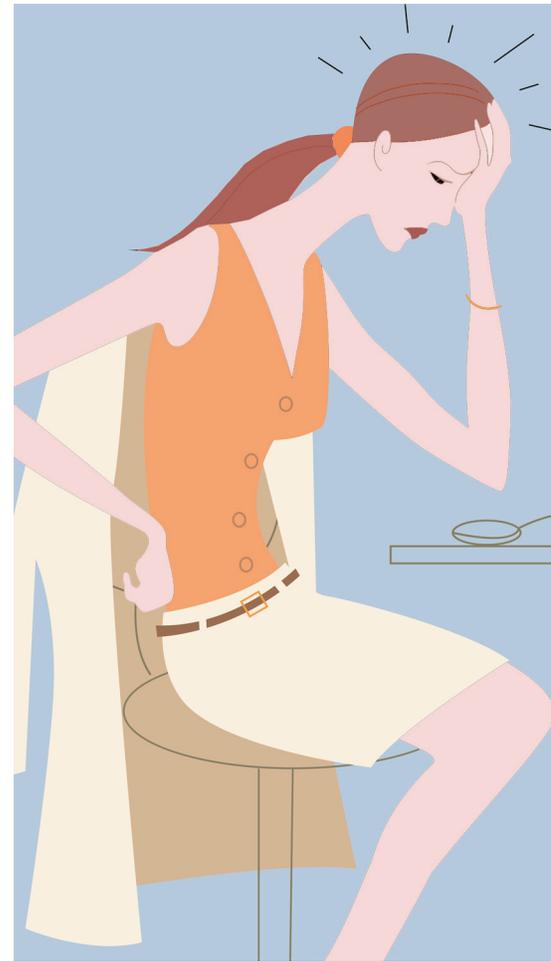
Recommendations

Illinois employers should update their handbook and equal-employment policies to affirmatively state that the employer does not discriminate against victims of domestic

or sexual violence.

Employers should also adopt policies regarding requests for leave and for reasonable accommodations under the VESSA. These policies can be structured in a similar manner to the employer’s FMLA and ADA policies.

Employers should train front-line managers, human resources personnel and any other person likely to receive requests for leave or reasonable accommodations on both the VESSA’s requirements and the specific provisions of the company’s policies to the extent such policies are more expansive



than the Act. In the related contexts of the FMLA and the ADA, suits are often based in part on the employee’s perception that these front-line managers ignored or mishandled a request for leave or a reasonable accommodation.

Finally, employers must post the required notice regarding VESSA rights. ■

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