

Sue K. Willman
Employment Attorney
Spencer Fane Britt & Browne LLP

On behalf of the
Society for Human Resource Management

Testimony before the U.S. Senate Subcommittee on
Employment and Workplace Safety

“Too Much, Too Long?
Domestic Violence in the Workplace”

628 Dirksen Senate Office Building
10:00 am
April 17, 2007

Introduction

Chairwoman Murray, Ranking Member Isakson, distinguished members of the committee, my name is Sue Willman, and I am an employment attorney with the law firm of Spencer Fane Britt & Browne LLP. I commend the Subcommittee for holding this hearing on domestic violence in the workplace, and appreciate the opportunity to testify. My comments will focus on my experience with workplace violence and legislation that Chairwoman Murray has introduced in previous congresses, known as the Security and Financial Empowerment (SAFE) Act.

By way of introduction, I am a member of my law firm's labor and employment practice group. I have over 30 years of experience both as an employment lawyer and as a human resource (HR) professional, and have spent a good part of my career advising employers on issues relating to leave in the workplace, including the Family and Medical Leave Act (FMLA).

I am also a certified human resource professional, and appear today on behalf of the Society for Human Resource Management (SHRM). SHRM is the world's largest association devoted to human resource management. Representing more than 210,000 individual members, the Society's mission is to serve the needs of HR professionals by providing the most essential and comprehensive resources available. As an influential voice, the Society's mission is also to advance the human resource profession to ensure that HR is recognized as an essential partner in developing and executing organizational strategy. Founded in 1948, SHRM currently has more than 550 affiliated chapters within the United States and members in more than 100 countries.

SHRM is well positioned to provide insight on the impact of domestic violence in the workplace as well as the role of employers in responding to this issue. HR professionals are responsible for designing and implementing employee benefit programs that meet the needs of workers and contribute to organizational success. HR professionals strive to offer the right mix of benefits to attract and retain top performers while balancing the

increasing costs of offering these benefits. Organizations also depend on their respective HR departments to craft policies that help to ensure a safe workplace.

I also approach this issue from a unique perspective, from that of a survivor of domestic violence. I am one of the nearly one-third of American women who report being physically or sexually abused by a husband or boyfriend at some time in their lives.¹ I divorced my first husband in 1978, after three years of physical abuse. Wanting to help other women make the journey from victim to survivor, I have served on the Board of Directors for both Safehome, Inc., a shelter for battered women in Kansas City, and the Domestic Violence Network, a coalition of shelters and organizations devoted to preventing domestic violence. These organizations provide invaluable support and education to countless women nationwide.

As employment counsel to hundreds of employers, I have provided legal advice on domestic violence situations for over 10 years. Such counsel has included drafting workplace domestic violence policies and conducting training on best practices for dealing with domestic violence situations at work, including stalking of employees, threats by abusers against employees, and frequent requests for time off. I have also developed a web-based training program on workplace violence for my clients.

Domestic Violence in the Workplace

As a result of my background and experiences, I am extremely sensitive to the perspective of domestic violence victims. With nearly one in three women reporting abuse at some time in their lives, domestic violence is likely to affect most workplaces. . . Indeed, I believe employers are legitimately concerned about harmful domestic relationships spilling over into the workplace as the number of these incidents continues to grow.

Domestic violence can affect an organization in numerous ways. Certainly, violence in the workplace exposes employees to physical harm, but even the threat of violence can be

¹ U.S. Department of Justice, Bureau of Justice Statistics, (2000). Intimate Partner Violence. NCJ 178247

detrimental to employee output, attendance, morale, well-being, and retention. In a survey of Fortune 1000 companies, 49 percent of corporate leaders said domestic violence had a harmful effect on their company's productivity; 47 percent said it had a harmful effect on attendance; and 44 percent said it had a harmful effect on health care costs. For all these reasons, workplace violence can negatively affect employers' bottom lines. In 2003, the Centers for Disease Control and Prevention estimated domestic/intimate partner violence cost employers \$727.8 million in lost productivity.

Not only does domestic violence affect a victim at work, domestic violence often infiltrates a workplace to the point of placing the safety of other employees in jeopardy. Studies of survivors (cited by the ABA Commission on Domestic Violence) indicate that 67% of their abusers came to the victims' workplaces. A recent study in Maine found that 78% of surveyed perpetrators used the workplace to check up on, pressure, threaten, or express anger or remorse to their victims. In addition, the SAFE Act states that 94% of corporate security and safety directors at companies nationwide rank domestic violence as a "high security" concern, and for good reason, as explained in the following paragraph.

It is not unusual for abusers to threaten the safety of other employees in an effort to control, gain access to, and/or determine the whereabouts of the victim. It is also not unusual for the employer and other employees to become targets of the abuser's violence if the abuser perceives them as providing assistance or protection to the victim. Any measures to address domestic violence in the workplace must appropriately balance the victim's individual interests with the rights of all employees to work in a safe environment.

One of the many situations in which I participated as a domestic violence prevention team member involved a female abuser who threatened the life of a male employee (her significant other) and other employees who refused to disclose his whereabouts or permit her to speak with him by phone at work. This went on for several weeks, during which time the employer adjusted his work schedule, placed him on paid leave, required that he

obtain a restraining order, and imposed other conditions to protect him and the workforce. Notwithstanding these efforts, she persisted in stalking him at work. In the meantime, and while the employer was assisting the victim, he, unbeknownst to the employer, disclosed to her where he was staying while on leave and advised her of all efforts the employer made to help him. She then became extremely angry at the employer for interfering and began making threats, including death threats, against other employees (the receptionist, his supervisor and others), which led the employer to place the receptionist on paid leave in order to protect her. The abuser then showed up on the premises with a loaded gun and threatened to kill employees if her significant other did not come out to see her, while her four small children were in her car observing. Although the employee had obtained a restraining order against her, and although the police were called to subdue the situation and arrest her, she posted bail and later was involved in a drive-by shooting at the victim's resident. She ultimately spent time in jail, but was later released and resumed her relationship with this gentleman, in spite of all the efforts the employer had made to protect him and other employees. Thereafter, the relationship would become volatile (violence and threats) again. The employer finally determined that the only way to protect the safety of the entire workforce was to terminate his employment.

Employer Response

Over the last decade, employers have begun to recognize the impact domestic violence has on the workplace and have actively sought to mitigate its potential effect on their organization. Certainly, progress varies across the professional landscape; while some employers are just starting to develop and implement workplace violence programs, other organizations have been leaders in the fight against domestic violence and have long provided support and resources to victims. The SHRM Knowledge Center is frequently contacted in regards to issues relating to domestic violence in the workplace. Specifically, HR professionals are interested in learning how to implement successful workplace policies, make available victim referral services, and establish workplace security measures around workplace violence events.

SHRM strongly believes that every employee is entitled to a safe work environment, and HR professionals play a critical role in ensuring their organizations provide necessary support. HR professionals can help their organizations create and foster a culture that promotes diversity, effective communication and the dignity and respect of all employees.

To reinforce this culture, it is SHRM's view that organizations need domestic violence policies that ensure a consistent and uniform organizational response to domestic violence and limit the occurrence of violent incidents. Employers need policies that outline ways the organization can support victims and the safety of all employees. Once a policy is in place, an employer must make sure all employees are aware of it through communication, training and enforcement. To reduce violence at the workplace, it is critical that employers create workplaces where employees will feel free to come forward by ensuring their situation is handled in a sensitive and confidential manner.

Progressive employers who have addressed this issue realize the complexities of dealing with domestic violence in the workplace. They understand there is no "one size fits all" approach to providing assistance when domestic violence finds its way into the workplace. Each situation must be evaluated on a case-by-case basis. Employers have established multi-disciplinary teams that are charged with evaluating workplace violence issues as they arise. These teams are normally comprised of human resource, security, safety, legal, and operations personnel who have been trained in evaluating and handling workplace violence situations. These teams often have outside consultants on call, such as psychologists and law enforcement personnel who have expertise in domestic violence evaluation and intervention.

When these teams evaluate domestic violence situations, the first issue is to assess whether the domestic violence has infiltrated the workplace, and if not, the likelihood that it might. The next step is to assess the risk to the workplace as a whole. Numerous factors must be taken into account. These factors include: (1) whether the abuser has visited the employer's premises; (2) the abuser's behavior while on any of the employer's

property (including parking lots, etc.); (3) whether the abuser has been contacting the victim at work; (4) the nature of any communications the abuser has had with the victim at work; (5) whether the abuser has threatened or attempted to penetrate the employer's security measures; (6) whether the abuser has threatened other employees or the employer's property; (7) whether the victim has obtained a restraining order; (8) whether the victim is seeking assistance from a lawyer, the courts, domestic violence advocates, a therapist, and other resources; (9) whether the abuser has previously caused physical harm to the victim; (10) whether any efforts by the employer to assist the victim will increase the likelihood, nature, or extent of violence in the workplace; (11) whether the victim has children who are also at risk; and (12) whether the victim will fully cooperate and not undermine any assistance the employer provides.

Psychological experts on domestic violence have advised employers that they must be careful about the steps they take to assist victims when domestic violence finds its way into the workplace. Even seemingly helpful measures such as providing time off to the victim, changing the victim's telephone extension, refusing to allow the abuser to speak with the victim by telephone, requiring the victim to obtain a restraining order, and refusing to tell the abuser whether the victim is or is not at work can jeopardize the safety of the entire workforce. Abusers, who have anger and control problems, often perceive such efforts as a conspiracy between the employer and the victim. They become frustrated, angry, and feel out of control when employers make it difficult for them to access their victims. Unfortunately, and in too many cases, the employer and other employees unwittingly become additional targets of violence because of their good faith efforts to help or protect the victim.

As I mentioned earlier, I have advised numerous employers on workplace violence and workplace domestic violence situations. I have found employers to be extremely compassionate about the challenges facing victims. I have also found them to be more than willing to provide reasonable assistance to victims (including reasonable time off from work), without a government mandate, as long as the assistance did not jeopardize the safety of the rest of the workforce. In fact, a new federal mandate, as proposed in the

SAFE Act, could prevent an employer from properly assessing and reacting to the unique situation they are facing.

I encourage employers and my clients to adopt voluntary policies to address domestic violence in the workplace, as employers need flexibility when providing any particular measures or benefits when domestic violence becomes a workplace issue. Every situation has to be evaluated on a case-by-case basis, with safety of the entire workforce being the top priority.

I am not familiar with any data that demonstrates that employees have been discriminated against by their employers because of their domestic violence situations or that employers are regularly terminating their employment because of the domestic violence. Many of the statistics surrounding the issue of domestic violence come from victim studies. To serve as a useful guide for employers and public policy makers, this information must be combined with the experience of employers and experts on the psychological and safety aspects of domestic violence. Because of the many factors that must be considered when domestic violence enters the workplace, Congress would be remiss in mandating any measures unless adequate research examining the total picture has been done.

The Occupational Safety and Health Administration (OSHA) has studied the issue of workplace violence for many years. However, to date, OSHA has only issued guidelines and elected not to issue regulations because of the difficulty in mandating specific standards when there are no easy answers, many factors are involved, and there is no perfect solution.

Before any federal employment legislation is considered, the government should thoroughly research best practices already utilized by employers to address domestic violence situations, provide guidelines to employers on how to assess workplace risks of domestic violence, encourage employers to provide victims with referrals and resource materials, encourage employers to take steps to increase workforce awareness of

domestic violence issues, and consult with psychological and law enforcement experts on the risks of well-intentioned intervention by employers.

General Comments About the SAFE Act

The SAFE Act incorporates concepts from the Family and Medical Leave Act (FMLA), the Americans with Disabilities Act (ADA), the Fair Labor Standards Act, and various federal laws on domestic violence (such as the Higher Education Amendments of 1998 and the Violence Against Women Act). It gives enforcement power to the Department of Labor (DOL), rather than the Equal Employment Opportunity Commission (EEOC) or OSHA, who have far more familiarity and expertise in dealing with employment discrimination and safety issues.

SHRM is concerned that the legislation primarily focuses on protecting individual victims of domestic violence and ignores the inevitable workplace safety issues that will arise and affect other employees and entire workforces. SHRM believes that there needs to be a balance between the interests of a victim and the welfare of all other employees who, due to no fault of their own, often become unintentional, additional victims of the domestic violence.

The other major challenge with the SAFE Act involves numerous implementation and interpretation challenges. In an effort to protect victims, it overlooks the realities of the workplace and the difficulties that employers will have in administering its provisions. SHRM also has concerns with the leave benefit provisions of the legislation. Both of these issues are addressed later in these comments

Leave Benefits

The SAFE Act would provide a federal entitlement to workers to emergency leave in the event of domestic or sexual violence. As I understand it, one of the purposes of the SAFE Act is to allow victims of domestic violence to take time off from work to make court appearances, seek legal assistance, and get help with safety planning. However, I

question the necessity of a federal requirement that employers provide an entirely new category of leave when employees virtually always have available other types of leave.

There are no data to suggest that current leave programs fail to provide adequate time off for victims of domestic violence. Employers nationwide are committed to providing *voluntary* paid leave to their employees because offering competitive workplace benefits allows employers to increase employee morale, retention, and productivity, all of which are crucial elements to organizational success.

In fact, a majority of employees view paid time off as one of the more important benefits an employer can offer. For example, employee benefits were cited as the second-most important recruitment and retention factor behind only compensation in the 2005/2006 *SHRM Job Satisfaction Survey Report*. To compete for talent, most employers currently provide voluntary paid vacation, paid sick days, paid personal days, paid time-off (PTO) plans and liberal attendance policies. These benefits come at a significant cost to employers, as roughly 31 percent of payroll is spent on benefits (both voluntary and involuntary benefits). Moreover, the cost of these voluntary benefits increased by 29 percent in 2006 over the previous year.² Even with these benefit cost increases, employers continue to offer these benefits because they are committed to helping their employees balance the demands of both their work and personal lives.

Many employers also offer nontraditional scheduling options to help accommodate employees' work/life balance. According to the *2006 SHRM Benefits Survey Report*, thirty-five percent of organizations allow for compressed workweeks, where full-time employees are allowed to work longer days for part of a week or pay period in exchange for shorter days or a day off during the same period. Such scheduling benefits give another dimension of flexibility to employees who are dealing with domestic violence issues.

² 2006 *SHRM Benefits Survey Report*

Since many employers already offer paid leave voluntarily to their employees, a federal mandate requiring leave for domestic violence could have the opposite effect of its intention. It is likely that some employers would be forced to reduce existing employee benefits in order to comply with a new federal standard for domestic violence-related leave. In this way, any federal initiative that limits employer flexibility tends to work against employees. This reality has been well-documented in several congressional hearings since enactment of the Family and Medical Leave Act. Employers that provided generous paid leave benefits prior to the FMLA's enactment have been impacted the most by the Act's provisions. The end result has been more organizations rethinking their existing sick leave programs and the voluntary expansion of paid leave policies. Adding a new type of leave system will only heighten this concern, and will discourage employers from implementing additional improvements in their paid leave programs.

Moreover, under current law, employees already have access to job-protected leave under the FMLA, which was established to assist employees in balancing their work and family life. The law guarantees eligible employees 12 workweeks of unpaid leave during any 12-month period for the birth or adoption of a child or for an employee's serious medical condition or to care for a parent or child. Some states have additional family and medical leave requirements as well. Federal law does not require FMLA leave to be paid, but 32 percent of HR professionals responding to the *2006 SHRM Benefits Survey Report* indicated that their organizations did offer some paid family leave. Twenty-seven percent of HR professionals reported that their organizations offered family leave above required federal FMLA leave, and 25 percent offered family leave above required state FMLA leave.

The leave benefits proposed in the SAFE Act provide for six (6) weeks of time off. This time off is in addition to any FMLA leave benefits to which the employee is entitled. There is no requirement that these six weeks run concurrently with FMLA leave. Being the victim of domestic violence is emotionally and psychologically traumatic, and as a practical matter, it is highly likely that the situation would qualify as a serious health condition under the FMLA, allowing the victim to take up to 12 weeks of leave.

Unemployment Benefits

The legislation not only proposes that employers provide six weeks of time off, it also requires unemployment benefits for victims of domestic violence who are separated from employment “due to circumstances resulting from the individual’s experience of domestic violence.” There is no requirement that the victim must actually remove himself/herself from the abuser’s household. SHRM is concerned that language in the SAFE Act would allow an abuser to manipulate the victim by forcing a victim to quit his/her job and stay home (in the abuser’s household) while collecting unemployment compensation at the same time. Employers should not be required to fund unemployment benefits when the victim has not taken steps to actually remove himself/herself from the abusive situation.

Discrimination and Accommodation Benefits

The discrimination provisions in the legislation prohibit discrimination because an applicant or employee: (1) is or is perceived to be a victim of domestic violence; (2) participates in legal proceedings related to the domestic violence; or (3) requests an accommodation to increase his/her personal safety in the workplace. As a result, an employer would also have a “duty to reasonably accommodate” the employee. However, unlike the ADA, the legislation does not provide a process to engage the employee to determine what type of accommodation is necessary. If the employer requires the employee to take a leave of absence because the abuser is harassing or stalking the employee at work, and if the employee refuses to do so, it could be considered a discriminatory practice. If the employer requires the employee to adjust his/her work schedule and the employee refuses, it could be considered discrimination if the employer insists upon it. If the employer refuses to install additional locks or other security measures, it could be considered discrimination. Unlike the ADA, the SAFE Act does not require an interactive process for evaluating accommodations.

More significantly, the SAFE Act specifically states that “an employer shall not...discharge...or otherwise discriminate against any individual...because the

workplace is disrupted or threatened by the action of a person whom the individual states has committed or threatened to commit domestic violence, dating violence, sexual assault, or stalking against the individual, or the individual's family or household member." This language raises serious concerns about an employer's ability to ensure a safe workplace. For example, consider the situation in which an abuser has threatened to kill other employees because they will not disclose the whereabouts of the victim or will not provide telephonic or in person access to the victim. In this situation, the welfare of other employees is certainly being threatened, but under the SAFE Act, employers would be prohibited from terminating or placing on administrative leave the employment of the victim, even when such termination might be the only way to remove the safety risk from the workplace.

Implementation Concerns

I understand the desire of members of the Subcommittee to help victims of domestic violence. Although well-intentioned, the SAFE Act includes a host of broadly based employment-related provisions that would negatively impact employers. Moreover, these provisions conflict with other federal and state employment laws, which will cause confusion for both employers and employees. In particular, the bill would invite confusion with the FMLA and state FMLA laws.

The SAFE Act would apply to employers with as few as 15 employees. The bill would be a monumental new requirement on small employers that are *not* currently covered under the FMLA. Also, unlike the FMLA, there is no service eligibility requirement under the SAFE Act, so an employee who has been with an organization even one day would be eligible for the 30 days of leave, and all part-time employees are presumably covered under the proposed legislation as well.

Employers would face many implementation and interpretation problems if the SAFE Act were enacted. I have outlined a number of these issues below.

New Federal Leave Statute—The SAFE Act proposes an entirely new federal leave statute for addressing employees, or employees’ family members, who are victims of domestic violence. The leave provisions entitle employed victims of domestic or sexual violence to take 30 days (6 workweeks) of leave in any 12 month period to seek medical help, legal assistance, counseling, safety planning, and other assistance. A victim of the kind of domestic violence contemplated by the proposal is under substantial personal stress that normally results in one or more psychological conditions (such as post-traumatic stress syndrome, battered woman syndrome, startle response syndrome, and a host of other related conditions). These conditions would, in all likelihood, qualify as a psychological serious health condition under the FMLA. Therefore, the FMLA already provides adequate leave.

Impact on Small Employers— The SAFE Act would apply to employers with 15 or more employees, placing significant new requirements on small employers that are *not* currently covered under the FMLA. Instead of burdening small employers, Congress might consider incentives for employers to provide additional resources or benefits to employees who may be victims of domestic violence.

Coordination with Other Laws—Many of the SAFE Act provisions are not coordinated with other federal and state employment laws, which will cause confusion for both employers and employees. Most notably, they are not coordinated with the FMLA or the ADA, or OSHA. They will be administered by the DOL, rather than EEOC or OSHA who have far more experience with discrimination and accommodation issues.

Interaction with Other Laws—The psychological condition of the victim could potentially qualify as a “serious health condition” under the FMLA and a “disability” under the ADA. This invites confusion as to which law will apply and how they will relate to each other. For example, there is no requirement that domestic violence leave run concurrently with FMLA, when the leave would in all likelihood qualify as FMLA leave. The bottom line is that the SAFE Act expands the FMLA entitlement from 12 weeks to 18 weeks when the additional 30 days of domestic violence leave is added to it.

Furthermore, an employee may elect to use paid time off while on domestic violence leave, whereas under the FMLA, an employer can require that paid time off be used. If the victim's psychological condition qualifies for leave under the SAFE Act, FMLA, and ADA, which law will take precedent? Can an individual circumvent each law by stacking leave under each one of them?

Ambiguous Definitions—Many of the definitions in the SAFE Act are overly broad and could result in interpretation disputes.

- 1.) **“Domestic Violence”**—The definition of “domestic violence” is not clear. The proposal adopts the definition in the Higher Education Act amendments. However, that definition states that domestic violence “includes felony and misdemeanor crimes of violence.” What else does it include? Are employers supposed to become experts on what constitutes “crimes of violence?” Must there actually be a conviction for a crime of violence for the abuser's conduct to constitute “domestic violence?”
- 2.) **“Family Member”**— The definition of “family member” includes the abuser and perhaps others not intended by the proposal. The abuser could purportedly take leave to appear in court where he/she is being prosecuted for a crime of domestic violence. The abuser could also take leave for his/her own psychological condition to purportedly attend counseling, but without any required proof that he/she used the time off for that purpose, the abuser could just as likely use the leave to harass, stalk, and threaten the victim.
- 3.) **“Perceive Victims”**—The civil rights protections apply not only to victims, their family and household members, but also to those “perceived” by the employer to be victims even though they had never suffered any actual threats or violence. It is unclear what is meant by “perceived” or how it would have any relevance if the individual is not actually a victim of domestic violence.

- 4.) **“Victim”**—If co-workers become an unintended target of the domestic violence, there is an argument that they may be covered by the proposal as a “victim.”

Accommodation Process—Unlike the ADA, there is no requirement that the victim engage in an interactive dialog with the employer to identify and evaluate the effectiveness of possible accommodations. There is no protection for employers should a victim refuse to cooperate with any protective measures that the employer might feel would be appropriate. For example, if the employer complies with a request by a victim for a different telephone number at work so that the abuser cannot reach him/her directly, and if the employee then turns around and gives the new number to the abuser, should the employer have any further duty to accommodate? Unfortunately, there is no provision in the SAFE Act that would require the victim to have a genuine and demonstrated commitment to improve his/her situation or to refrain from contributing to workplace safety risks.

“Direct Threat”—As mentioned earlier, an employer is basically prohibited from protecting other employees who may be threatened by the abuser. The victim’s welfare is required to be protected even at the risk of the safety of other employees. SHRM is concerned that the legislation overlooks the effects that the domestic violence may have on other employees, including their overall safety. Unlike the ADA, the SAFE Act includes no “direct threat” defense when the domestic violence poses a significant risk of substantial harm to the safety or health of the victim or other employees. If the victim’s safety or other employees’ safety is at risk, employers should be able to apply the direct threat concept and defense. If the employee does not request an accommodation or believes one is not necessary, and if the employer disagrees because the victim’s or other employees’ safety is in jeopardy, there is no mechanism that would allow an employer to force a needed accommodation without potentially violating the proposal’s anti-discrimination provisions that protect “perceived” or actual victims.

Victim Commitment—Another concern with the SAFE Act is that it does not require that the victim have actually left the abusive situation and does not require that the victim

refrain from conduct that would undermine any assistance provided by the employer. For example, it will apply to victims who stay with their abusers. It is not unusual for victims to pursue avenues for leaving the abusive situation, but then return to the abuser. The bill would allow a victim to prepare to leave over and over again without really doing so, year after year. At some point, an employer should not be required to provide further assistance if the victim is not genuinely committed to permanently removing himself/herself from the abuse.

Certification Requirement—Another practical concern with the proposal is the certification requirement. The bill allows an employee to simply provide a sworn statement of the employee that he/she is the victim of domestic violence without any corroborating proof. The entire leave entitlement rests solely on an employee’s word or attestation with no verification required from a third party. This raises concerns about fraudulent uses of the leave, as there is nothing preventing anyone from merely claiming he/she is a victim of abuse and receiving the benefit.

Verification Requirement—The proposed bill does not permit employers to obtain verification that the employee actually spent his/her time off for one of the stated purposes.

Timeframe—There is no provision requiring that the domestic violence be recent enough to justify any time off. An employee could produce a police report of domestic violence that is three years old and still be entitled to take the leave.

Confidentiality Requirement—Information in connection with domestic violence leave or reasonable accommodation of an employee’s circumstances must be maintained in the “strictest” confidence. Such strict confidentiality is not necessarily in the victim’s best interests or the workforce’s best interests. For example, if the receptionist who answers all calls knows the victim is absent, but does not know the victim has gone to court to get a restraining order or is making arrangements to move to a shelter, the receptionist might inadvertently take a call from the abuser and tell him/her that the victim is not at work

that day. The abuser would not have known it in the absence of that disclosure, could get very angry, and could then physically abuse the victim later for not being at work. Also for example, an abuser may have told the victim that he/she would harm or kill any co-worker who interferes with his/her attempts to reach the victim at work. The victim passes along this threat to the HR manager when the victim requests time off. Under the confidentiality provisions of the bill, the HR manager would be prohibited from warning other employees that their safety or lives might be in jeopardy. A better approach would be to require a good faith effort by the employer to maintain confidentiality to the extent reasonably possible under the circumstances, but an employer should not be restricted from disclosing information that it reasonably believes would be beneficial in protecting the victim or other employees.

Purpose of Leave—Under the proposal, there is a very real possibility that an abuser could take advantage of the situation by requiring his/her victim to take “domestic violence leave” to stay home, go on vacation, or engage in other activities under a threat of violence. Rather than risk physical abuse to self or perhaps his/her children, the victim will be inclined to go along with the abuser’s wishes, knowing that the leave is job-protected. This will only perpetuate the abusive situation, not end it as presumably intended by the bill.

Service Eligibility Requirement—Unlike the FMLA, there is no service eligibility requirement under the SAFE Act, so an employee who has been with an organization even one day would be eligible for the 30 days of leave.

“Hours Worked” Eligibility Requirement—Unlike the FMLA, there is no “hours worked” prerequisite under the SAFE Act. All employees would be covered, including temporary, seasonal, contract labor, and part-time employees. An employer’s efforts to adequately staff to meet business needs can be easily undermined by an employee who simply hires on, even as a temporary employee, knowing that he/she can immediately request time off with guaranteed reinstatement rights.

Duration of Leave—There is no basis or justification for mandating six (6) weeks of leave, as opposed to a shorter amount of leave, especially given that other leave programs are usually available.. Six weeks seems to be an excessive amount of leave and could invite misuse of the leave provisions.

Intermittent Leave—SHRM is also concerned that the proposal stipulates that the 30 days of leave do not need to be taken continuously, but can be taken on an intermittent basis and advance notice is not required. Leave taken on an intermittent basis under the FMLA has resulted in a host of challenges for HR professionals. It is often difficult to track an employee’s intermittent leave usage, particularly when the employee takes leave in small increments. In addition, unscheduled, intermittent leave poses staffing problems for employers. When an employee takes unscheduled, intermittent leave with little or no advance notice, organizations must cover the absent employee’s workload by reallocating the work to other employees. For example, 88 percent of HR professionals responding to the *2007 SHRM FMLA Survey Report* indicated that during an employee’s FMLA leave, their location attends to the employee’s workload by assigning work temporarily to other employees.

Statute of Limitations—The statute of limitations for filing a claim under the SAFE Act is two years, even though it is only 300 days maximum for discrimination under the Civil Rights Act, the ADEA, and the ADA. This could suggest that discrimination based on domestic violence is given more weight than discrimination based on sex, race, national origin, religion, age, and disability.

Leave as an Accommodation—In light of the fact that the reasonable accommodation provisions require that a leave of absence be considered as an accommodation, there is no reason to mandate six weeks of leave. This creates an incredible inconsistency and could also be interpreted to mean that more than six weeks of leave might be a reasonable accommodation.

Unemployment Provisions—The proof of domestic violence required for unemployment purposes is inconsistent with the proof required for the leave and discrimination portions of the proposal. Interestingly, a state would not be required to merely accept a sworn statement by the victim, whereas an employer would be required to do so. There appears to be no legitimate reason why two different standards should be used.

While the purpose of the SAFE Act is a laudable one, the unintended consequences of this legislation suggest that it is not the best approach for helping victims of domestic violence. Another approach that would be far less disruptive to employers and employees would be for Congress to provide federal grants, tax incentives/credits, or training program initiatives for employers. Under such initiatives, employers would be encouraged to employ and train victims of domestic violence and collaborate with shelters for victims of domestic violence to provide employment and other resources. Such programs would be particularly attractive to larger employees, who are in a better position to employ, provide resources and assistance to, and protect victims. Large employers might very well view such an initiative as an attractive opportunity for contributing to the community on a social issue of great importance. In addition, they could lead the way for developing best practices and evaluating the success and challenges of such initiatives so that other employers could learn and benefit from their experiences.

Again, thank you for the opportunity to provide my perspective on an issue that is important to me both personally and professionally. SHRM is committed to working with members of the Subcommittee to formulate policies that will encourage employers to continue to offer reasonable leave benefits that support their employees as they respond to personal needs. I look forward to answering any questions you might have.